Before the Constitutional Court
Of the Czech Republic

Judgment 4 Azs 115/2014-40

B E T W E E N:

Blerim Greka, Agnesa Greka, Resul Greka

- and -

Police of the Czech Republic, Regional Directorate of the Police of the South Moravian Region

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AMICUS CURIAE
EUROPEAN COUNCIL ON REFUGEES AND EXILES (ECRE)

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1. Introduction

A. These written comments are submitted on behalf of the European Council on Refugees and Exiles (ECRE) in support of the appeal by Blerim, Agnesa and Resul Greka against the Police of the Czech Republic, Regional Directorate of the Police of the South Moravian Region in a case 4 Azs 115/2014 – 40.

B. **The European Council on Refugees and Exiles (ECRE)** is an international alliance of 85 non-governmental organisations across Europe working together to protect and advance the rights of refugees, asylum seekers and displaced persons. Their mission is to promote the establishment of fair and humane European asylum policies and practices in accordance with international human rights law. ECRE engages in legal research and training on the application and interpretation of EU asylum law, the EU Charter of Fundamental Rights (CFR) and relevant international human rights instruments, including the 1951 Refugee Convention and the European Convention on Human Rights (ECHR). Noteworthy in this regard has been ECRE's recent publication, along with the Dutch Council of Refugees, on the application of the EU Charter to EU Asylum law. ECRE has been involved in a number of research studies on detention in Europe, including the Point of Non-Return, and is managing the Asylum Information Database (AIDA) and the European Database of Asylum Law (EDAL) that amongst other issues focus on detention practices of asylum seekers in Europe. ECRE was a third party intervener before the European Court of Human Rights (ECtHR) in the case of Tarakhel v. Switzerland, is currently a third party intervener in the cases of FG v. Sweden and A.E. v. Finland and has so far made three submissions to the Committee of Ministers of the Council of Europe on the execution of the ECtHR judgment in the case of M.S.S. v. Belgium and Greece.

2. ECRE's submissions in this amicus curiae in summary are as follows:

A. Persons who have applied for protection in one EU Member State, should be treated as asylum seekers with the respective rights attached to this status, in another Member State, due to the fact that entitlements under Article 18 of the EU Charter of Fundamental Rights (CFREU) (right to asylum) are linked to individuals rather than States and the purpose of the Common European Asylum System (CEAS), including the Dublin Regulation. The narrow reading of the status of an asylum seeker as only relating to the State where the asylum application was first lodged and the rights accrued to it seems to be overly restrictive, contradicting the purpose of the CEAS and hindering access to the right to asylum under Article 18 CFREU.

B. There is a strong presumption against the deprivation of liberty of asylum seekers, refugees, and asylum seeking children, in particular, due to their established vulnerabilities, in international and regional human rights law, including the European Convention on Human Rights.

C. Double vulnerability of asylum seeking children along with the principle of best interest of the child must always be a primary consideration when taking a decision to detain and it is impossible to conceive of a situation in which detention could be in the best interest of the child.

D. The detention of asylum seeking children together with their parents when the latter are found to be in an irregular situation, justified on the basis of maintaining family unity, may not only violate the principle of the best interests of the child and the right of the child to be detained only as a measure of last resort, but it may also violate their right not to be punished for the acts of their parents.

E. In line with general principles of EU law, including the right to good administration, the assessment of the necessity, proportionality and reasonableness of detention must be "rigorous" and individualised, and must take into account all relevant facts.

F. The decision to detain is carried out in bad faith, and therefore arbitrary, when less coercive measures are available and can effectively be applied and the State could have resorted to an alternative to detention in a process of a transfer under Regulation EU 604/2013 (the Dublin Regulation).

G. In light of the stringent requirements accompanied with the right to liberty and best interests of the child, State practice within European countries demonstrates that the detention of children and children in families is hardly ever practiced in the situations, where grounds for detention exist, and alternatives to detention in such cases are being increasingly used by the European states in order to comply with their international and EU law obligations.

3. The meaning of "asylum seeker" in accordance with the purpose and objectives of the CEAS

3.1 When assessing the question that the applicants enjoyed the status of asylum seekers in Hungary, where they applied for asylum, rather than in the Czech Republic, and as a

result could not be treated as asylum seekers with regard to their deprivation of liberty in the Czech Republic, it is imperative to consider entitlements under Article 18 of the EU Charter of Fundamental Rights (CFREU) and the purpose of the Common European Asylum System (CEAS).

3.2 The rights of an asylum seeker are linked to the individual rather than the State as the right to asylum under Article 18 of the CFREU is to be construed as a subjective and enforceable right of individuals to be granted asylum under the Union's law. The beneficiaries of this provision are all individuals, who may be eligible for international protection on grounds established under any instrument of international human rights law, including the 1951 Refugee Convention and the European Convention on Human Rights, and EU law. Since asylum is a shared competence between the Union and its Member States, the protection of Article 18 CFREU applies in all areas of activity of the Union and its Member States that fall within the scope of application of the Union's law.[1]

3.3 Moreover, the right to asylum under Article 18 CFREU embraces the following elements (a) access to fair and efficient asylum procedures and an effective remedy; (b) treatment in accordance with adequate reception and (where necessary) detention conditions and (c) the grant of asylum in the form of refugee or subsidiary protection status when the criteria are met.[2]

3.4 The stated objective of the EU's Common European Asylum System (CEAS), is to establish a common area of protection and solidarity based on high standards of protection where, regardless of the Member State in which an asylum application is lodged, similar cases result in the same outcome, while Article 78 TFEU envisages the creation of a uniform status of asylum, valid throughout the Union. In this regard, the narrow reading of the status of asylum seeker as only relating to the State where the asylum application was first lodged and the rights accrued to it seems to be overly restrictive, contradicting the purpose of the CEAS and hindering access to the right to asylum under Article 18 CFREU.

4. EU Member States' obligations in relation to the deprivation of liberty of an asylum seeking family with children

International Law

4.1 The fundamental right to liberty and security of person and freedom of movement is laid down in all the major international human rights instruments, and are essential components of legal systems built on the rule of law.[3]

4.2 Article 31.2 of the 1951 Refugee Convention prohibits restrictions on the movement of refugees "other than those which are necessary, and requires that they be imposed only until the individual's status is regularised or they obtain admission into another country". This article would be meaningless if only applied to refugees and not asylum seekers, due to the declaratory nature of a refugee status[4] and the principle of international law

[1] The Charter of Fundamental Rights of the European Union and the right to be granted asylum in the Union's law, Maria Teresa Gil-Bazo, 2008

[2] UNHCR intervention before the Court of Justice of the European Union in the cases of N.S. v. Secretary of State for the Home Department in United Kingdom and M.E. and Others v. Refugee Application Commissioner and the Minister for Justice, Equality and Law Reform in Ireland, 2011

[3] See, for example, Articles 3 and 9, UDHR; Article 9, ICCPR; Article 5, ECHR; Article 6, CFREU.

[4] J.C. Hathaway, The Rights of Refugees Under International Law (Cambridge University Press 2005) 171-173

that a treaty "shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty and in the light of its object and purpose".[5]

4.3 Based on these provisions, the UNHCR Guidelines on Applicable Criteria and Standards on the Detention of Asylum Seekers and Alternatives to Detention[6], and the Conclusions adopted by the Executive Committee on the International Protection of Refugees,[7] establish a presumption against detention, and the need to justify detention in each individual case as necessary and proportional for specified purposes. As emphasised in the UNHCR Guidelines seeking asylum is not an unlawful act and therefore, detention of asylum seekers must never be automatic, should be used only as a last resort where there is evidence that other less coercive measures would be inadequate in the particular circumstances of the case, and should never be used as a punishment. Where detention is imposed, it should be an exceptional measure, and must last for the shortest possible period.[8]

4.4 Children should, however, not be detained at all as they are particularly vulnerable to the harmful effect of detention, and will easily become traumatized.[9] The United Nations Convention on the Rights of the Child (CRC) provides specific international legal obligations in relation to children and sets out a number of guiding principles regarding their protection, including the principle of the best interests of the child[10]. The CRC also obliges the States to ensure that children are not punished for the acts of their parents.[11]

4.5 Detention of children cannot be justified on their legal status, or lack thereof. Moreover, detaining asylum seeking children with their parents on the premise of maintaining family unity violates a number of CRC principles, including the principle of the best interest of the child, which should prevail and should be used as the key evaluation tool in all decisions affecting asylum seeking children.[12]

4.6 The abovementioned international law standards contend that children should never be detained[13] as it is impossible to conceive of a situation in which the detention of asylum seeking children would comply with the best interests of the child, and that all possible alternatives to detention must be considered[14].

The European Convention on Human Rights and national jurisprudence

4.7 Any deprivation of liberty must be in conformity with the purpose of Article 5 of the European Convention on Human Rights (ECHR), to protect the individual from arbitrariness.[15] For detention to be permissible under Article 5.1.f it must be closely

[5] Art. 31, Vienna Convention on the Law of Treaties (22 May 1969).
[6] UNHCR Revised Detention Guidelines, Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum Seekers and Alternatives to Detention, 2012, Guidelines 2, 3 and 4.
[7] Conclusion No. 44, UNHCR
[8] UNHCR Guidelines on Detention, Guideline 4.1.4
[9] High-level Dialogue on international migration and development "Migrant Children should not be Detained", Statement by the UN Special Rapporteur on the human rights of migrants, François Crépeau, 2 October 2013
[10] Article 3, UN CRC
[11] Article 2(2) UN CRC
[12] Ibid, but see also "Report of the Special Rapporteur on the human rights of migrants, François Crépeau, to the UN Human Rights Council", 2012; "Contribution from the Special Rapporteur on the sale of children, child prostitution and child pornography, Najat Maalla M'jid, to the draft basic principles and guidelines on remedies and procedures on the right of anyone deprived of his or her liberty", February 2013
[13] The alternatives to immigration detention of children, PACE, 13597, September 2014
[14] Bakhtiyari v. Australia, Communication No. 1069/2002, U.N. Doc CCPR/C/79/D/1069/2002; UN 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)*, February 2013; Report of the Working Group on Arbitrary Detention to the Thirteenth Session of the Human Rights Council', U.N. Doc A/HRC/13/30, January 2010
[15] Conka v Belgium, Application No.51564/99 para.39, Chahal v UK Application No.22414/93, para.118

connected with one of the permitted purposes under that article: it must be in accordance with national law and procedures, it must be carried out in good faith; the place, regime and conditions of detention must be appropriate, and the length of detention must not exceed that reasonably required for the purpose pursued.[16]

4.8 The European Court of Human Rights (ECtHR) has frequently pointed to the fact that deprivation of liberty inevitably generates suffering and humiliation.[17]

4.9 Furthermore, States' obligations vis-à-vis asylum seekers under the ECHR must be interpreted in light of the ECtHR's jurisprudence attaching considerable importance to the status of an asylum seeker as "a member of a particularly underprivileged and vulnerable population group in need of special protection" and "the existence of a broad consensus at the international and European level concerning this need for special protection, as evidenced by the Geneva Convention, and the standards set out in the Reception Conditions Directive". The specific vulnerability of asylum seeking children, including within families has been affirmed consistently in the jurisprudence of the ECtHR.[18] Moreover, before deciding to detain the authorities need to carry out an individual assessment[19] of each applicant as to whether they should be detained.

4.10 This has been reiterated by the ECtHR in Tarakhel, Mubilanzila Mayeka and Kaniki Mitunga v. Belgium and Popov v. France which confirm child specific needs, their double vulnerability (stemming first from their status as an asylum seeker and secondly as a child) and that "the child's extreme vulnerability is the decisive factor and takes precedence over considerations relating to the status of illegal immigrant."[20]

4.11 The requirement that a separate best-interest assessment must be made for children prior to the decision to detain has been clarified by the Court in several cases where it has held that the effect of conditions on children can amount to a breach of Article 3 even where the treatment would not do so for an adult.[21] This is further reaffirmed by domestic law which provides that children are innocent victims of their parents' choices, thus the decision and impact of the decision must pay paramount consideration to their welfare.[22]

4.12 Whether administrative detention of children can ever be in their best interests has been discussed by the German Supreme Court[23], which has held that it is, indeed, unlawful.

4.13 The issue has also been discussed in UK case law where Justice Williams in the High Court referred in his arguments to a report by the Child's Commissioner for England stating that "detaining children for administrative reasons is never likely to be in

[16] Saadi v UK, Application No.13229/03, GC, para.74; A v UK Application No.3455/05, GC para.164; Louled Massoud v Malta, Application No.24340/08,
[17] De Los Santos and De La Cruz v. Greece, Application 2134/12 and 2161/12, para. 42.
[18] *MSS v Belgium and Greece,* Application no. 30696/09, ECtHR, 21 January 2011, *Tarakhel v Switzerland*, Application no. 29217/12
[19] Guideline 4 of UNHCR Detention Guidelines
[20] Tarakhel para 99; Mubilanzila Mayeka and Kaniki Mitunga v. Belgium, para 55; Popov v. France para 91.
[21] Muskhadzhieyava and others v. Belgium, 41442/07, 19 January 2010; Mubilanzila Mayeka 13178/03, 12 October 2006 at [81] and [83]; see Popov v. France 39472/07 and 39474/07, 19 April 2012; see Kanagaratnam and others v Belgium 15297/09, 13 December 2011; Neulinger and Shruk v. Switzerland, 41615/07, judgment [GC] 6 July 2010.
[22] Privy Council case of Naidike v Attorney-General of Trinidad and Tobago [2004] UKPC 49, [2005] 1 AC 538, at para 75 and ZH (Tanzania) v Secretary of State for the Home Department [2011] UKSC 4 (1 February 2011) para 24.
[23] Federal Supreme Court (Bundesgerichtshof), decision of 7 March 2012 - V ZB 41712 - asyl.net, M19452; Regional Court (Landgericht) Passau, decision of 24 July 2012 – 2 T 113/12 – asyl.net, M19979

their best interests."[24] In this case, notwithstanding that the Judge found the conditions were appropriate for families and that it was not comparable to the facts presented in Mubilanzila Mayeka and Kaniki Mitunga v. Belgium, and therefore did not amount to a violation of Article 3 ECHR, he concluded that the safeguarding and promotion of the child's welfare had not been sufficiently examined as a primary consideration when the decision to detain was made, thus the detention was unlawful. The case also refers to a substantial amount of literature on the mental health of detained asylum seeking children[25] and concludes that "no one can seriously dispute that detention is capable of causing significant and, in some instances, long lasting harm to children."[26]

4.14 In light of the above it is submitted that any State detaining asylum seeking children, regardless of whether they are detained with their parents, must meet the test that delineates from the ECtHR case law referred to above.

4.15 First, compliance with Article 3 ECHR must be ensured. The ECtHR has not yet contended that any place where people are deprived of their liberty for immigration purposes is inherently inhuman and degrading for children. However, even though the Court has not dismissed that possibility, it is difficult to imagine under what conditions the Court will find the detention of an asylum seeking child compliant with Article 3.[27] The Belgian authorities' attempts to create a detention facility adapted to children failed in Mushkadzhieva case as there is no place that seems capable of being suitably adapted for the detention of an asylum seeking child.

4.16 Secondly, in accordance with Article 5 ECHR detention must be complaint with the purpose pursued, it must be demonstrated that less coercive measures are inadequate and 'there must be some relationship between the ground of permitted deprivation of liberty relied on and the place and conditions of detention'[28].

4.17 It is submitted that in accordance with the ECtHR case law prisons are only suitable for holding prisoners; those with mental illness can only be detained in hospitals or clinics[29] and there is hardly any closed facility that is consistent with the detention of asylum seeking children[30] taking into account their extreme vulnerability and a detrimental effect detention in a closed facility could have over them. When assessing the necessity of detention of children, where there is a less restrictive measure the authorities should resort to it in order not to breach the Convention.

4.18 Thirdly, the decision makers should look at the compliance with Article 8 ECHR. In Popov v France: '[The Court] is of the view that the best interests of the child cannot be limited to simply maintaining family unity. Rather, the authorities must put in place all of the measures necessary to limit as much as possible the detention of families with children and to preserve their right to a family life effectively'. In detaining an asylum seeking child for immigration purposes, the authorities run the risk of threatening the moral and physical integrity of a child and, most of all, being unable to justify detention in the light of the best interests of the child, as Rahimi[31] requires.

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[24] Suppiah & Ors, R (on the application of) v Secretary of State for the Home Department [2011] EWHC 2 (Admin) (11 January 2011) Para 116

[25] The mental health of detained asylum seeking children", M. Hodes, European Journal of Child Psychiatry 2010; Psychiatric Report on the Effects of Detention of Children D.Black; Mental health implications of detaining asylum seekers: systemic review, Robjant.

[26] Para 111

[27] Detention of Children, Weiss and Lieu

[28] Mayeka Mutunga, Application no 13178/03, para 102.

[29] Ibid

[30] Detention of Children, Weiss and Lieu

[31] Rahimi v. Greece, Application No. 8687/08

4.19 It is submitted that the European Court of Human Rights has not yet, when asked, approved of the detention of asylum seeking children. In light of this, any detention of children seems open to challenge and must be tested against the principles the Court has set out under Article 3, 5 and 8 ECHR.

4.20 Moreover, in all the jurisprudence referred to in this submission the Court has looked into the reality of life in detention for children.[32] For example, in Mushkhadzhiyeva, the Belgian Government's description of Transit Centre 127 bis seemed well adapted for children. However, the information provided by NGOs and independent government agencies revealed confusion and anguish by children and the Court subsequently found breaches of the Convention rights.

European Union Law

4.21 EU asylum law clearly establishes that detention, being an exception to the fundamental right to liberty, can only be used as a measure of last resort. The reasons for detaining a person seeking international protection are exhaustively stipulated by Article 8 of the recast Reception Conditions Directive and Article 28 of the recast Dublin Regulation. Article 18 of the Asylum Procedures Directive and Article 26 of its recast provide that an asylum seeker should not be detained for the sole reason that he/she claimed asylum.[33] Moreover, Article 28 of the recast Dublin Regulation provides a number of safeguards that should be taken into account when adopting a decision to detain, including by declaring that Member States are prohibited from detaining a person for the sole reason that he or she is subject to the Dublin procedure; the fact that detention should be for as short a period as possible and subject to the principles of necessity and proportionality based on an individual assessment and only when there is a significant risk of absconding.

4.22 All grounds for the detention of an applicant for international protection as set out in national legislation must comply with one of the grounds listed in Article (5) the European Convention of Human Rights and its equivalent, Article 6 of the Charter of Fundamental Rights of the European Union. If the detention cannot be based on any of these grounds, it is automatically unlawful.[34]

4.23 Article 6 CFREU of provides that 'everyone has the right to liberty and security of person'. The rights in Article 6 CFREU are the rights guaranteed by Article 5 of the ECHR[35], and in accordance with Article 52(3) of the Charter, they have the same meaning and scope. Consequently, the limitations which may legitimately be imposed on them may not exceed those permitted by the ECHR'. Therefore, Member States must abide by the restrictions imposed by Article 5 ECHR when implementing or interpreting EU law.

4.24 The burden of proof in establishing that these requirements for applying detention is on the Member State concerned and any decision to detain must be reasoned in accordance with the right to good administration.

[32] Ibid
[33] This is also reiterated in Article 8 of the recast Reception Conditions Directive.
[34] Reception and Detention Conditions for asylum seekers in light of the Charter of Fundamental Rights of the EU, ECRE, January 2015
[35] Explanations relating to the Charter of Fundamental Rights, 2007/C 303/02

4.25 The application of the Dublin Regulation is intended to promote, not undercut, the fundamental rights of asylum seekers.[36]

5. The risk of absconding in EU and ECHR law and the principle of voluntary return

5.1 The Member State authorities are under obligation to comply with Article 28 of the recast Dublin Regulation, which includes a number of requirements that need to be in place before they can justify detention, such as the requirement of establishing there is a significant risk of absconding as defined in national law depending on the individual circumstances of the case.

5.2 The burden of proof with regard to existence of a significant risk of absconding by the applicants lies on the authorities and in order to comply with the due diligence obligation their assessment of such risk should be individualised and rigorous.

5.3 No objective criteria of significant risk of absconding has been defined in the Czech law and due to the abovementioned safeguards provided by the recast Dublin Regulation and the CFREU, when assessing such risk the authorities should take into account available evidence and alternatives to detention.

5.4 In a recent judgment of 2014 the German Federal Court[37] found that domestic law (Section 62 para 3 line 5 of the German Residence Act[38]) specifying that detention pending deportation is allowed where there is "a well-founded suspicion that the person intends to evade deportation" is not in compliance with the Constitutional principle of legality and is, thus, unlawful.

5.5 The case concerned the detention of a Pakistani national, who had previously applied for asylum in Hungary before entering Germany, but was later detained for the purpose of a transfer under the recast Dublin Regulation on the basis of Section 62 para 3 of the Residence Act. However, noting that the recast Dublin Regulation requires that the significant risk of absconding is based on objective criteria, defined by law, the Federal Court held that the absence of such criteria in German law, poses significant problems for legal clarity and transparency. Any analogy of absconding in relation to immigration detention prior to a forced return is strictly prohibited, given that a person can only be restricted or deprived of his or her right to liberty on the basis of a clearly defined provision in law.

5.6 Thus where the risk of absconding is not accompanied by a clear definition listing objective criteria and codified in national legislation, any detention in order to fulfil a

[36] UNHCR, Oral Submissions in Joined cases of NS (C-411/10) and ME and Others (C-493/10), CJEU hearing, 2011

[37] Bundesgerichtshof, V ZB 31/14, veröffentlicht am 23. Juli 2014, see link at https://recht.nrw.de/lmi/owa/br_show_anlage?p_id=24781

[38] Gesetz über den Aufenthalt, die Erwerbstätigkeit und die Integration von Ausländern im Bundesgebiet (Aufenthaltsgesetz - AufenthG) 2004, see link at http://www.gesetze-im-internet.de/bundesrecht/aufenthg_2004/gesamt.pdf.

transfer under the recast Dublin Regulation has been held by the Federal Court to be unlawful.

5.7 Moreover, in Popov[39] the European Court of Human Rights reiterated that 'in the absence of any indication that the family intended to abscond from the authorities, detention in a closed facility for fifteen days appears disproportionate to the aim pursued'. Notwithstanding that detention of a family may be compatible with Article 8 of the Convention if there are clear indications the family intend to abscond, it does not rule out a rigorous assessment of Article 3 and 5(1) which may, nonetheless, be violated in respect of the children.

5.8 In accordance with the recast Dublin Regulation the Member States must promote voluntary transfers by providing adequate information to the applicant and ensure that supervised or escorted transfers are undertaken in a humane manner, in full compliance with fundamental rights and respect for human dignity, as well as the best interests of the child and taking utmost account of developments in the relevant case law.[40]

5.9 Consequently, where a decision to detain was made instead of finding a way to assist a voluntary return under the Dublin Regulation or choosing another less coercive alternative to detention of an asylum seeking family, and resort to a lengthy detention of a family, such decision to detain can be said to be made in bad faith.

6. Detention as a last resort, for the shortest time possible and alternatives to detention

6.1. Article 37(b) of the UN CRC, Article 17(1) of the Returns Directive, Recital 15 and Article 8 (2) of the 2013 Reception Conditions Directive, all require that children and vulnerable persons are detained as a measure of last resort "[w]hen it proves necessary and on the basis of an individual assessment of each case, Member States may detain an applicant, if other less coercive alternative measures cannot be applied effectively."

6.2. The interpretation given to a measure of "last resort" has been elaborated upon by domestic policy and jurisprudence[41] to mean that the decision maker must undertake a rigorous analysis of all relevant factors, that alternatives must be explored adequately, that alternatives have been refused by the family and an exhaustive check has detected no barriers to removal detention and that finally any detention is an exceptional course. Arguably, a blanket submission that alternatives were not applicable for the applicants on account of their international protection claim elsewhere, would not meet the high threshold of "rigorous analysis," confirmed by the UK courts as being in line with international law.[42]

[39] Popov v. France 39472/07 and 39474/07, 19 April 2012

[40] Recital 24, Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast)

[41] See Section 55 of the Borders, Citizenship and Immigration Act 2009 and Suppiah & Ors, R (on the application of) v Secretary of State for the Home Department [2011] EWHC 2 (Admin) (11 January 2011).

[42] Ibid, para. 201

6.3 In February 1999 the Lithuanian Constitutional Court ruled that restriction on freedom of movement must be necessary and indispensable, which means that detention is a measure of last resort and can only be applied if the objectives of detention cannot be reached by others means.[43]

6.4 Furthermore the ECtHR[44] has held that detention should set a specific time limit, reflecting domestic practice[45] which has found detention unlawful where the time limit for removal is based on a rough estimate. Thus, the period of several months in detention without regular needs assessments, on the prediction that removal would take two months due to previous experience appears to breach the requirements of 37(b) UN CRC[46] and the due diligence requirement in Article 5 ECHR.

6.6. As stated above the recast Reception Conditions Directive requires Member States to consider alternatives to detention before subjecting asylum seekers to detention. Even without this explicit obligation, however, international law and the CFREU require Member States to examine alternatives, as an application of the principles of necessity and proportionality in order to avoid arbitrary deprivation of liberty.

6.7 It is submitted that alternatives to detention play a central role in an individualised assessment in order to avoid that detention is carried out in bad faith and therefore arbitrary. National authorities should verify in each individual case whether "there were no less coercive means of achieving the same ends".[47]

6.8 This requires the authorities to undertake, for every individual, both a needs and a risk assessment, which examines the vulnerability of the individual and of their eventual special reception or procedural needs.[48]

6.9 The Lithuanian court when reviewing the detention of an applicant with children who were returned to Lithuania, under the Dublin Regulation, found that detention was not reasonable. It took into account the vulnerability of the applicant (a family with four minor children and a pregnant mother) and decided that they should be released from detention without applying alternative measures. This departed from the previous practice of the Supreme Administrative Court of Lithuania to apply detention in Dublin cases whereby the applicants were considered to have misused asylum procedures and to have obstructed the adoption of final decisions. The court stated that each case should be examined individually.[49]

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[43] Alternatives to Immigration and Asylum Detention in the EU, Report by the Odysseus Network, January 2015; Legal Questionnaire, Lithuania

[44] Meloni v. Switzerland, Application 61697/00, § 53

[45] Suppiah & Ors, R (on the application of) v Secretary of State for the Home Department [2011] EWHC 2 (Admin) (11 January 2011) para 170; Chapter 55.9, Section 55 of the Borders, Citizenship and Immigration Act 2009

[46] UN Committee on the Rights of the Child (CRC), 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.

[47] C. versus Australia Communication no 900/1999 (HRC), para 8.2; See also, Baban versus Australia Communication no 1014/2011 (HRC), para 7.2; Shams and others versus Australia Communication no 1255/2004 (HRC), para 7.2; F.K.A.G. versus Australia Communication no 2094/2011(HRC), para 9.3; Zeyad Khalaf Hamadie Al-Gertanie versus Bosnia and Herzegovina Communication no 1955/2010 (HRC), para 10.4.

[48] Ibid

[49] Decision A-540-617/2013 of the Svencionys district court, 18/04/2013

6.10 *Where alternatives to detention, such as voluntary return to the responsible Member State, exist in national law but the law is applied in such a manner as to prevent an asylum seeker from availing himself of such an alternative, detention will be in bad faith and therefore arbitrary.*

7. Administrative and judicial practice in relation to detention of asylum seekers in Europe

7.1 The majority of EU and European Free Trade Association (EFTA) countries either explicitly prohibit or allow only in exceptional circumstances the detention of vulnerable persons, of which the definition encompasses "*children*, unaccompanied children, disabled people, elderly people, pregnant women, *single parents with children*, victims of human trafficking, persons with serious illnesses, persons with mental disorders and persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence, such as victims of female genital mutilation."

7.2 A number of member States, including **Belgium, Denmark, France, Hungary, Ireland, Italy, the Netherlands and the United Kingdom**, have taken steps towards ending the immigration detention of children. In these States, migrant children are either not detained or there is a provision for the release of migrant children from detention in law, policy or practice.[50]

7.3 In **Ireland**, detention of children for the purpose of deportation and removal of persons refused leave to land respectively is prohibited by s.5(4)(a) of the Immigration Act 1999 and s. 5(2)(b) of the Immigration Act 2003.

7.4 In **Cyprus** Part II Article 7 (c) of the Refugee Law 2000 forbids the detention of an asylum seeking applicant.

7.5 In **Belgium** from 2009 onwards families with children, arriving at the border and not removable within 48 hours after arrival, should be accommodated in a family unit. These family or housing units are individual houses or apartments provided for a temporary stay.[51]

7.6. In **Germany** the number of children being detained is very limited and the German Federal Supreme Court has consistently held that the detention of children is unlawful.[52]

7.7 In **Sweden** there is a maximum time limit in detention of 72 hours after which the child must be released, only in very exceptional cases can a child be detained for another 72 hours. For the first quarter of 2013 40 children were detained in Sweden, 35 for a maximum of 48 hours and 5 for up to 14 days.[53]

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[50] The alternatives to immigration detention of children, PACE, 13597, September 2014

[51] http://www.asylumineurope.org/reports/country/belgium/grounds-detention#footnote6_oxr4scr See further https://www.defenceforchildren.org/files/Dossier-pedagogique-tribunal_FR.pdf "A la date du 12 septembre 2008, la Ministre de la Politique de migration et d'asile annonçait par voie de presse qu'il n'y aurait plus de detention des familles avec enfants en centres fermés à partir du mois d'octobre."

[52] Federal Supreme Court (Bundesgerichtshof), decision of 7 March 2012 - V ZB 41712 - asyl.net, M19452; Regional Court (Landgericht) Passau, decision of 24 July 2012 – 2 T 113/12 – asyl.net, M19979. Also http://www.asylumineurope.org/reports/country/germany/detention-conditions#footnote14_q8x167z.

[53] AIDA Sweden report 2014 at 43.

7.8 In **Hungary**, legislation prescribes that families with children may not be detained for more than 30 days, however practice shows that families with children are no longer detained.[54]

7.9 In **Luxembourg** a family accompanied by a minor cannot be detained for more than 72 hours according to Article 6 (3) of the Law of 28 May 2009 concerning the Establishment and Organisation of the Detention Centre. In practice, a family with children are usually detained no longer than 24 hours.[55]

7.10 In **Norway** children are detained under the Immigration Act for a very limited period, normally not exceeding 24 hours.

7.11 In the **Netherlands** a family with children may be placed in detention, but for a time period of no longer than two weeks before the date of their departure, and only if the family has evaded supervision before.[56]

7.12. In **the UK** detention of an entire family must be justified in all circumstances and there will continue to be a presumption in favour of granting temporary release.[57]

7.13 In **Finland** there is a government proposal to amend the Aliens Act which would place the emphasis on alternatives to detention, especially when it involves children. [58]

7.14 It is noteworthy to mention that **24 countries** out of the 32 EU and EFTA states **expressly provide for alternatives to detention in the assessment procedures**, which broadly comprises of vulnerability, sufficiency and feasibility considerations.[59]

7.15 **Croatia** introduced several alternatives to detention in its national legislation, namely the duty to surrender documents, to deposit sureties, to have a fixed address and to report to the authorities regularly.

7.16 **Cyprus** amended its legislation as well and created the possibility to apply alternatives, without however defining the type of alternatives available.

7.17 **Slovakia's** new Law on Residence of Foreigners which came into force in January 2012 also introduced alternative measures; under the new law, detention with designated residence and the possibility of financial guarantees can be applied.[60]

[54] AIDA Report, Hungary: http://www.asylumineurope.org/reports/country/hungary/grounds-detention
[55] EMN Study on the use of detention and alternatives to detention, Luxembourg, 2014, p.9
[56] EMN Study on the use of detention and alternatives to detention, Netherlands, 2014, p.9
[57] Chapter 55.1.3. of Section 55 of the Borders, Citizenship and Immigration Act 2009.
[58] Detention of asylum seekers, NOAS, 2014, p.83
[59] EMN, The use of detention and alternatives to detention in the context of immigration policies, 2014, p.22
[60] The alternatives to immigration detention of children, PACE, 13597, September 2014