Summary

I. The interveners submit that to meet the standards of Article 5 ECHR, detention must comply with the requirements of legality, be free from arbitrariness and comply with a provision prescribed by law both substantively and in procedure. Detention, which is a measure of last resort, may be imposed if following an individualised and thorough examination it is concluded that less severe measures cannot be applied effectively.

II. Detention under Article 5 (1) ECHR will be unlawful and arbitrary where it lacks a clear and accessible legal basis, clearly setting forth the permissible grounds of detention as well as the relevant procedural guarantees and remedies available to detainees, including judicial review and access to legal advice and assistance.

III. In light of the obligations of EU Member States to comply with Article 53 ECHR, the interveners submit that the responsibility of EU States under the EU *asylum acquis* is engaged in relation to any individuals who seek international protection. The EU asylum acquis, which includes EU fundamental rights and CJEU jurisprudence, precludes domestic emergency measures whereby asylum applicants may be placed in detention for the sole reason that they are staying illegally on the territory of an EU Member State. This EU law protection must be complied with under Art 53 ECHR

IV. Accessible and effective judicial review in accordance with Article 5 (4) ECHR is an essential safeguard against arbitrary detention. Access to legal aid and advice should be taken into consideration in this regard. Contracting Parties bound by EU law should comply with their relevant obligations particularly under the Reception Conditions Directive which provides that applicants may only be detained for as short a period as possible, should have access to a speedy, judicial review of the lawfulness of their detention and should have access to free legal assistance and representation.

Deprivation of liberty and its requirements under Article 5 (1) ECHR

1. The interveners note that detention can only be considered lawful and meet the requirements of legality if it is *"in accordance with a provision prescribed by law*", and that the conditions for the deprivation of liberty are clearly defined in national law and therefore foreseeable in their application.[1]

2. The requirement of Article 5(1) that detention must be in accordance with the law has its foundation in principles of the rule of law, legality and protection against arbitrariness.[2] To be in accordance with the law, detention must both have a clear legal basis in national law, and must follow a procedure prescribed by law.[3] It must also conform to any applicable norms of international law.[4] This Court has held that a person's detention under any of the grounds of Article 5(1)[5] must be compatible with the overall purpose of Article 5, namely, to safeguard liberty and ensure that no person is deprived of their liberty in an arbitrary fashion.[6]

3. For detention to be free from arbitrariness, as required by Article 5(1), it must be carried out in good faith; be closely connected to a permitted ground; the place and conditions of detention must be appropriate; and the length of detention must not exceed what is reasonably required for the purpose

[1] Enhorn v. Sweden, App No. 56529/00, (25 January 2005), para 36.

[2] Louled Massoud v Malta, App No. 24340/08, (27 July 2010), para.61; Medvedyev v. France [GC], App. No.3394/03, (29 March 2010), para.80.

[3] Louled Massoud v. Malta, op. cit., para.61, Khlaifia and others v. Italy [GC], App No. 16483/12, (15 December 2016), para 91.

[4] Medvedyev v France [GC], App. No.3394/03, (29 March 2010), paras.79 – 80.

[5] Nabil and others v. Hungary, App No. 62116/12, (22 September 2015), para. 18.

[6] Saadi v. the United Kingdom [GC] App No. 13229/03, (29 January 2008), para. 66; Khudoyorov v. Russia App No. 6847/02, (8 November 2005), para 137; Rahimi v. Greece, App No. 8687/08 (5 July 2011), para. 102.

pursued.[7] Moreover, detention can be considered arbitrary in situations where it is in compliance with national law, but there has been an element of bad faith or deception on the part of the authorities.[8] The conditions for the deprivation of liberty must be defined in national law, and must be clear, precise and foreseeable in their application.[9]

4. In the migration context, those not defined as "detained" under national law who are placed in facilities classified as a "reception", "holding" or "accommodation" centres, , may be considered to be deprived of their liberty under Article 5 ECHR as a consequence of the nature of the restrictions on their freedom of movement.[10]

5. Furthermore, the Court has reiterated that detention is such a serious measure that unless justified as a last resort where alternative and less severe measures have been considered and deemed insufficient to safeguard an individual or public interest, it may be found to be arbitrary.[11] Recent case law of this Court has continued to emphasise the severity of detention, shown in *Dshijri v. Hungary*, which, with reference to the conditions set in national law, holds that "*asylum detention could not be ordered for the sole reason that the person seeking recognition had submitted an application to that effect*" and where a violation of Article 5 (1) was found on the basis that the reasoning of the authorities "*was not sufficiently individualised to justify the measure in question".*[12]

6. The need to consider less severe or alternative measures to detention has been emphasised by this Court, notably in cases relating to applicants with a particular vulnerability.[13] Other Council of Europe bodies have similarly noted the importance of alternative measures to detention and advocated for its consideration in all cases concerning detention.[14] The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT)[15] has stated that deprivation of liberty "*should only be a measure of last resort, after a careful and individual examination of each case*." It has emphasised that alternatives should be developed and used when possible and that detention without a time limit and with unclear prospects for release could be considered as amounting to inhuman treatment.[16]

7. The report of a visit to Lithuanian "registration centres" in 2022, by the CPT noted that "*the restrictions imposed on ""accommodated" foreign nationals were such that they could amount to a form of deprivation of their liberty*". The CPT commented that the foreign nationals "*accommodated*" in the visited centres were "*confined*" to these centres and that many detainees interviewed had been subject to "*excessive use of force*" and "*cramped*", living spaces with a

[7] Saadi v UK, op. cit, para 74; Yoh-Ekale Mwanje v Belgium, App No. 10486/10, (20 December 2011) paras. 117-119.

[8] Akkad v. Turkey, App No. 1557/19, (21 June 2022), para 99.

[9] Khlaifia and others v. Italy, App No. 16483/12, (15 December 2016), para 92.

[10] Abdolkhani and Karimnia v. Turkey, App No. 30471/08, (22 September 2009), para. 125-127 -; Amuur v France, App No. 19776/92, (25 June 1996), para. 43; Riad and Idiab v. Belgium, App. Nos. 29787/03 and 29810/03, (24 January 2008), para. 68.

[11] Rusu v. Austria, App No. 34082/02, (2 October 2008), para 58.

[12] Dshijri v. Hungary, App No. 21325/16, (23 February 2023).

[13] Yoh-Ekale Muanje v. Belgium, op. cit., para 124, Popov v. France, App No. 39472/07, (19 January 2012), para 119.

[14] For example, in the Commissioner for Human Right's Human Rights Comment "High time for states to invest in alternatives to migration detention" on 31 January 2017, the Commissioner for Human Rights at the time emphasised the importance of alternative measures to "safeguard the human rights of migrants" and that these alternatives apply to all forms of detention.

[15] The mandate of the CPT does not permit it to make legal findings under the provisions of the ECHR

[16] European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), Factsheet: Immigration Detention, March 2017.

"*prison-like character"*. [17] National reports have followed this reasoning, including the Seimas Ombudsman who likened the nature and degree of restrictions applied to migrants in foreigner registration centres to be "*equivalent to detention*."[18]

8. In its aforementioned visit report to Lithuania, the Committee reiterated that deprivation of liberty under national law should only be a measure of last resort, and stressed that "*detention of asylum seekers should be even more exceptional*." It continued that it experienced "*serious misgivings regarding the systematic application of custodial measures to all foreign nationals who irregularly crossed the border into Lithuania, with little to no resort made to genuine alternatives to detention which do exist in law*."[19] Furthermore, a CoE Steering Committee for Human Rights (CDDH) publication underlines that under the principle of proportionality, States are obliged to examine alternatives to detention and that the alternatives to detention should "*respect the principle of necessity, proportionality and non-discrimination; never amount to deprivation of liberty or arbitrary restrictions on freedom of movement; always rely upon the least restrictive measure possible; be established in law and subject to judicial review, ensure human dignity and respect for other fundamental rights."*[20]

Deprivation of liberty under EU and international law

9. Under Article 53 ECHR, where Contracting Parties to the ECHR are also bound by EU law, the Court must ensure that the Convention rights are interpreted and applied in a manner which does not diminish the rights guaranteed under the applicable EU law. This requirement is over and above the general requirement that all measures carried out by Contracting Parties that affect an individual's protected rights be "*in accordance with the law*"[21], which in some circumstances will be EU law.

10. The EU Charter of Fundamental Rights (CFR)[22] forms part of EU law.[23] It enshrines guarantees fundamental to the rights under consideration, namely through Article 6 CFR which provides that "*everyone has the right to liberty and security of person."*

11. The EU asylum *acquis* comprises a number of legal instruments and their judicial interpretation by the Court of Justice of the EU (CJEU). The recast Reception Condition Directive (rRCD)[24] provides guarantees for applicants detained in the asylum procedure. The Court will recall that in *MSS v. Belgium and Greece*[25], the Grand Chamber took into account Greece's obligations under the Reception Conditions Directive (RCD)[26], as part of its national law, to ensure adequate material

[17] European Committee for the Prevention of Torture and Inhuman or Degrading Treatment (CPT), Report to the Lithuanian Government on the periodic visit to Lithuania from 10 to 20 December 2021, 23 February 2023.

[18] The Seimas Ombudsmen's Office of the Republic of Lithuania, Report on ensuring human rights and freedoms of foreign nationals in the Kybartai Aliens Registration Center under the Ministry of the Interior of the Republic of Lithuania, No. NKP-2021/1-4 of 24 January 2022 Vilnius.

[19] European Committee for the Prevention of Torture and Inhuman or Degrading Treatment (CPT), Report to the Lithuanian Government on the periodic visit to Lithuania from 10 to 20 December 2021, 23 February 2023.

[20] Council of Europe, Practical Guide: Alternatives to immigration detention: Fostering effective results, 25 November 2019.

[21] See Article 1 and 8 (2) ECHR

[22] European Union, Charter of Fundamental Rights of the European Union, 26 October 2012, 2012/C 326/02

[23] CJEU Judgment of 26 February 2013, Åklagaren v. Åkerberg Fransson, C-617/10, ECLI:EU:C:2013:105, para 19.

[24] Directive 2013/33 of the European Parliament and the Council of 26 June 2013 on laying down standards for the reception of applicants of international protection (recast) [2013] OJ L 180/96

[25] MSS v. Belgium and Greece, [GC] App No. 30696/09, (21 January 2011).

[26] Directive 2013/33 of the European Parliament and the Council of 26 June 2013 on laying down standards for the reception of applicants of international protection (recast) [2013] OJ L 180/96

reception conditions, finding that the situation of extreme poverty brought about by the inaction of the State was treatment contrary to Article 3 ECHR. This principle applies to detention and the deprivation of liberty which is provided for in Article 8 of the RCD. Article 8 RCD reinforces that a Member State may only detain an applicant if it proves necessary on the basis of an individual assessment and if less coercive, alternative measures cannot be applied. This was reiterated by the CJEU in the case of *V.L. v. Ministerio Fiscal*.[27] The applicant raised questions as to the conditions in Article 8 and whether Member States may hold a third-country national in detention if the conditions are not met, in a situation where the applicant has indicated their intention to apply for international protection. The CJEU highlighted that "*Articles 8 and 9 of that directive, read in conjunction with recitals 15 and 20 thereof, place significant limitations on the Member State's power to hold a person in detention*". It subsequently emphasised that "*an applicant for international protection may be held in detention only where, following an assessment carried out on a case-by-case basis, that is necessary and where other less coercive measures cannot be applied effectively. It follows that national authorities may hold an applicant for international protection in detention only after having determined, on the basis of an individual assessment, whether such detention is proportionate to the aims pursued by detention*."[28] The CJEU, in *K v. Staatssecretaris van Veiligheid en Justitie*[29] and *FMS and others v Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóságup*[30] affirmed these limitations and obligations of Member States to undertake an individualised assessment, enforce detention as a last resort and ensure if used it is a proportionate measure for the objectives pursued.

12. The CJEU in *M.A. v. Valstybės sienos apsaugos tarnyba*[31] examined the compatibility of Lithuanian domestic legislation with the rRCD and the Asylum Procedures Directive (APD).[32] The case concerned a third-country national who was detained for six months on the grounds of irregular entry and stay and on the justification that he was liable to abscond, who subsequently applied for international protection during his detention proceedings. The CJEU firstly reiterated its definition of detention, according to which the latter "*constitutes a coercive measure that deprives the applicant of his or her freedom of movement and isolates him or her from the rest of the population, by requiring him or her to remain permanently within a restricted and closed perimeter*".[33] The Court then concluded that keeping an applicant in detention due to national security or public interest grounds could only be justified "*if the applicant's individual conduct represents a genuine, present and sufficiently serious threat affecting a fundamental interest of society or the internal or external security of the Member State concerned*", and elaborated that "*the illegal nature of the presence of an applicant for international protection cannot, in itself, be regarded as demonstrating the existence of a sufficiently serious threat affecting a fundamental interest of society or as revealing a threat to another of the interests mentioned.*"[34] In light of this, the Court commented that the Lithuanian Government's measures to derogate from EU law in the event of "*an emergency due to a mass influx of aliens*" and enforce the detention of those irregularly staying on the territory was not compatible with the requirements under rRCD or capable of justifying the application of Article 72 TFEU. Art 72 only provides for derogation from EU law in situations of an emergency

[27] CJEU, Judgment of 25 June 2020, VL v. Ministerio Fiscal, C-36/20 PPU, ECLI:EU:C:2020:495; CJEU, Judgment of 14 September 2017, K, C-18/16, ECLI:EU:C:2017:680.

[28] CJEU, Judgment of 25 June 2020, VL v. Ministerio Fiscal, C-36/20 PPU, ECLI:EU:C:2020:495, paras 101-102.

[29] CJEU Judgment of 14 September 2017, K v. Staatssecretaris van Veiligheid en Justitie, C-18/16, ECLI:EU:C:2017:680, para 48.

[30] CJEU Judgment of 14 May 2020, FMS and others v Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóságup, C-924/19 PPU and C-925/19 PPU, ECLI:EU:C:2020:367, para 258.

[31] CJEU Judgment of 30 June 2022, M.A. v. Valstybės sienos apsaugos tarnyba, C-72/22 PPU, ECLI:EU:C:2022:505.

[32] Directive 2013/32/EU of the European Parliament and the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast) [2013] OJ L 180/60

[33] CJEU Judgment of 30 June 2022, M.A. v. Valstybės sienos apsaugos tarnyba, C-72/22 PPU, ECLI:EU:C:2022:505, para 39.

[34] CJEU Judgment of 30 June 2022, M.A. v. Valstybės sienos apsaugos tarnyba, C-72/22 PPU, ECLI:EU:C:2022:505, paras 89-90.

due to a mass influx of migrants. It therefore concluded that these emergency measures were unlawful and emphasised, in particular that if a Member State is in an exceptional situation due to an influx of migrants, asylum seekers cannot be placed in detention for the sole reason that they are staying illegally on the territory of that Member State.[35]

13. In addition, the Return Directive,[36] which provides for common procedures and standards for returning third country nationals, lays out the instances when detention is possible "*unless other sufficient but less coercive measures can be applied effectively*" and furthermore provides that "*any detention shall be for as short a period as possible and only maintained as long as removal arrangements are in progress and executed with due diligence".*[37] The CJEU emphasised that "*it makes the use of coercive measures expressly subject to the principles of proportionality and effectiveness with regard to the means used and objectives pursued."*[38] Similar arguments were subsequently used in *Bashir Mohamed Ali Mahdi*[39] to determine that less coercive measures must be considered in the decision to extend detention, taking into account an individual assessment of the facts and circumstances of the case. Although these arguments largely relate to detention on the grounds of removal, the above cases show their repeated relevance to other grounds for detention.

14. Article 53,also applies to provisions of international law if those provisions bind the State in question.[40] Article 9 of the International Covenant on Civil and Political Rights (ICCPR)[41] sets out that everyone has the right to liberty and security of person and must not be subject to arbitrary detention. Similarly, the ICCPR's General Comment No. 35, clarified that "*detention must be justified as reasonable, necessary and proportionate in the light of the circumstances and reassessed as it extends in time*".[42] The UN Human Rights Committee has highlighted the importance of alternatives to detention in its case law, shown in *C. v. Australia* where it was emphasised that to avoid arbitrariness, detention should not continue beyond the period for which a justification has been provided and in circumstances where the detention continues, a State Party must demonstrate that this continued detention is justified in light of the passage of time and intervening circumstances. The Committee found a violation of the right to liberty in this case and concluded that the respondent State "*had not demonstrated that, in the light of the author's particular circumstances, there were not less invasive means of achieving the same ends*."[43]

15. **The interveners thereby submit that detention must meet the requirements of legality, not be arbitrary and be in accordance with a provision prescribed by law. The consideration of less invasive alternatives to detention must form part of an individualised assessment, which takes into account all circumstances of the case and applicant concerned. The grounds of detention should be considered in this assessment and must be justified when a decision is made regarding an applicant's detention.**

[35] CJEU Judgment of 30 June 2022, M.A. v. Valstybės sienos apsaugos tarnyba, C-72/22 PPU, ECLI:EU:C:2022:505, paras 92 and 93.

[36] Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2018 on common standards and procedures in Member States for returning illegally staying third-country nationals [2008] OJ L 348/98

[37] Directive 2008/115/EC (op cit) Chapter IV, Article 15 (1)

[38] CJEU, Judgment of 28 April 2011, Hassen El Dridi, alias Karim Soufi, C-61/11 PPU, ECLI:EU:C:2011:268

[39] CJEU, Judgment of 5 June 2014, Bashir Mohamed Ali Mahdi, C-146/14 PPU, ECLI:EU:C:2014:1320

[40] Lithuania acceded the ICCPR on 20 November 1991

[41] UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, U N, Treaty Series, vol. 999, p. 171

[42] UN Human Rights Committee, General comment no. 35, Article 9 (Liberty and security of person), 16 December 2014, CCPR/C/GC/35, para 18.

[43] C. v. Australia, CCPR/C/76/D/900/1999, UN Human Rights Committee (HRC), 13 November 2002, para 8.2

Article 5 (4) and the requirements for a speedy judicial review and the effective access to legal assistance

16. The safeguards against arbitrariness contained in Article 5 (1) are rendered ineffective unless the detained individual is able in law and in practice to take proceedings to establish whether the deprivation of liberty and the conditions of detention are lawful. The right to challenge the lawfulness of detention judicially under Article 5 (4) is a fundamental and non-derogable protection against arbitrary detention, as well as against torture or ill-treatment in detention. Article 9 (4) ICCPR provides that anyone deprived of their liberty shall be entitled to take proceedings against the lawfulness of their detention. The UN Human Rights Committee (CCPR) General Comment No. 35 has clarified this right as non-derogable, stating that "*In order to protect non-derogable rights…the right to take proceedings before a court to enable the court to decide without delay on the lawfulness of detention must not be diminished by measures of derogation*".[44]

17. It is a *lex specialis* over and above the general requirements of Article 13 ECHR. It requires that persons subject to any form of deprivation of liberty have effective access to an independent court or tribunal to establish the lawfulness of their detention while they are detained, and not just afterwards[45] and that they or their representative have the opportunity to be heard before the court.[46] Presence in court, either in person or through a representative, is an important safeguard against violations of the Convention. Article 5 (4) requires a specific remedy to the protect the liberty of the detained individual rather than an opportunity to complain generally about the proceedings leading to their detention.[47] The possibility to access such a procedure is an obligation and *cannot* be left to the discretion or '*good will'* of the detaining authority.[48] The remedy must also be "*sufficiently certain, not only in theory but also in practice, failing which it will lack the accessibility and effectiveness required for the purposes of that provision*".[49] To be practical and effective, detained persons must also be informed in a language they understand of the reasons for detention[50] and should have access to legal advice and interpretation.[51] Furthermore, this Court has required that applicants are not only informed of the orders to hold them in detention, but that this information has also provided them with the legal basis and legal and factual reasons for their deprivation of liberty, in such a way as to give them a fair opportunity to challenge its legality.[52]

18. The Court has previously emphasised the importance and value that effective access to legal assistance holds for an applicant. In *S.H. v. Malta*, the Court associates the applicant's lack of prepared and technical responses recognised in the credibility assessment, with the fact that he did

[44] UN Human Rights Committee (CCPR), General comment no. 35, Article 9 (Liberty and security of person), 16 December 2014, CCPR/C/GC/35, para 67.

[45] See G.B. and Others v. Turkey, App no. 4633/15, (17 October 2019) para 183; Mooren v. Germany [GC], App No. 11364/03, (9 July 2009) para 106; and Ilnseher v. Germany [GC], App Nos. 10211/12 and 27505/14, (4 December 2018) para 251.

[46] Al-Nashif v. Bulgaria, App No. 50963/99, (20 June 2022), para 92; De Wilde, Ooms and Versyp v. Belgium, App Nos. 2832/66; 2835/66; 2899/66, (18 June 1971) para. 73.

[47] Rakevich v. Russia, App No. 58973/00, (28 October 2003) paras 44 and 45; G.B. and Others v. Turkey, App No. 4633/15, (17 October 2019), para 178.

[48] Rakevich v. Russia, no. 58973/00, (28 October 2003), para 44.

[49] G.B. and Others v. Turkey, App No. 4633/15, (17 October 2019), para 163.

[50] M.S. v. Slovakia and Ukraine, App No. 17189/11, (11 June 2020), para 141.

[51] M.S. v. Slovakia and Ukraine, App No. 17189/11, (11 June 2020), para 143.

[52] R.M. and others v. Poland, App No. 11247/18, (9 February 2023), para 29.

not have access to legal representation while in detention.[53] In the judgments of *Aden Ahmed v. Malta*[54] and *Mahamed Jama v. Malta*[55] the Court held that lack of access to a properly structured system of legal aid makes the remedy inaccessible.

19. The Grand Chamber of this Court has affirmed that Article 5 (4) requires the lawfulness of detention to be determined by a speedy judicial decision.[56] In order to determine whether authorities complied with the '*speediness*' requirement, the Court will consider the circumstances of each individual case which includes the complexity of the proceedings, the conduct of domestic authorities and detainees, and what was at stake for the detained individuals.[57] The Court should consider the duration of proceedings as a whole – this includes lengthy intervals between decisions, or the time taken to obtain evidence or further information.[58] This has been further illustrated in previous cases, such as *G.B. v. Switzerland*, which like *Mooren v. Germany* relates to detention in a criminal context, and where the Court indicated that when considering the circumstances of the case, it would consider the reasons for detention, any requests for release, the lapse in time of detention, and the overall duration of proceedings.[59] Furthermore, this Court has highlighted the importance of the "*speediness*" requirement, by providing that proceedings involving issues of deprivation of liberty require particular expedition and that exceptions to the requirement of this speedy review of lawfulness call for a strict interpretation.[60] It has held that in situations where an applicant has not been informed of the reasons for the deprivation of liberty, as was the case with the detainees in *Khlaifia and others v. Italy*, the right to appeal was deprived of effective substance. They thus did not have a remedy which would enable them to obtain a judicial decision on the lawfulness of the deprivation of liberty.[61]

20. Council of Europe bodies have also emphasised the necessity of legal safeguards for applicants in immigration detention. In the aforementioned CPT report subsequent to the Committee's visit to Lithuania, it was recommended that "*detained foreign nationals be better informed about the legal framework applicable to them and that steps be taken to improve their access to translation, legal assistance and avenues for complaints*". The report highlights that the right to have access to a lawyer should be fully effective from the outset of the deprivation of liberty."[62] Furthermore, this Committee has consistently considered the necessity of access to a lawyer, free legal assistance and interpretation where required.[63]

[53] S.H. v. Malta, App No. 37241/21, (20 December 2022), para 85.

[54] Aden Ahmed v. Malta, App No. 55352/12, (23 July 2013), para 66.

[55] Mahamed Jama v. Malta, App No. 10290/13, (26 November 2015), para 65.

[56] Mooren v. Germany [GC], App No. 11364/03, (9 July 2009), para 106.

[57] Mooren v. Germany [GC], App No. 11364/03, (9 July 2009), para 106. See also G.B. v. Switzerland, App No. 27426/95, (30 November 2000), paras 33-39; Musiał v. Poland [GC], App No. 24557/94, (20 January 2009), para 43.

[58] Baranowski v. Poland, App No. 28358/95, (28 March 2000), para 73.

[59] G.B. v. Switzerland, op.cit., paras 34-35; Baranowski v. Poland, op. cit., paras 61, 63, 68.

[60] Khlaifia and others v. Italy, App No. 16483/12, (15 December 2016), para 131.

[61] Khlaifia and others v. Italy, App No. 16483/12, (15 December 2016), para 132-133

[62] European Committee for the Prevention of Torture and Inhuman or Degrading Treatment (CPT), Report to the Lithuanian Government on the periodic visit to Lithuania from 10 to 20 December 2021, 23 February 2023.

[63] European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), Factsheet: Immigration Detention, March 2017.

21. The interveners submit that the procedure to examine the "*lawfulness*" of an applicant's detention under Article 5 (4) can require not only that the applicant is heard, but also that they have the effective assistance of a lawyer.[64] The Court demonstrates this in the case of *Černák v. Slovakia*, concerning pre-trial detention, in which a relevant element to the finding of a violation of Article 5 (4) was that even though the applicant concerned had a lawyer, the lawyer was summoned to the remand hearing only a few hours before it took place and was only allowed to inspect the case file and consult with the applicant for twenty minutes, therefore considerably limiting the preparation and assistance that could be provided to the applicant.[65]

22. The interveners call attention to the relevant provisions of EU law, in particular rRCD[66]. According to the rRCD, applicants may only be detained for as short a period as possible and for as long as the detention grounds are relevant.[67] The rRCD also requires that detainees shall have access to a speedy judicial review of the lawfulness of detention. Where applicants' detention is found to be unlawful, they should be released immediately.[68]

23. **The interveners emphasise that an effective judicial review of detention in accordance with Article 5 (4), clearly prescribed by law and accessible in practice, is an essential safeguard against arbitrary detention, including in the context of immigration control. Access to legal aid and advice is indispensable in ensuring the accessibility and effectiveness of judicial review,[69] and the absence of provision for legal assistance in law or in practice should be taken into consideration in assessing the adequacy of judicial review under Article 5 (4).[70]**

[64] Černák v. Slovakia, App No. 36997/08, (17 December 2013), para 78; Lutsenko v. Ukraine, App No. 6492/11, (3 July 2012), para 96.

[65] Černák v. Slovakia, App No. 36997/08, (17 December 2013), para 80.

[66] Directive 2013/33/EU of 26 June 2013 laying down standards for the reception of applicants for international protection (recast)

[67] rRCD Article 9 (1) and (2).

[68] rRCD Article 9 (3).

[69] Louled Massoud v Malta, op. cit. para 61.

[70] Account should also be taken of the UNHCR Detention Guidelines which provide for a range of procedural safeguards, including access to legal advice and judicial review; Guideline 7.