BEFORE THE SECOND SECTION

OF THE EUROPEAN COURT OF HUMAN RIGHTS

APPLICATION NO. 27915/22

S.M.H.

v.

LITHUANIA

WRITTEN SUBMISSIONS ON BEHALF OF THE INTERVENERS:

ADVICE ON INDIVIDUAL RIGHTS IN EUROPE (AIRE CENTRE)
INTERNATIONAL COMMISSION OF JURISTS (ICJ)
EUROPEAN COUNCIL ON REFUGEES AND EXILES (ECRE)
DUTCH COUNCIL FOR REFUGEES (DCR)

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pursuant to the Registrar's notification dated 11 September 2023 on the Court's permission to intervene
under Rule 44 § 3 of the Rules of the European Court of Human Rights

9 October 2023

1. Requirements under Art. 5 (1) for lawful deprivation of liberty

1. Detention may only be considered lawful and meet the requirements of legality if it is *"in accordance with a provision prescribed by law*", and if the conditions for the deprivation of liberty are clearly defined in national law, thereby making them 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 the 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 follow a procedure prescribed by law.[3] Detention must also conform with 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. This Court found[7] that detention 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 pursued.[8] 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.[9]
4. In the context of measures taken with the stated aim of migration control, it is clear that those not considered as "detained" under national law, who are placed in facilities classified as "reception", "holding", "accommodation" or "foreigners registration" centres, may be still 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 as well as "*the type, duration, effects and manner of implementation*" of such placement.[10]
5. 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] This Court has recently held that,

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[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.
[7] 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.
[8] Saadi v UK, op. cit, para 74; Yoh-Ekale Mwanje v Belgium, App No. 10486/10, (20 December 2011) paras 117-119.
[9] Akkad v. Turkey, App No. 1557/19, (21 June 2022), para 99.
[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.

"*asylum detention could not be ordered for the sole reason that the person seeking recognition had submitted an application to that effect*" and went on to find a violation of Article 5 (1) on the basis that the reasoning of the authorities "*was not sufficiently individualised to justify the measure in question"*, that is, detention. [12]

6. The need to consider, in the first place, measures alternative to detention has been emphasised by this Court, notably in cases arising from the detention of individuals, such as asylum-seekers, whom deprivation of liberty exposed to a greater risk of human rights violations.[13] Other Council of Europe bodies have similarly underscored the obligation to consider measures alternative to detention before resorting to deprivation of liberty *(See Annex*).[14] The CPT 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 to detention should be developed and used when possible and that detention without a time limit and with unclear prospects for release may amount to inhuman treatment.[15]
7. Although the CPT does not make legal findings, the report of a visit to Lithuanian "registration centres" in 2021 noted that "*the restrictions imposed on "accommodated" foreign nationals were such that they could amount to a form of deprivation of their liberty*". Foreign nationals "*accommodated*" in the visited centres were "*confined*" to these centres and many detainees interviewed had been subject to "*excessive use of force*" and "*cramped*" living spaces with a "*prison-like character"*.[16] The Seimas Ombudsman also noted that restrictions applied to migrants in foreigner registration centres were "*equivalent to detention*".[17]
8. The CPT 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 experienced "*serious misgivings regarding the systematic application of custodial measures to all foreign*

[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] In the Commissioner for Human Right's Human Rights Comment "High time for states to invest in alternatives to migration detention", 31 January 2017, the Commissioner emphasised the importance of alternative measures to "safeguard the human rights of migrants" and that these alternatives apply to all forms of detention.
[15] European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), Factsheet: Immigration Detention, March 2017.
[16] 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.
[17] 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. *(See Annex).*

nationals who irregularly crossed the border into Lithuania, with little to no resort made to genuine alternatives to detention which do exist in law".[18][19]

9. **The interveners submit that in order 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.**

2. Right to have lawfulness of detention speedily examined by a Court under Article 5 (4) and effective access to legal assistance

10. The "quality of the law" safeguards against arbitrariness under Article 5 (1) are rendered ineffective unless detained individuals are able in law and in practice to take proceedings by which a court would speedily establish the lawfulness of their deprivation of liberty, including with respect to detention conditions, and order their release if the detention is not lawful.
11. 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 other ill-treatment in detention.
12. It entitles persons subject to any form of deprivation of liberty to take proceedings to have an independent court or tribunal establish the lawfulness of their detention while they are detained[20] rather than a mere opportunity to complain generally about the proceedings leading to their detention, and entitles the detainee to be heard before the court either in person or through a legal representative.[21] Presence in court, either in person or through a representative, is an important safeguard against violations of the Convention.
13. Article 5 (4) requires a specific remedy, namely, release whenever the Court finds detention is unlawful, to protect the liberty of the detained individual.[22] The right to bring proceedings under Article 5 (4) corresponds to a positive obligation on the part of the State to ensure the exercise of this right; it is an obligation and *cannot* be left to the discretion or '*good will'* of the detaining authority.[23] The remedy must also be "*sufficiently certain, not only in theory but*

[18] 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.

[19] Similarly, the Council of Europe Steering Committee for Human Rights (CDDH) has underlined 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. Council of Europe, Practical Guide: Alternatives to immigration detention: Fostering effective results, 25 November 2019.

[20] 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.

[21] 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.

[22] 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.

[23] Rakevich v. Russia, op. cit., para 44.

also in practice, failing which it will lack the accessibility and effectiveness required for the purposes of that provision".[24]

14. For the remedy to be practical and effective, detained individuals must also be informed promptly in a language they understand of the reasons for detention[25] and should have access to legal advice and, if needed, to interpretation.[26] Furthermore, this Court has required that detained persons are not only informed of the orders to hold them in detention, but of the legal basis, legal and factual reasons for their deprivation of liberty, in such a way as to give them an opportunity to challenge its legality.[27]
15. The Court has emphasised that accessible legal advice and assistance may be required for detainees to understand their circumstances.[28] In *S.H. v. Malta*, the Court attributes the applicant's lack of prepared and technical responses recognised in the credibility assessment, to the fact that he did not have access to legal representation while in detention.[29] In *Aden Ahmed v. Malta*[30] and *Mahamed Jama v. Malta*[31] the Court held that lack of access to a properly structured system of legal aid makes judicial review of detention inaccessible.
16. 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.[32] In order to determine whether authorities complied with the '*speediness*' requirement, the Court will consider the circumstances of each individual case, including the complexity of the proceedings, the conduct of domestic authorities and detainees, and what was at stake for the detained individuals.[33] The Court considers the duration of proceedings as a whole – this may include lengthy intervals between decisions, or the time taken to obtain evidence or further information.[34] 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.[35] It has held that in situations where a detainee 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*, their rights under Article 5 (4) were deprived of effective substance. The Court found that Article 5 (4) had been violated since they had been denied

[24] G.B. and Others v. Turkey, op. cit., para 163.
[25] M.S. v. Slovakia and Ukraine, App No. 17189/11, (11 June 2020), para 141.
[26] Ibid., para 143.
[27] R.M. and others v. Poland, App No. 11247/18, (9 February 2023), para 29.
[28] Guideline 5. Remedy against the removal order in CoE Committee of Ministers "Twenty Guidelines on forced return" adopted on 4 May 2005 as referenced by the ECtHR in De Souza Ribeiro v. France, No. 22689/07, para. 47.
[29] S.H. v. Malta, App No. 37241/21, (20 December 2022), para 85.
[30] Aden Ahmed v. Malta, App No. 55352/12, (23 July 2013), para 66.
[31] Mahamed Jama v. Malta, App No. 10290/13, (26 November 2015), para 65.
[32] Mooren v. Germany [GC], App No. 11364/03, (9 July 2009), para 106.
[33]Mooren v. Germany [GC], op. cit., 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.
[34] Baranowski v. Poland, App No. 28358/95, (28 March 2000), para 73.
[35] Khlaifia and others v. Italy [GC], App No. 16483/12, (15 December 2016), para 131.

access to a remedy that should have enabled them to obtain a judicial decision on the lawfulness of their deprivation of liberty.[36]

17. Council of Europe bodies too have emphasised the necessity of legal safeguards for applicants in immigration detention. The CPT has consistently emphasized the necessity of access to a lawyer, free legal assistance and interpretation.[37] For example, in the aforementioned CPT report on its visit to Lithuania, the Committee 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 right to have access to a lawyer should be fully effective from the outset of the deprivation of liberty.[38]
18. The interveners note that for the right to challenge the lawfulness of detention under Article 5 (4) to be practical and effective, the procedure to examine the "*lawfulness*" of detention should require not only that the person in detention be heard, but also that they enjoy effective assistance of a qualified and competent lawyer.[39] In *Černák v. Slovakia,* concerning pre-trial detention, the Court considered that a relevant element to its finding of a violation of Article 5 (4) was that, even though the applicant 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 client for twenty minutes, therefore, considerably limiting the preparation and assistance provided to the applicant.[40]
19. **The interveners submit 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 competent legal representation and advice are indispensable in ensuring the accessibility and effectiveness of judicial review of the lawfulness of detention.[41] The absence of provision for legal assistance in law or in practice should be taken into consideration in assessing the compliance of judicial review provided under domestic law with Article 5 (4).**

3. EU and international law standards related to deprivation of liberty.

20. 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 that does not limit or derogate the rights guaranteed under the applicable EU law. This obligation is supplementary to the obligation that all measures taken by Contracting Parties that affect the human rights

[36] Khlaifia and others v. Italy [GC], op. cit,, para 132-133.
[37] European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), Factsheet: Immigration Detention, March 2017.
[38] 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.
[39] Černák v. Slovakia, App No. 36997/08, (17 December 2013), para 78; Lutsenko v. Ukraine, App No. 6492/11, (3 July 2012), para 96. 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
[40] Černák v. Slovakia, op. cit., para 80.
[41] Louled Massoud v Malta, op. cit. para 61.

guaranteed by the ECHR be "*in accordance with the law*,"[42] which in some circumstances will be EU law.

21. The EU Charter of Fundamental Rights (CFR)[43] forms part of EU primary law.[44] It enshrines guarantees fundamental to the rights under consideration in the present case, namely, through Article 6 CFR guaranteeing that "*everyone has the right to liberty and security of person."* Article 47 of the CFR guarantees the right to an effective remedy and to a fair trial, [45] entitling all persons to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law, and guaranteeing to everyone the possibility of being advised, defended and represented.[46]

22. 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)[47] provides guarantees for individuals detained in the asylum procedure. This Court will recall that, in *MSS v. Belgium and Greece*,[48] the Grand Chamber took into account Greece's obligations under the Reception Conditions Directive (RCD),[49] as part of its national law, to ensure adequate material reception conditions. The same reasoning that led to the Grand Chamber in *MSS* to consider Greece's obligations under the RCD as part of the country's national law, applies, for present purposes, to EU Member States' obligations under Article 8 of the rRCD with respect to detention. Pursuant to Article 8 rRCD, a Member State may only detain an applicant if such detention "*proves necessary and on the basis of an individual assessment*", "*if other less coercive alternative measures cannot be applied effectively*".[50] Interveners draw the Court's attention to the fact that EU law stipulates that the period of detention of an applicant for international protection under border procedures shall never exceed four weeks from the date on which the application for international protection is lodged, even in cases of emergency.[51] The Court underlined in *C, B and X* that where the conditions for lawful detention are not met or cease to be met, the individual must be released immediately.[52]

23. In *V.L. v. Ministerio Fiscal* the CJEU held 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*

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[42] See Article 1 and 8 (2) ECHR.

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

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

[45] CJEU Judgment of 22 December 2010, DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v. Bundesrepublik Deutschland, Case C-279/09, ECR I-13849; CJEU Judgment of 26 September 2013, Texdata Software GmbH, Case C-418/11, ECLI:EU:C:2013:588, para. 84.

[46] EU Charter of Fundamental Rights, Article 47.

[47] 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.

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

[49] 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.

[50] Ibid.

[51] Article 8(3)(c) rRCD in conjunction with Article 43(2) APD; CJEU, Judgment of 17 December 2020, Commission v Hungary, C-808/18, ECLI:EU:C:2020:1029, para 181.

[52] CJEU, Judgment of 8 November 2022, C, B and X, Joined Cases C 704/20 and C 39/21, ECLI:EU:C:2022:858, para. 79, 80.

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."[53] In *K v. Staatssecretaris van Veiligheid en Justitie*[54] and *FMS and others v Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóságup*,[55] respectively, the CJEU found that Member States are obliged to undertake an individualised assessment, make use of detention as a last resort and ensure that, if used, detention be a proportionate measure for the objectives pursued.

24. In *M.A. v. Valstybės sienos apsaugos tarnyba*[56] the CJEU examined the compatibility of Lithuanian domestic legislation with the rRCD and the Asylum Procedures Directive (rAPD).[57] The CJEU 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*".[58] 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.*"[59] The CJEU found 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 to enforce the detention of those irregularly staying on the territory was not compatible with the requirements under the rRCD or capable of justifying the application of Article 72 TFEU.[60]

25. The aforementioned case was later referred to by the Constitutional Court of Lithuania that on 7 June 2023 declared that certain provisions of the Law on the Legal Status of Foreigners were inconsistent with Article 20 of the Constitution of Lithuania. The Court considered EU and international law as well as CJEU and ECtHR jurisprudence highlighting that amendments that required all asylum-seekers to stay in designated places during a state of emergency or war, restricting their free movement for up to six months without the right to appeal

[53] CJEU, Judgment of 25 June 2020, VL v. Ministerio Fiscal, C-36/20 PPU, ECLI:EU:C:2020:495, paras 101-102.
[54] CJEU, Judgment of 14 September 2017, K v. Staatssecretaris van Veiligheid en Justitie, C-18/16, ECLI:EU:C:2017:680, para 48.
[55] 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.
[56] CJEU, Judgment of 30 June 2022, M.A. v. Valstybės sienos apsaugos tarnyba, C-72/22 PPU, ECLI:EU:C:2022:505.
[57] 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.
[58] CJEU, Judgment of 30 June 2022, M.A. v. Valstybės sienos apsaugos tarnyba, C-72/22 PPU, ECLI:EU:C:2022:505, para 39.
[59] Ibid., paras 89-90.
[60] Ibid., paras 92 and 93.

could be considered a form of detention and should only be used when no less restrictive measures are available.[61]

26. The rAPD[62] provides for effective access to the asylum procedure for all applicants without any exception and defines a set of guarantees according to which the applicants shall be informed in the language they understand of the procedure and of their rights and should have the opportunity to communicate with organizations providing legal aid.[63] Under the rAPD, border procedures shall ensure, in particular, that persons willing to apply for international protection: *"(a) have the right to remain at the border or transit zones of the Member State; (b) are immediately informed of their rights and obligations; (c) have access to interpretation; (d) are interviewed […] by persons with appropriate knowledge of the relevant standards applicable in the field of asylum and refugee law; (e) can consult a legal adviser or counsellor*".[64]
27. Article 9(6) rRCD and Article 26 rAPD notably require that "*Member States shall ensure that [detained] applicants have access to free legal assistance and representation*", including "*at least, the preparation of the required procedural documents and participation in the hearing before the judicial authorities on behalf of the applicant*". It is further emphasised that legal assistance shall be provided by "*suitably qualified persons […] whose interests do not conflict or could not potentially conflict with those of the applicant*", thus guaranteeing the impartiality and independence of legal aid.
28. Additionally, EU law encompasses the right to effective legal protection[65] as well as the right to an effective remedy[66] and the right to be heard.[67] The CJEU reaffirmed that: *"[…] the detailed procedural rules governing actions for safeguarding an individual's rights under EU law must not make it in practice impossible or excessively difficult to exercise rights conferred by EU law*".[68]
29. Article 53 ECHR also applies to provisions of international law if those provisions bind the State in question.[69] Article 9(1) of the ICCPR[70] sets out that everyone has the right to liberty and security of person and must not be subject to arbitrary detention. Article 9(4) ICCPR provides that anyone deprived of their liberty shall be entitled to take proceedings against the lawfulness of their detention. This right should be determined before a competent judicial, administrative or legislative authority or by any other competent authority

[61] Constitutional Court of the Republic of Lithuania, Case No. 10-A/2022, 7 July 2023.
[62] Recast Asylum Procedures Directive, op. cit.
[63] Ibid., Recital 25.
[64] Ibid., Articles 2(p), 6, 8, 10-12, 15 and 19.
[65] CJEU, Judgment of 11 July 2002, Marks and Spencer plc v. Commission of Customs & Excise, Case C-62/00, ECR I-6348, para 27.
[66] CJEU, Judgment of 22 December 2010, DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v. Bundesrepublik Deutschland, Case C-279/09, ECR I-13849; CJEU Judgment of 26 September 2013, Texdata Software GmbH, Case C-418/11, ECLI:EU:C:2013:588, para. 84.
[67] Case C-277/11 M. M. v. Minister for Justice, Equality and Law Reform, Ireland, Attorney General [2012] ECLI:EU:C:2012:744, para 87.
[68] CJEU, Judgment of 22 December 2010, DEB, op. cit., para 28.
[69] Lithuania acceded the ICCPR on 20 November 1991.
[70] UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, UN, Treaty Series, vol. 999, p. 171.

designated by the State. States must ensure that access to effective remedies is enforced by the relevant authorities.[71]

30. The UN Human Rights Committee's (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*"[72] and that "*detention must be justified as reasonable, necessary and proportionate in the light of the circumstances and reassessed as it extends in time.*"[73] The CCPR has highlighted the importance of alternatives to detention 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*."[74] Consideration of less intrusive alternatives to detention for the purposes of immigration control is also required in order to protect against arbitrary detention under UNHCR Guidelines on Detention (Guideline 4.1).[75]

31. **The interveners submit that under EU and international standards 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 the 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. Access to information and legal assistance is a fundamental requirement for achieving effective redress.**

3. Right to an effective remedy against unlawful detention and material conditions

32. Article 13 ECHR guarantees the right to access a remedy at the national level to enforce the substance of Convention rights and freedoms.[76] A remedy must be effective both in practice and in law and not unjustifiably hindered by the acts or omissions of the relevant authorities.[77] Detained persons must have access to an effective remedy within the meaning of Article 13 during the course of detention. A domestic remedy procedure should have the capacity to offer effective redress and function effectively in practice.[78] In this regard the Court

[71] ICCPR Article 2 (3)(a)-(c)
[72] Ibid., para 67.
[73] Ibid., para 18.
[74] C. v. Australia, CCPR/C/76/D/900/1999, UN Human Rights Committee (HRC), 13 November 2002, para 8.2.
[75] UNHCR, Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention, 2012, Guideline 4.1.
[76] Neshkov and Others v. Bulgaria, App Nos. 36925/10 and 5 others, (27 January 2015), para 180.
[77] See for example, El-Masri v. the former Yugoslav Republic of Macedonia [GC], App No. 39630/09, (13 December 2012), para 255.
[78] G.B. and Others v. Turkey, op. cit., para 131.

has noted that where arguable complaints[79] are raised regarding inhuman and degrading conditions of detention, any remedy to be effective should have the possibility to improve the material conditions of detention, or where there is a breach of Article 3 ECHR, to put an end to the ongoing violation and inhuman and degrading treatment.[80]

33. The effective remedy must be sufficient and accessible to the person concerned, while fulfilling the obligation of promptness in light of any particular vulnerabilities of the applicant.[81] This Court's jurisprudence highlights a number of obstacles that may render the remedy against prohibited treatment under Article 3 ineffective, including, *inter alia*, insufficient information on how to gain effective access to the relevant procedures and remedies;[82] obstacles in physical access to and/or communication with the responsible authority;[83] lack of (free) legal assistance and access to a lawyer;[84] and lack of interpretation.[85]

34. This Court has noted that the special importance attached to Article 3 ECHR means that States are required to establish, over and above a compensatory remedy, an effective mechanism to put an end to treatment prohibited by Article 3 rapidly.[86]

35. Similarly, in accordance with the ICCPR, States must ensure that persons whose rights have been violated must have access to an effective remedy. This right should be determined before a competent judicial, administrative or legislative authority or by any other competent authority designated by the State. States must ensure that access to effective remedies is enforced by the relevant authorities.[87]

36. **The interveners stress that all those who have been deprived of their liberty should have an effective access to a fair and effective remedy at national level, in accordance with EU and international law**. **The lack of access to clear information; lack of access to a lawyer; and lack of access to an effective remedy render access to rights under Articles 3 and 13 ineffective, theoretical and illusory.**

[79] G.B. and Others v. Turkey, op. cit., paras 125-126.
[80] G.B. and Others v. Turkey, op. cit. para 129; Neshkov and Others v. Bulgaria, App Nos. 36925/10 and 5 others, (27 January 2015), paras 185 and 186.
[81] Kadikis v. Lettonie, App No. 62393/00, (04 August 2009), para 62; Payet v. France, App. No. 19606/08, (20 January 2011), paras 131-134.
[82] Hirsi Jamaa and Others v. Italy, App. No. 27765/09, (23 February 2012), para 204.
[83] Gebremedhin v. France, App. No. 25389/05, (26 April 2007), para 54; I.M. v. France, App. No. 9152/09, (14 December 2010), para 130; M.S.S v. Belgium and Greece [GC], App. No. 30696/09, (21 January 2011), para 301-313.
[84] M.S.S v. Belgium and Greece [GC], op. cit, para 319; mutatis mutandis, N.D. and N.T. v. Spain, Nos. 8675/15 and 8697/15, (3 October 2017), para 118.
[85] Hirsi Jamaa and Others v. Italy [GC], App. No. 27765/09, para 202.
[86] G.B. and Others v. Turkey, op. cit., para 136.
[87] ICCPR Article 2 (3)(a)-(c). Similar guarantees are enshrined under Article 47 CFREU.