

5.1.2. Qualified and independent representatives

As mentioned earlier, the right to a representative who is both qualified and independent is recognised under the Screening Regulation, the AMMR, the amended RCD and the APR. Under the AMMR, representatives must possess the resources, qualifications, training, expertise and independence necessary to safeguard a child's best interests during procedures determining the Member State responsible to examine their application. Similarly, the APR requires guardians to guide minors through the asylum procedure and assist with the lodging of the application and the personal interview, while the amended RCD requires representatives to explain relevant information to an unaccompanied minor, liaise with competent authorities to secure immediate access to material reception conditions and healthcare, and represent the minor to ensure the effective exercise of their rights and compliance with their obligations.

These requirements are also reflected in several soft law instruments, notably the CRC Committee's General Comment No 6,[51] which provides that guardians "should have the necessary expertise in the field of childcare, so as to ensure that the interests of the child are safeguarded and that the child's legal, social, health, psychological, material and educational needs are appropriately covered by, inter alia, the guardian acting as a link between the child and existing specialist agencies/individuals who provide the continuum of care required by the child. Agencies or individuals whose interests could potentially be in conflict with those of the child's should not be eligible for guardianship".

Consequently, the CRC Committee's jurisprudence has repeatedly recalled the duty of authorities to appoint qualified representatives (see for instance *J.A.B.* v *Spain*, 31 May 2019, para 13(7); *A.L.* v *Spain*, 31 May 2019, para 12(8); *M.B.* v *Spain*, 28 September 2020, para 9(12); *R.Y.S.* v *Spain*, 4 February 2021, para 8(9)). The committee has also specifically addressed the requirement of independence and the risks arising from conflicts of interest in age assessment procedures in *A.D.* v *Spain* (4 February 2020, paras 10(11), 10(14) and 11) and *C.O.C.* v *Spain* (29 January 2021, paras 8(12) and 10), as well as in several other cases not involving applicants for international protection, where the committee referred to the position of the Spanish Public Prosecution Service, which is tasked both with deciding on age assessments and protecting the rights of the child. It found that the role played by the Office of the Prosecutor was insufficient to fulfil the function of a guardian, as it does not adequately ensure respect for the best interests of the child or the child's right to be heard. In its decisions, the committee recommended that all presumed minors be appointed a representative as soon as possible and emphasised "that any private lawyers chosen to represent them are recognised and that all legal and other representatives are allowed to assist them during the age assessment".

At the national level, German case law has likewise addressed the requirements of independence and competence of representatives. In a ruling concerning the age assessment of a Guinean applicant claiming to be a minor, the Higher Administrative Court of Bremen (4 June 2018) held that the consent form for the medical examination, signed by a Youth Welfare Office *(Jugendamt)* employee on the applicant's behalf, was invalid because the *Jugendamt*'s appointment as guardian by the Family Court had not yet been served at the time the form was signed. The court noted that, while the *Jugendamt* may also act as an emergency representative under Section 42a(3) of Book VIII of the German Social Code (SGB VIII), this requires an organisational and personnel separation of functions within the *Jugendamt* to prevent conflicts of interest between its role as the child's representative and its responsibilities for age determination, decisions on reception placement, and the provision of benefits to unaccompanied minors. The court therefore stressed that tasks relating to emergency representation should be performed by persons responsible for guardianship rather than by staff involved in age assessment, as was the case here.

Relatedly and drawing from the ECtHR's judgment in *Darboe* and CRC case law, the Higher Administrative Court of Baden-Württemberg also ruled on 9 April 2024 and 11 June 2024 that applicants plausibly claiming to be unaccompanied minors must be appointed an independent representative during the age assessment. Importantly, the court noted that German law did not meet EU standards under Article 24(1) of the recast RCD (while also referring to the not yet applicable Article 27(1) of the 2024 RCD) as it failed to ensure the appointment of an independent representative during age assessments. It therefore applied the directive with vertical direct effect.

In both cases, following preliminary interviews, the *Jugendamt* determined that two applicants who had not been appointed representatives were of legal age and terminated their temporary custody. The applicants appealed the decisions, requesting their interim suspension before the Freiburg Administrative Court, which was granted and subsequently contested before the Higher Administrative Court. The Higher Administrative Court confirmed that the *Jugendamt*'s decisions violated both Article 24(1) of the recast RCD and Article 25(1) of the recast APD, which it interpreted to require that a qualified and independent representative be appointed as soon as possible when there are credible indications that the applicant is a minor. In this regard, the court dismissed the argument that the *Jugendamt* educators responsible for the applicants complied with EU law requirements to be considered guardians. It noted that while they may temporarily act in the child's interest, since the *Jugendamt* is also the body that decides to terminate custody, this could lead to a conflict of interest between applicants and the *Jugendamt* staff. The court pointed out that this staff was not barred under the SGB VIII from being part of the organisational unit responsible for age determination, and it found this contrary to the EU standard.

Consequently, the court held that EU law must be applied directly over the conflicting national provisions that failed to ensure the appointment of a qualified and independent representative. Such a representative must be a person whose interests do not conflict with those of the child, in accordance with Articles 2(j) and 24(1) of the recast RCD and Article 25(1) of the recast APD. Furthermore, this representative must assist the minor and serve as a link to the authorities and institutions responsible for implementing the measures and procedures under the recast RCD,

and therefore must also possess knowledge of the recast RCD and the relevant procedural law, be informed about the possibility of family reunification, understand the specific protection needs and developmental psychology of an unaccompanied minor, and be able to communicate in a child-friendly manner.

In contrast, in a 27 June 2024 decision, the Higher Administrative Court of Bremen addressed the case of a Ugandan national claiming to be a minor who was not an applicant for international protection and had not been assigned a representative until she lodged an administrative challenge against the *Jugendamt*'s decision classifying her as an adult. In this case, the court dismissed her request for interim measures, distinguishing between the right to representation under Article 24(1) of the recast RCD, which required asylum-seeking minors to be appointed a representative "as soon as possible", and the protection afforded by Article 8 of the ECHR, which the court considered to establish a less stringent standard. Although no representative had been appointed at the outset of the age assessment, the court held that this did not render the decision unlawful, because one was appointed during the administrative challenge in which the authorities fully reconsidered the case and issued a new, reasoned and judicially-reviewable decision.

Overall, agencies and bodies involved in handling applicants who plausibly claim to be minors are obligated to prioritise the best interests of the child in all their actions. However, since institutions also have their own needs and priorities which can sometimes conflict with the interests of the applicants, the requirement to appoint a representative supports the administration in effectively upholding the child's best interests. It is undisputed that applicants whose minority is in question must be appointed a guardian, and this appointment must be swift, raising the question about when this right attaches.

Departing from the 2013 recast APD requirement that a representative be appointed "as soon as possible", the Pact instruments adopt a more procedural approach, identifying the *making* of the asylum application as the moment that triggers the obligation to provide a (provisional) representative. International human rights bodies, UN committees and the ECtHR have typically adopted a substantive perspective, treating representation as a safeguard that enables access to a range of core rights, including the right to international protection. For example, noting the 3-day limit in the recast APD between the making and the registration of an application, in *R.K.* v *Spain* the CRC Committee found a violation of Article 22 of the CRC because the State's failure to appoint a representative precluded the detained applicant from being *registered* as a minor.

Notably, in the ECtHR's landmark case *Darboe and Camara* v *Italy*, as well as in several subsequent rulings that followed this line of case law, the court found a breach of Article 8 of the ECHR in the State's neglect to ensure appropriate safeguards, particularly the failure to promptly appoint a legal guardian or representative, which prevented the applicants from duly and effectively *submitting* an asylum request.

It follows that the standards may not always fully align. A key implication is that the authorities, and courts when necessary, may need to reconcile them to avoid potential situations where the

absence of a representative, resulting from the child not having yet *made* an application, leads to the inability, difficulty or delay in making the application, and could even contribute to outcomes such as detention or *refoulement*. This could be achieved through the domestic child welfare framework or front-loaded child protection provisions, such as Article 13(3) of the Screening Regulation, which aim to reduce these risks. In this regard, several national courts have held that the absence of a representative can render the relevant procedure invalid, with case law showing instances in which either the termination of child welfare services or the denial of international protection was overturned on this basis.

In addition, the representative's presence must be meaningful. The guardian must be qualified, possess sufficient knowledge of the relevant issues, be allowed to participate in all key matters, from age assessments to asylum and reception matters, and must be independent. This requirement of independence has been codified in Article 13(4) of the Screening Regulation, which provides that the child's representative "shall not be a person responsible for any elements of the screening, shall act independently and shall not receive orders either from persons responsible for the screening or from the screening authorities". Likewise, in related frameworks, independence has been interpreted as ensuring that the guardian is, by design, free from any potential conflicts of interest. For instance, both national courts and the CRC Committee have indicated that certain institutional arrangements may fall short of this standard, including situations where representatives are affiliated with agencies responsible for conducting age assessments or making decisions on custody.

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  UN Committee on the Rights of the Child (1 September 2005). General Comment No 6: Treatment of Unaccompanied and Separated Children Outside their Country of Origin, CRC/GC/2005/6, para 33.

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