

EUROPEAN COURT OF HUMAN RIGHTS

Application No. 55558/22

Z. H. R. and Others

v.

Poland

WRITTEN SUBMISSIONS ON BEHALF OF THE INTERVENERS:

ADVICE ON INDIVIDUAL RIGHTS IN EUROPE (AIRE CENTRE)
EUROPEAN COUNCIL ON REFUGEES AND EXILES (ECRE)
DUTCH COUNCIL FOR REFUGEES (DCR)

pursuant to the Registrar's notification dated 15 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

I. The engaged obligations of Contracting Parties under Article 3

1. The obligation of the State Parties under Article 3 of the European Convention of Human Rights (ECHR) is absolute. It requires States to ensure that no individuals within their jurisdiction are subjected to prohibited ill-treatment.¹ Treating all individuals in a manner compatible with the ECHR includes the obligation to identify and pay special attention to the needs of people in a vulnerable situation, irrespective of whether authorisation to enter the territory has been granted or if the person has irregular migration status. This includes asylum seekers;² children travelling with their parents;³ and persons with chronic illnesses or other medical needs.⁴
2. To fall within the scope of Article 3, ill-treatment “*must attain a minimum level of severity [...] the assessment of [which] depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim*”.⁵ This Court will also consider factors, such as the context of the ill-treatment and whether the individuals are in a particularly vulnerable situation.⁶
3. This Court has recognised that asylum seekers are members of a “*particularly underprivileged and vulnerable population*”.⁷ They have few resources and can only rely on the State for assistance. It is, therefore, crucial for the Contracting Parties “*to provide accommodation and decent material conditions*”⁸ for asylum seekers in order not to render them more vulnerable.⁹
4. As regards child asylum seekers, the Court recognises their enhanced vulnerability, as children and as asylum seekers, which must be a primary consideration, taking precedence over other’s arising from their irregular migration status.¹⁰ The Court has recognised the right of children to have their best interests assessed and taken as a primary, and in some contexts, paramount consideration.¹¹ In *Rahimi v. Greece*,¹² the Court confirmed that in all actions relating to children, conformity with Article 53 ECHR (see below) requires a best interests assessment and determination be undertaken separately and prior to any decision that will affect that child’s life or wellbeing.¹³
5. In the context of the **administrative detention of children**, the Court has found a violation of Article 3 on the basis of a combination of three factors: the child’s young

¹ *Hirsi Jamaa and Others v. Italy*, no. 27765/09, §§ 70, 114, 23 February 2012.

² *M.S.S v. Belgium and Greece* [GC], no. 30696/09, § 251, 21 January 2011.

³ *Muskhadzhiyeva and Others v. Belgium*, no. 41442/07, § 55, 19 January 2010.

⁴ *Muskhadzhiyeva and Others v. Belgium*, no. 41442/07, 19 January 2010; *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, no. 13178/03, 12 October 2006.

⁵ *M.S.S v. Belgium and Greece* [GC] no. 30696/09, § 219, 21 January 2011; *Sufi and Elmi v. United Kingdom*, nos. 8319/07 and 11449/07, § 213, 28 June 2011.

⁶ *Khlaifia and Others v. Italy* [GC], no. 16483/12, § 160, 15 December 2016.

⁷ *M.S.S v. Belgium and Greece* [GC], no. 30696/09, § 251, 21 January 2011.

⁸ *M.S.S v. Belgium and Greece* [GC], no. 30696/09, § 251, 21 January 2011.

⁹ *O.M. v. Hungary*, no. 9912/15, § 53, 5 July 2016.

¹⁰ *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, no. 13178/03, § 55, 12 October 2006.

¹¹ *Bistieva and Others v. Poland*, no. 75157/14, § 78, 10 July 2018; *Popov v France*, nos. 39472/07 and 39474/07, § 140, 19 January 2012; *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, no. 13178/03, § 103, 12 October 2006; *Rahimi v. Greece*, no. 8687/08, § 109, 5 April 2011.

¹² *Rahimi v. Greece*, no. 8687/08, § 108, 5 April 2011.

¹³ EASO, ‘Practical Guide on the Best Interests of the Child in Asylum Procedures’, 2019, p.17 and 25.

age,¹⁴ the length of detention and the unsuitability of the premises taking into account the specific needs of children.¹⁵ In *M.H. and Others v. Croatia*, this Court has acknowledged that the detention of minors shall be for the shortest period of time and all efforts shall be made to release a detained minor as soon as possible.¹⁶ Moreover, the conditions of detention should not create a situation of stress and anxiety.¹⁷

6. The intervenors recall the Court's case law according to which the detention of accompanied asylum-seeking children in poor conditions even for a short period of time has been found to be sufficient to meet the minimum level of severity to engage Article 3.¹⁸ In cases where the material reception conditions have met dignified standards, this Court has still attributed paramount importance to the overall duration of the detention and repeatedly found a violation of Article 3.¹⁹
7. The Court has emphasised **that the passage of time is of primary significance**, irrespective of whether the conditions of detention alone fall below the severity of the ill-treatment threshold of Article 3, the repeated and accumulated effects of deprivation of liberty may, taken together, meet the threshold. As a result, children may experience a level of psychological and emotional harm due to prolonged detention which may bring the detention within the Article 3 threshold.²⁰
8. The fact that a child may be accompanied by a parent does not relieve national authorities of the obligation to protect children from treatment in breach of Article 3.²¹ Where the Court has found that the detention of children falls within the scope of Article 3, a similar finding might apply to the mother in light of the inseparable bonds and emotions shared between a mother and child.²² The Court found an Article 3 violation in such a context in *M.D. and A.D. v. France*. After concluding that the detention of a 4-month-old baby amounted to proscribed ill-treatment, the Court also found a breach of Article 3 with regard to the mother due to, *inter alia*, the inseparable bond between the mother and her baby.²³ The Court highlighted that "*the particularly vulnerable situation of the minor child is decisive and takes precedence over the parent's status as an illegal resident alien.*"²⁴

¹⁴ *Popov v France*, nos. 39472/07 and 39474/07, § 102f, 19 January 2012; *S.F. and Others v. Bulgaria*; no. 8138/16, § 89, 7 March 2018; *Muskhadzhiyeva and Others v. Belgium*, no. 41442/07, § 63, 19 January 2010.

¹⁵ *A.M. and others v. France*, no. 7534/20, § 94, May 2023. See also relevant reports of Polish NGOs, according to which the conditions in detention centres are not adequate for children (Annex 2); and [the letter of the Polish Commissioner for Human Rights to the regional courts](#) (Annex 3).

¹⁶ *M.H. and Others v. Croatia*, nos. 15670/18 and 43115/18, §§ 200, 254, 257, 18 November 2021.

¹⁷ *Popov v France*, nos. 39472/07 and 39474/07, §§ 91 and 119, 19 January 2012.

¹⁸ *Rahimi v. Greece*, no. 8687/08, § 107ff., 5 April 2011; *S.F. and Others v. Bulgaria*, no. 8138/16, § 84, 7 March 2018.

¹⁹ *A.B. and Others v. France*, no. 11593/12, § 114, 12 July 2016; *R.M. and Others v. France*, no. 33201/11, § 75; 12 October 2016; *M.H. and Others v. Croatia*, nos. 15670/18 and 43115/18, § 199, 18 November 2021; *Bistieva and Others v. Poland*, no. 75157/14, § 87, 10 July 2018.

²⁰ *A.M. and others v. France*, No. 7534/20, 4 May 2023, § 14. See also: *A.B. and Others v. France*, no. 11593/12, § 109 and 114, 12 July 2016.

²¹ *A.M. and others v. France*, no. 7534/20, 4 May 2023, § 8.

²² *A.M. and others v. France*, no. 7534/20, 4 May 2023, § 16.

²³ *M.D. and A.D. v. France*, no. 57035/18, § 71, 22 October 2021.

²⁴ *M.D. and A.D. v. France*, no. 57035/18, § 65, 22 October 2021.

9. Furthermore, UNHCR Guidelines establish that detaining single migrant women with accompanying children may also deteriorate the well-being of the children who might be left without support or care.²⁵
10. In the context of detention, this Court also ruled that Article 3 would be engaged in a situation where there is “*detriment to ... physical or mental condition, or avoidable suffering of a certain intensity, or an immediate risk of such detriment or suffering*”.²⁶ In a case concerning an applicant with medical problems stemming from past domestic abuse, the Court noted that the authorities should have been aware of the consequences that detention, which lasted for almost seven months, would have on the applicant’s mental health.²⁷
11. Immigration detention can have devastating effects on mental health. For many detainees, not knowing how long they will be detained causes trauma, distress, and a sense of powerlessness.²⁸ Detention can exacerbate existing psychosocial disabilities and frequently triggers new ones, including depression, anxiety, and post-traumatic stress. Scientific research has also shown that even brief periods of immigration detention caused significant deterioration of mental health in applicants for international protection.²⁹ Many immigration detainees develop suicidal ideation as they begin to lose hope, particularly those fleeing traumatic experiences and persecution in search of safety and protection.³⁰
12. States have a positive obligation under Article 3 to ensure in a timely fashion that all reasonably possible medical measures are taken to prevent the deterioration of an individual’s health, that a comprehensive record is kept of the detained individual’s state of health and any treatment provided; and that supervision is regular and systematic.³¹ The Court has ruled on numerous occasions that the detention of a sick person may raise problems under Article 3 of the Convention³² and it has been clearly established in the Court’s case-law that Article 3 of the Convention requires States to ensure that the health and well-being of persons deprived of their liberty are adequately secured by, among other things, providing them with the requisite medical assistance. A lack of appropriate medical care may thus amount to treatment contrary to Article 3 of the Convention.³³
13. In determining the “adequacy” of medical assistance, the Court takes into account several factors and decides on a case-by-case basis.³⁴ In the case of detained persons with mental

²⁵ UNHCR, Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention, Guideline 9, 2012.

²⁶ *Moxamed Ismaaciil and Abdirahman Warsame v. Malta*, nos. 52160/13 and 52165/13, § 83, 84, 96, 12 January 2016.

²⁷ *W.O. and Others v. Hungary*, no. 36896/18, § 5 and 12, 25 August 2022.

²⁸ *V.M. and Others v. Belgium*, no. 60125/11, § 162-163, 7 July 2015.

²⁹ HRW and Amnesty International joint report, “*I don’t feel like a Human in there*”, June 17, 2021 (Annex 1); [Report of the Special Rapporteur on the human rights of migrants](#) on his visit to Poland (Annex 4); and Polish Commissioner for Human Rights, letter to the regional courts, 25 January 2022 (Annex 3).

³⁰ HRW and Amnesty International joint report, “*I don’t feel like a Human in there*”, June 17, 2021.

³¹ *Iacov Stanciu v. Romania*, no. 35972/05, §170, 24 July 2012.

³² *Matencio v. France*, no. 58749/00, § 76, January 15, 2004; and *Mouisel v. France*, no. 67263/01, § 38.

³³ *Rivière v. France*, no. 33834/03, § 74, 11 July 2006; *Raffray Taddei v. France*, no. 36435/07, § 51, 21 December 2010; and *Blokhin v. Russia* [GC], no. 47152/06, § 136, ECHR 2016.

³⁴ *Blokhin*, cited above, §§ 137-138; *Bamouhammad v. Belgium*, no. 47687/13, §§ 120-123, 17 November 2015; and *Aleksanyan v. Russia*, no. 46468/06, §§ 137-140, 22 December 2008.

disorder, the Court has considered them to be particularly vulnerable³⁵ and it underlined that at least three elements must be taken into consideration in this area: the pathologies from which the person concerned suffers, the appropriate nature of the assistance and medical care provided in detention and **the advisability of maintaining detention taking into account the state of health of the person concerned.**³⁶ Where the authorities decide to place and keep in detention a person with mental disorder, they should demonstrate special care in guaranteeing that the conditions of detention correspond to the person's special needs resulting from his or her disability.³⁷

14. The assessment of whether the particular conditions of detention are compatible with the standards of Article 3 must take into consideration the vulnerability of those persons³⁸ and in some cases, their inability to complain coherently or at all about how they are being affected by any particular treatment.³⁹ The Court has emphasised that feelings of inferiority and powerlessness, which are typical of persons suffering from a mental disorder, call for increased vigilance in evaluating compliance with the Convention.⁴⁰ The Court has considered that it is not enough for such persons who have been deprived of liberty to be examined and a diagnosis made; it is essential that proper treatment and suitable medical supervision by qualified staff is also provided.⁴¹ The mere fact that a person deprived of liberty has been seen by a doctor and prescribed a certain form of treatment cannot automatically lead to the conclusion that the medical assistance was adequate⁴². The authorities must also ensure that a comprehensive record is kept concerning the person's state of health and his or her treatment while in detention, that diagnosis and care are prompt and accurate, and that where necessitated by the nature of a medical condition, supervision is regular, systematic, and involves a comprehensive therapeutic strategy aimed at adequately treating the person's health problems or preventing their aggravation, rather than addressing them on a symptomatic basis.⁴³ The authorities must also show that the necessary conditions were created for the prescribed treatment to be actually followed through.⁴⁴
15. **Detaining persons with mental health conditions in establishments that are not suitable for their condition raises a serious issue under the Convention, in particular where no specialist treatment or medical supervision appropriate to their condition is available and where detention significantly deteriorates this condition.**⁴⁵

³⁵ *Renolde v. France*, no. 5608/05, § 84, ECHR 2008 (extracts).

³⁶ *Aleksanian v. Russia*, no. 46468/06, §§ 133 - 140, December 22, 2008.

³⁷ *Fernandes de Oliveira v. Portugal* [GC], no. 78103/14, § 113, 31 January 2019; and *Jeanty v. Belgium*, no. 82284/17, § 99, 31 March 2020.

³⁸ *M.S. v. Croatia* (no. 2), no. 75450/12, § 96, 19 February 2015, and *Aggerholm v. Denmark*, no. 45439/18, § 81, 15 September 2020.

³⁹ *Keenan v. the United Kingdom*, no. 27229/95, § 111, ECHR 2001-III, *Rooman*, cited above, § 145, with further references.

⁴⁰ *Dybeku v. Albania*, no. 41153/06, § 47, 18 December 2007, *Slawomir Musiał v. Poland*, no. 28300/06, § 94, 20 January 2009, and *Gömi v. Turkey*, no. 38704/11, § 87, 19 February 2019.

⁴¹ *Murray v. the Netherlands* [GC], no. 10511/10, § 107, ECHR 2016; *Poghosyan v. Georgia*, no. 9870/07, § 49, 24 February 2009; *Bamouhammad*, cited above, § 122; and *Rooman*, cited above, § 146.

⁴² *Rooman v. Belgium* [GC], 2019, §§ 147-148.

⁴³ *Sy v Italy*, n^o 11791/20, §§ 78-80, 24 January 2022

⁴⁴ *Blokhin*, cited above, § 137; and *Rooman*, cited above, § 147, *L.R. v. North Macedonia*, no. 38067/15, 23 January 2020, and *Sy v. Italy*, no. 11791/20, §§ 86-88, 24 January 2022.

⁴⁵ *Slawomir Musiał*, cited above, §§ 94 and 96; *Rivière*, cited above, § 75; and *G. v. France*, no. 27244/09, §§ 47-48, 23 February 2012.

16. Applying the criteria set out above, the intervenors recall the Court's consistent case law according to which the responsibility of the State might be engaged under Article 3 in respect of treatment where an applicant, who was wholly dependent on State support, found him or herself faced with official indifference in a situation of serious deprivation or want incompatible with human dignity.⁴⁶ Having regard to the absolute character of the prohibition of inhuman or degrading treatment, where the lack of adequate medical care has met the threshold of severity under Article 3, any justifications advanced by the respondent Government relating to a lack of resources may not justify such treatment.⁴⁷ Respect for the dignity of persons deprived of liberty must be ensured regardless of financial or logistical difficulties⁴⁸, a shortage of places in suitable facilities⁴⁹ or other such reasons.
17. **The intervenors submit that when assessing the threshold of severity to establish a violation of Article 3 ECHR, the Court must take into consideration the vulnerability of the applicants and the cumulative effects of the conditions and treatment to which the applicants were subjected. This includes consideration of the applicant's age, sex and state of health on entry to the detention facility, the development or deterioration of their health condition, and whether lack of medical assistance led to avoidable suffering or the risk of such suffering.**
18. **Where an applicant has particular healthcare needs as a vulnerable person and those are not adequately accommodated by the authorities, this indicates indifference. This is especially evident in serious situations concerning vulnerable individuals with mental health needs and may amount to degrading treatment within the scope of Article 3.⁵⁰**
19. **The intervenors submit that the authorities have a duty to act with due diligence, taking all the measures that could reasonably be expected of them to protect the health of the person under its custody and prevent the deterioration of their state of health.⁵¹**

II. Article 8 and the right to respect for private and family life

20. Article 8 ECHR essentially aims to protect individuals against arbitrary interference by public authorities.⁵² However, it does not only require that States abstain from interferences with this right: it may also impose positive obligations on Contracting Parties to ensure effective respect for the right to respect for private and family life.⁵³ **These positive obligations may also arise in contexts where a State's inaction materially impacts an applicant's ability to pursue normal family life within the meaning of the Convention.⁵⁴**

⁴⁶ *Tarakhel v. Switzerland* [GC], no. 29217/12 § 98, 4 November 2014; *V.M. and Others v. Belgium*, no. 60125/11, § 134, 7 July 2015.

⁴⁷ *M.S.S v. Belgium and Greece* [GC] no. 30696/09, § 223, 21 January 2011.

⁴⁸ *Dybeku*, cited above, § 50.

⁴⁹ *Claes v. Belgium*, no. 43418/09, § 99, 10 January 2013.

⁵⁰ *Aswat v UK*, no. 17299/12, § 50, 16 April 2013.

⁵¹ *Yoh-Ekale Mwanje c. Belgique* - 10486/10, §93 and 98, 20 December 2011.

⁵² *Maire v. Portugal*, no. 48206/99, § 69, 26 June 2006; *Harroudj v. France*, no. 43631/09, § 40, 4 October 2012; *Popov v. France*, nos. 39472/07 and 39474/07, § 133, 19 January 2012.

⁵³ *Söderman v. Sweden* [GC], no. 5786/08, § 78, 12 November 2013.

⁵⁴ *Harroudj v. France*, no. 43631/09, § 41, 4 October 2012.

21. Any interference with rights under Article 8 § 1 must be made in accordance with the law. This requires the Court to consider whether the interference strikes a fair balance between an individual's right to protection under the ECHR and the community's interests.⁵⁵
22. When striking this balance, Contracting States are afforded a certain margin of appreciation. However, this margin is narrower in cases concerning vulnerable persons, such as asylum seekers or stateless persons.⁵⁶ In the case of children, the Court has reiterated that all decisions concerning children require that their best interests are of paramount importance, including in cases concerning the right to respect for private and family life.⁵⁷ This Court has made it clear, in the context of Article 8 ECHR, that it is the obligation of Contracting Parties to place the best interests of the child at the centre of decisions affecting them, including decisions which may affect their health and development.⁵⁸
23. In *Bistieva and Others v Poland*, this Court found that "even though Ms Bistieva was not separated from her children, the fact of confining the applicants to a detention centre for almost six months[...]subjecting them to living conditions typical of a custodial institution, can be regarded as an *interference* with their family life".⁵⁹ The Court also highlighted that
- "the child's best interests cannot be confined to keeping the family together[...]the authorities have to take all the necessary steps to limit[...]the detention of families accompanied by children and effectively preserve the right to family life[...]the Court is not convinced that the Polish authorities had in fact, as they should have, viewed the family's administrative detention as a measure of last resort. Nor had they given due consideration to possible alternative measures. Accordingly, the Court finds that, even in the light of the risk that the family might abscond, the authorities failed to provide sufficient reasons to justify the detention for five months and twenty days in a secure centre, and as a result that there has been a violation of Article 8 of the Convention".**⁶⁰
24. **Where a Contracting Party fails to consider the best interests of the child as a primary consideration, including its placement in a detention centre for a prolonged time, this may amount to an unjustified interference with the right to respect for private and family life. Even if the Court finds that an interference with Article 8 is undertaken in pursuit of a recognised legitimate aim, it must also be proportionate to the aim pursued.**⁶¹ In the *Popov* case this Court held that the detention in a secure centre for a period of fifteen days led to a disproportionate interference with the applicants right to respect for their family life.

⁵⁵ *Kurić and Others v. Slovenia* [GC] no. 26828/06, § 355, 2 March 2014; *Nunez v. Norway*, no. 55597/09, § 68, 28 June 2011; See also *Ramadan v Malta*, no. 76136/12, 21 June 2016; *Konstatinov v. The Netherlands*, no. 16351/03, 26 April 2007.

⁵⁶ *Hoti v. Croatia*, no. 63311/14, § 122, 26 April 2018; See also: *Konstatinov v. The Netherlands*, no. 16351/03, 26 April 2007.

⁵⁷ *Vavříčka and Others v. the Czech Republic* [GC], nos. 47621/13 and 5 others, § 287, 8 April 2021.

⁵⁸ *Vavříčka and Others v. the Czech Republic* [GC], nos. 47621/13 and 5 others, § 288, 8 April 2021.

⁵⁹ *Bistieva and Others v Poland*, no. 75157/14, § 70, 10 July 2018.

⁶⁰ *Bistieva and Others v Poland*, no. 75157/14, § 85ff, 10 July 2018. Similar findings were made in *A.B. and Others v. Poland*, nos. 15845/15 and 56300/15, 4 June 2020; and *R.M. and Others v. Poland*, no. 11247/18, February 9 2023.

⁶¹ *Popov v. France*, nos. 39472/07 and 39474/07, § 140, 19 January 2012 or vulnerable people with illnesses see *Rooman v. Belgium* [GC], 2019, §§ 147-148.

25. **Similarly, a lack of appropriate medical treatment that leads to the deterioration of the mental health of a person under State custody, therefore impacting its ability to pursue normal family life within the meaning of the Convention may amount to a violation of Article 8.**

III. Article 53 and relevant provisions of international and EU law

26. This Court has consistently reiterated that the ECHR cannot be interpreted in a vacuum but must be interpreted in harmony with the general principles of international law.⁶² Article 53 ECHR prohibits a construction of Convention rights which would limit the human rights and fundamental freedoms ensured under any other agreement to which the respondent State is a party. To ensure compliance with Article 53 ECHR when construing the rights and freedoms which are defined in the Convention, this Court must guarantee at least the level of protection of those human rights and fundamental freedoms already guaranteed by other international agreements to which the relevant State is a party.
27. The intervenors submit that this Court has an obligation under both the first and second limbs of Article 53 ECHR (taken together with Article 19 ECHR) not to construe the applicable provisions of the Convention incompatibly with (i) any provisions of national law and (ii) any other international agreements which the respondent state has ratified. The intervenors invite the Court to consider the relevant provisions of the International Covenant on Civil and Political Rights (ICCPR); the UN Convention on the Elimination of all forms of Discrimination Against Women (CEDAW); the UN Convention on the Rights of the Child (CRC), and the UN Convention on the Rights of Persons with Disabilities (CRPD) as well as the relevant provisions of EU law.

a. Relevant provisions of EU Law

28. The Court is thus invited to consider the relevant provisions of the Charter on Fundamental Rights of the European Union (CFR).⁶³ **Article 1** provides that the dignity of the human person is not only a fundamental right in itself but constitutes the real basis of fundamental rights. **Article 6** provides for the right to liberty and security of person. **Article 7** enshrines the right to respect for private and family life. **Article 24** provides that children have the right to protection and care as necessary for their well-being and that the best interests of the child must be a primary consideration in all actions concerning children.⁶⁴ Assessing the lawfulness of the detention of individuals requires an individual examination of the necessity and proportionality of the proposed detention of the people concerned, including in light of their vulnerability. Once detention is considered necessary and proportionate, assessment of whether less coercive measures can be applied effectively in the specific case should be pursued in line with all individual circumstances of persons concerned.⁶⁵ The Court of Justice of the European Union

⁶² Among other cases: *Demir and Baykara v. Turkey* [GC], no. 34503/97, 67, 12 November 2008; *Loizidou v. Turkey*, No. 15138/89, § 43, 18 December. This principle is equally found in other international human rights agreements. For instance, see UN CRC, Article 41.

⁶³ Charter on Fundamental Rights of the European Union (CFR) Articles 2 and 3.

⁶⁴ CFR, Article 24 (1) and (2).

⁶⁵ Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (Recast Reception Conditions Directive), Recital 15 and Articles 8 para 2 and 9(1).

- (CJEU)⁶⁶ confirmed 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.⁶⁷
29. The intervenors also highlight that this Court has repeatedly referred to the recast Reception Conditions Directive (rRCD)⁶⁸ in its former case law on immigration detention of minors.⁶⁹ The rRCD also provides in **Article 11(1)** that the health, **including the mental health**, of individuals in vulnerable conditions in detention shall be a primary concern and that States shall monitor and provide adequate support in light of each individual's specific situation. These provisions are applicable also in case of detention of applicants for international protection. Under **Article 21 rRCD**, "vulnerable persons" include pregnant women, single parents with minor children and persons who have been subjected to serious forms of psychological, physical or sexual violence. **Article 23 rRCD** provides specific guarantees for minors. The best interests of the child shall be a primary consideration and States shall ensure a standard of living adequate for the physical, mental, spiritual, moral and social development of the child.⁷⁰ Per **Article 25(2) rRCD**, States must ensure that victims of torture, rape or other serious acts of violence receive the necessary treatment, in particular medical and psychological care. The intervenors further observe that the provisions of the rRCD should be interpreted in accordance with the relevant provisions of the CFR.⁷¹
30. **The intervenors draw the Court's attention to the fact that the EU asylum *acquis* recognises the special vulnerability of persons with a mental health condition and requires Member States to ensure uninterrupted access to material reception conditions which ensure an adequate standard of living and protect their mental health.**⁷²

b. Relevant standards and provisions of international law

31. This approach is reflected in the views of the UN Human Rights Committee (HRC) which, in its General Comment No. 35 on the right to liberty and security of person,⁷³ it stated that "[d]ecisions regarding the detention of migrants must also take into account the effect of the detention on their physical or mental health."⁷⁴
32. In *C v Australia*,⁷⁵ the HRC found a violation of the right to liberty of an asylum seeker, detained despite his deteriorating mental health *condition and* the respondent State failed to take the steps necessary to ameliorate his mental deterioration, and where it "*ha[d]*

⁶⁶ CJEU, *Ministerio Fiscal (Authority likely to receive an application for international protection)*, C-36/20 PPU, § 102, 25 June 2020.

⁶⁷ CJEU, *K. v Staatssecretaris van Veiligheid en Justitie*, C-18/1614 September 2017, §42 – 47.

⁶⁸ Directive 2013/33/EU (recast) laying down standards for the reception of applicants for international protection (rRCD), 29 June 2013.

⁶⁹ *Rahimi v Greece*, § 108; *M.H. and Others v. Croatia* § 184, and *Popov v France*, § 91.

⁷⁰ rRCD, Article 23(1).

⁷¹ CFR, Preamble § 9 and 35.

⁷² CJEU, *Haqbin v. Federaal Agentschap voor de opvang van asielzoekers*, C-233/18, 12 November 2019, § 50. See also recital no. 20 of rRCD: "*In order to better ensure the physical and psychological integrity of the applicants, detention should be a measure of last resort and may only be applied after all non-custodial alternative measures to detention have been duly examined. Any alternative measure to detention must respect the fundamental human rights of applicants.*"

⁷³ UN HRC General comment No. 35 Article 9 (Liberty and security of person), 16 December 2014.

⁷⁴ UN HRC General comment No. 35 Article 9 (Liberty and security of person), 16 December 2014, § 18.

⁷⁵ UN HRC, *C. v. Australia*, CCPR/C/76/D/900/1999, 13 November 2002, §§8.2-8.4.

not demonstrated that, in the light of the author's particular circumstances, there were not less invasive means of achieving the same ends”.

33. The CRC Committee has urged Poland to ensure that child asylum seekers and families with children are not placed in guarded centres.⁷⁶ Furthermore, the UN Committee against Torture has expressed concern about the detention of families with children, the failure to identify individuals who are survivors of torture and the inadequate protection for survivors of sexual and gender-based violence.⁷⁷ The Committee also explicitly recommended that Polish authorities shall refrain from placing asylum seekers and in particular children in guarded centres and provide them with adequate access to health care and psychological services.⁷⁸ Very recently, the Supreme Court of Poland also reiterated that any deprivation or restriction of liberty “must meet the constitutional standard derived from the principle of proportionality specified in Article 31(3) of the Polish Constitution. Failure to meet it is an unjust deprivation of liberty”.⁷⁹
34. The special vulnerability of refugee and asylum-seeking women is acknowledged in General Recommendation No. 32 of the CEDAW Committee, which affirms that the Convention serves to prohibit sex and gender-based discrimination during the entire asylum process, throughout which women are entitled to be treated with respect and dignity at all times.⁸⁰ The CEDAW Committee has made clear that alternatives to detention shall be made available in order to prevent violence against women. In General Recommendation No. 24, the CEDAW Committee affirms that special attention should be paid to the health needs of women from vulnerable and disadvantaged groups including migrant women and refugees and internally displaced women.⁸¹ States have an obligation to take appropriate measures and to the maximum extent of available resources to ensure that women are guaranteed access to health care.⁸²
35. The CRPD obligates governments to take all appropriate steps to ensure that reasonable and procedural accommodation is provided.⁸³ This includes situations in which persons with disabilities have been deprived of their liberty in a prison or other legally mandated detention facility.⁸⁴ The HRC has also stated that decisions regarding the detention of migrants must take into account its effect on mental health and make available adequate community-based services for persons with psychosocial disabilities.⁸⁵
36. When parents are detained solely for the purposes of immigration control, detaining their non-national children with them on the sole premise of maintaining family unity, without

⁷⁶ UN CRC, Concluding observations on the combined fifth and sixth periodic reports of Poland, §41b, 6 December 2021.

⁷⁷ UN CAT Concluding observations on the seventh periodic report of Poland, 29 August 2019, § 25.

⁷⁸ CAT Concluding observations on the seventh periodic report of Poland, 29 August 2019, § 26(c) and (d).

⁷⁹ The Supreme Court of Poland, judgment of 20 June 2023, II KK 148/22, of 20 August 2023, available at: <https://www.sn.pl/sites/orzecznictwo/orzeczenia3/ii%20kk%20148-22-2.pdf>

⁸⁰ UN CEDAW, General recommendation No. 32 on the gender-related dimensions of refugee status, asylum, nationality and statelessness of women, CEDAW/C/GC/32, § 10, 11 and 14, 5 November 2014.

⁸¹ UN CEDAW, General recommendation No. 24: Article 12 of the Convention (Women and Health), § 6.

⁸² UN CEDAW, General Recommendation No. 24: Article 12 of the Convention, § 17.

⁸³ UN Special Rapporteur on the rights of persons with disabilities, “International Principles and Guidelines on Access to Justice for Persons with Disabilities”, August 2020, p.9.

⁸⁴ UN CRPD, art. 14 (2)

⁸⁵ UN HRC, General Comment No. 35, Article 9 (Liberty and security of the person), § 8–19.

any considerations of achieving the same result by resorting to less coercive measures, a number of obligations under the CRC are violated, including the best interests of the child principle. The best interests of the child principle should prevail over the interest of immigration control and should be used as the key evaluation tool in all decisions affecting asylum-seeking children. The CRC Committee and the Committee on Migrant Workers have jointly determined that the detention of children in the immigration context is incompatible with the CRC and the Convention on the Rights of Migrant Workers.⁸⁶ The Joint General Comment notes that detention of children may have a negative impact on the mental health and development of the child, even for short periods and even where accompanied by a parent.

37. In accordance with **Article 3** of the CRC, the best interests of the child shall be the primary consideration in any action taken by States parties. **Article 37 CRC** requires States parties to ensure that children are detained in conformity with the law, as a measure of last resort, for the shortest possible period of time.⁸⁷ **Article 6 CRC** provides that States must recognise the child's inherent right to life, which includes the need to ensure, to the maximum extent possible, the development of the child. **Article 27 CRC** provides that States must recognise that children have a right to a standard of living adequate for the physical, mental, spiritual, moral and social development of the child. This includes, per **Article 31 CRC**, the right of the child to rest and leisure, to play, and to engage in recreational activities. These provisions should be interpreted in light of the particular vulnerability of children seeking asylum, explicitly recognised by **Article 22 CRC** and elaborated in CRC General Comment 14 on the right of the child to have their best interests taken as a primary consideration.⁸⁸ Per **Article 24 CRC**, States must recognise the right of children to the enjoyment of the highest attainable standard of health.
38. The intervenors further invite the Court to consider the relevant provisions of CRC General Comment No. 7 on implementing the right of the child in early childhood. According to the Committee, early childhood is critical for realising the rights of the child for a number of reasons, including *inter alia*, that it is a key period of growth and change; it is a time where children form close attachments with their parents; children make sense of the physical world and space in which they live; and it is the foundation for the physical and mental health of children.⁸⁹ The Committee has further commented that States should provide assistance to parents, including by providing living conditions appropriate for the child's development, protection, and care.⁹⁰ Further, the Committee has observed that inadequate living conditions undermine the well-being, self-esteem, and development of children.⁹¹
39. **The intervenors submit that international and regional agreements oblige the States to ensure the specific needs of individuals who are in a vulnerable position are met and further submit that when considering arguments under Article 3 and Article 8 of the Convention, the Court should take account of these agreements.**

⁸⁶ UN CMW and CRC, General Comment No. 4 of the CMW and No. 23 of the CRC, State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination, and return, §12, 16 November 2017.

⁸⁷ HRC General Comment No. 35, § 18ff. and *D. and E. v Australia*, § 7.2; *Jalloh v Netherlands*, § 8.2f.

⁸⁸ UN CRC, General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (Article 3, § 1), § 75-76, 29 May 2013; and Article 22 CRC.

⁸⁹ CRC General Comment No. 7 on implementing child rights in early childhood (2005), § 6 (a) – (g).

⁹⁰ CRC General Comment No. 7, on implementing child rights in early childhood (2005), § 20.

⁹¹ CRC General Comment No. 7, on implementing child rights in early childhood (2005), § 26.

Annex

Annex	Document
1.	<i>Human Rights Watch and Amnesty International</i> , “I don’t feel like a Human in there”, 17 June 2021, available at https://www.hrw.org/report/2021/06/17/i-didnt-feel-human-there/immigration-detention-canada-and-its-impact-mental .
2.	<i>Legal Intervention Association (SIP)</i> , “Raport SIP w działaniu, Prawa cudzoziemców w Polsce w 2021 r”. [Report SIP in action. Rights of foreigners in Poland in 2021], available (PL) at https://bit.ly/3pmM6dS .
3.	<i>Polish Commissioner for Human Rights</i> , “Letter to the Regional Courts”, 25 January 2022, available at https://bit.ly/3HnQZJL .
4.	<i>UN Human Rights Council</i> , “Visit to Poland - Report of the Special Rapporteur on the human rights of migrants”, Felipe González Morales (A/HRC/53/26/Add.1), 21 May 2023, available at https://www.ohchr.org/en/documents/country-reports/ahrc5326add1-visit-poland-report-special-rapporteur-human-rights-migrants .