Chapter 15

Article 10: The Right to Family Reunification

Christian Whalen

1. In accordance with the obligation of States Parties under Article 9, paragraph 1, applications by a child or his or her parents to enter or leave a State Party for the purpose of family reunification shall be dealt with by States Parties in a positive, humane and expeditious manner. State Parties shall further ensure that the submission of such a request shall entail no adverse consequences for the applicants and for the members of their family.
2. A child whose parents reside in different States shall have the right to maintain on a regular basis, save in exceptional circumstances personal relations and direct contacts with both parents. Towards that end and in accordance with the obligation of States Parties under Article 9, paragraph 2, States Parties shall respect the right of the child and his or her parents to leave any country, including their own, and to enter their own country. The right to leave any country shall be subject only to such restrictions as are prescribed by law and which are necessary to protect the national security, public order (ordre public), public health or morals or the rights and freedoms of others and are consistent with the other rights recognized in the present Convention.

C. Whalen (✉)

Office of the Child, Youth and Seniors Advocate, Fredericton, NB, Canada
e-mail: Christian.Whalen@gnb.ca

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What Did Children Say?

‘The government should create a platform of contact when a child is being taken away from their parents’ (*Africa*)

‘Children [should] have a free phone line to contact parents abroad?’ ‘A phone line that would transfer the calls.’ (*Western Europe/Other*)

‘Can the children that are separated from one of their parents go see them at least once a year, even if the parents can’t pay for it? One free plane ticket paid by the government.’ (*Western Europe/Other*)

Best interests of the child must be a priority in the background checks to ensure children will be moved into a safe environment. (*Latin America/Caribbean*)

Overview

Article 10 is a right closely related to Articles 9 and 11. Its inclusion in the Convention affirms the longstanding recognition that separation of a child from their parents can have long-term damaging effects on the child’s development and well-being (UN Committee on the Rights of the Child, 2006, para. 18; UN General Assembly, 1948, Article 16(3), 1990, sec. preamble). The *Travaux Préparatoires* reveal that the framers of the Convention found it would be appropriate to deal with the right of the child not to be separated from their parents through these three separate provisions.

Article 10 addresses the right of children and their parents to enter or leave a state for the purpose of family reunification (UNICEF, 2007, pp. 135–136). It therefore constitutes a specialised application of the general right in Article 9 for parents and children not to be separated in domestic legal contexts, but it does not address the case of children who are abducted across international borders which is dealt with in Article 11. Article 10 was included as a separate provision to recognize the fact that keeping families united across international borders poses a challenge that requires separate treatment (Detrick et al., 1992, pp. 182–207). It is not, however, designed with the intention of affecting ‘the general right of States to establish and regulate their respective immigration laws in accordance with their international obligations’ (Detrick et al., 1992, p. 170).

There are many international treaties and agreements which have a bearing on the application of both Articles 10 and 11 and it was convenient to distinguish in two separate articles the rights of children who want to reunite with their parents across international borders with the consent of both parents from the separate case where one parent absconds with a child to a foreign country. Cases of child abduction, outside of the family context, as well as sale and trafficking, are dealt with even further and more generally in Article 35. For these reasons, Article 10 should be applied and interpreted in relation to the several rights which govern the child’s family situation, including Articles 3, 5, 9, 18, 20, and 21. However, it also has to be

interpreted and applied in relation to all the rights governing situations where children are on the move, such as Articles 6, 7, 8, 11, 16, 22, and 35, as well as the two first Optional Protocols to the Convention and those spelled out in other international conventions and agreements.

General Principles

Article 2 Most children affected by Article 10 are either economic migrants, refugees or children of separated parents living in different countries (UNICEF, 2007, p. 135). In every case, these children are already at a disadvantage in relation to their peers and that very status attracts the protection of Article 2's non-discrimination principle (UN Committee on the Rights of the Child, 2005a, para. 18). Additionally, other groups of children who are marginalised or discriminated against are at particular risk when in transit as unaccompanied or separated minors, for example, children with disabilities, children of minorities, indigenous children, LBGQT youth, and current and former child soldiers. States Parties must remain vigilant to ensure equal access to the protection of Article 10 to all children within their borders, especially non-nationals (UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and UN Committee on the Rights of the Child, 2017, paras. 11, 19).

Article 3 The child's best interests must be a primary consideration in all decisions affecting any separation from their parents, including in relation to matters of family reunification across national borders (Vučković-Šahović et al., 2012, p. 170). Articles 10 and 3 must be considered together to ensure that the child's best interests are explicitly considered in decisions concerning the entry or return of children for the purpose of family reunification, whether in a temporary, recurring, or permanent basis. The Joint General Comment of the Committee on the protection of the Rights of All Migrant Workers and Members of Their Families and of the Committee on the Rights of the Child explicitly underscores the obligation of States Parties to the Convention to 'ensure that the best interests of the child are taken fully into consideration in immigration law, planning, implementation and assessment of migration policies and decisions on individual cases, including in granting or refusing applications on entry to or residence in a country, decisions regarding migration enforcement and restrictions on access to social rights by children and/or their parents or legal guardians, and decisions regarding family unity and child custody where the best interests of the child shall be a primary consideration and thus have high priority' (2017, para. 29).¹

¹See also General Comment no. 14, paragraphs 30 through 33 and further (UN Committee on the Rights of the Child, 2013).

Article 6 The child's right to life, survival and maximum development relates closely to Article 10 rights, given the parents' primary role as caregivers. This principle emphasises the need to ensure that the child is brought up by their parents and to support parents in the assumption of their parental obligations. The protection of child rights in many states is at its weakest in immigration contexts (Harris et al., 2009; van Bueren, 2007, p. 123; Vučković-Šahović et al., 2012, pp. 165–170). In this specific context, the Committee is concerned about the 'lack of regular and safe channels for children and families to migrate,' which contributes to 'children taking life-threatening and extremely dangerous migration journeys. The same is true for border control and surveillance measures that focus on repression rather than facilitating, regulating and governing mobility, including detention and deportation practices, lack of timely family reunification opportunities and lack of avenues for regularization' (UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and UN Committee on the Rights of the Child, 2017, para. 41). International adoption procedures and surrogacy laws may also place children at risk in the context of international family reunification rights under Article 10.

Article 12 Article 10 can be supported through careful application of the Article 12 principle in relation to a child's right to express their views and have them considered in decisions relating to any application to enter or leave a country for the purpose of family reunification. Some experts have suggested that Article 10 is a weak right insofar as does not impose a clear obligation on States to allow entry, but only to treat such requests in a positive, humane and expeditious manner (UNICEF, 2007, p. 135; Vučković-Šahović et al., 2012, p. 168). Read in conjunction with Article 12 and the other General Principles, Article 10 takes on its full weight, beyond the guarantee that submissions of requests to leave or enter a country 'shall entail no adverse consequences for the applicants and for members of their families.' The Committee, in its Joint General Comment no. 22, strongly reinforces the States Parties obligation to ensure child participation in immigration matters affecting both children and their parents, as their best interests will be in play in both instances and children often have 'their own migration projects and migration-driving factors' (UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and UN Committee on the Rights of the Child, 2017, paras. 34–39).

Articles Related to or Linked to Article 10

Article 5 is a corresponding duty on parents to provide guidance and direction to their children.

Article 7 proclaims the child's right to know and to be cared for by their parents.

Article 8 protects the child's right to a named nationality, identity, and family relations and to be reconnected with family if these relations are disrupted.

Article 9 includes the right to not be separated from one's parents unless it is necessary in one's best interests as determined by competent authorities.

Article 11 is the child's right to be protected from international abduction.

Article 16 is the child's right to privacy and the inviolability of their family life.

Article 20 concerns the child's right to alternative care if deprived of their family.

Article 21 is the child's rights in relation to adoption.

Article 22 concerns the rights of refugee children and specifically their right to be reunited with family when separated.

Article 27 is the child's right to a decent standard of living, including the right to recover payment of alimony from parents abroad.

Article 35 is the child's right to be protected from abduction, sale, or trafficking.

Optional Protocol on the involvement of children in armed conflict.

Optional Protocol on the sale of children, child prostitution and child pornography.

Relevant Instruments

UN Convention Relating to the Status of Refugees (1951)

UN Convention relating to the Status of Stateless Persons (1954)

UN Declaration of the Rights of the Child (1959), Article 6, protects the child's right to 'grow up in the care and under the responsibility of his parents.'

UN Convention on the Reduction of Statelessness (1961)

International Covenant on Civil and Political Rights (1966), Articles 17, 23 and 24.

International Covenant on Economic, Social and Cultural Rights (1966), Article 10.

UN Protocol Relating to the Status of Refugees (1967)

The Geneva convention for the amelioration of the condition of the wounded and sick in armed forces in the field (1949), and the Additional Protocols I and II

Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (1993)

Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children (1996)

European Convention on Human Rights (1950), Article 8, Right to Privacy and Family Life

American Convention on Human Rights 'Pact of San Jose, Costa Rica' (B-32) (1978), Article 11, Privacy and Family Life, Articles 17–20 rights of the family, right to a name, rights of the child and right to nationality.

African Charter on Human and Peoples' Rights (1981), Article 18, rights of the family, and Articles 27 and 29, Duty to family and society and duty to preserve harmonious development of the family.

Attributes

Attribute One: Requests to Enter or Leave a Country for Family Reunification Should Be Dealt with in a Positive, Humane, and Expeditious Manner

Article 10 comes as close to a guarantee of a right of entry for family reunification purposes as the consensus of nations would allow at the time of the Convention's drafting. The right applies to both the parents and the child: either can apply for reunification with the other. The choice of the word 'positive' was strategic with its ambiguity enabling a consensus to be built around the text. Accordingly, it provides a focus on strengthening procedures when reunification applications are made, rather than guaranteeing outcomes that are child friendly: it introduces a presumption in favour of reunification, not an entitlement (Pobjoy & Tobin, 2019, pp. 348, 351). Experts have opined that it means something less than favourable—in the sense that the outcome should not be pre-determined—but something more than objective (Detrick et al., 1992, p. 206; UNICEF, 2007, p. 136; UN Committee on the Rights of the Child, 2004a, para. 9). The Committee's jurisprudence reveals that the Committee expects States Parties to uphold the right to family reunification across national boundaries or to show reasons why the child's best interest might direct otherwise (UNICEF, 2007, pp. 136–137; UN Committee on the Rights of the Child, 1995a, paras. 7, 29, 2003a, para. 34, 2005b). Positive treatment of these rights claims would also include their application to decisions involving the deportation of children's parents (UN Committee on the Rights of the Child, 2000, paras. 30, 31, 2005c, para. 22). Humane treatment introduces a further criterion that can support decisions favouring family reunification to avoid discriminatory consequences as between categories of entrants (UN Committee on the Rights of the Child, 2005d, paras. 63, 64), to avoid detention of children for immigration purposes (UN Committee on the Rights of the Child, 2005a, paras. 61–63), or to avoid further endangerment of refugee children if reunification in the country of origin poses a reasonable risk of fundamental human rights violations (UN Committee on the Rights of the Child, 2005a, pp. 82, 83). Finally, entry and exit requests must be treated expeditiously, a topic frequently raised by the Committee in its concluding observations, as children perceive time in different ways than adults and time separated from one's parents can have lasting and cumulative impacts (1995b, paras. 13, 24, 2002, para. 34, 2003b, para. 46, p. 126, 2004b, para. 54, 2005e, para. 49).

Attribute Two: Requests to Enter or Leave a Country Should Entail no Adverse Consequences for the Child, the Parent, or Their Family Members

The second attribute is sobering testimony to the adversity faced by migrant children and their families. Applying for exit or entry to a country should never attract significant adverse consequences, but it may. States Parties representatives agreed on this consensus text to challenge the status quo in several countries, where immigration processes could attract consequences for one's relatives. The Committee has further contextualised this risk in its General Comment no. 6 (2005a, paras. 81–83), and experts warn against the risk that authorities in host countries might inadvertently trigger risks to a child's family by making incautious inquiries or breaching confidentiality (UNICEF, 2007, pp. 139, 316). Other international agreements further reinforce these standards (UN General Assembly, 1991, Articles 14, 22; United Nations, 2006, p. 191).

Attribute Three: Right to Maintain Relations and Regular Contact with Both Parents, if Separated and Residing in Different States

Finally, Article 10 speaks to another common situation outside the context of immigration, where the child's parents reside in separate countries following a separation. There are international conventions for the reciprocal enforcement of court orders for custody and access, but the Convention provides a broader child rights lens through which to apply these standards and to guide case resolution where those more detailed standards may not apply.² This may include measures taken to maintain personal relations and contacts through telecommunications technologies and social media, as well as through periodic visits by parents or children, or relatives. While granting of refugee status is sufficient grounds to refuse any option of family reunification within the country of origin, it does not always prevent temporary visits to the refugee's country of origin in order to maintain family contact, if safe temporary family visits are possible. This practice should not jeopardise the refugee child's immigration status in the host country (UNICEF, 2007, p. 139). In all situations, careful attention should be paid to preparation for reunification and monitoring post-reunification to ensure that children are fully protected (UN General Assembly, 2010, paras. 146–151).

²These include the Hague Convention on Civil Aspects of International Child Abduction (1980), the Hague Convention on Protection of Children and Cooperation in Respect of Inter-Country Adoption, and the Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children.

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