

BEFORE THE FIRST SECTION,
EUROPEAN COURT OF HUMAN RIGHTS

Application No. 7463/23

Between

M.A.E.

Applicant

v.

Poland

Respondent

WRITTEN SUBMISSIONS ON BEHALF OF THE INTERVENORS

The AIRE Centre (Advice on Individual Rights in Europe),
the Dutch Council for Refugees (DCR),
and ECRE (the European Council on Refugees and Exiles)

pursuant to the Registrar's notification dated February 20, 2025, on the Court's permission
to intervene under Rule 44 § 3 of the Rules of the European Court of Human Rights

11 March 2025

Contracting Parties' obligations under Article 5(1) of the European Convention on Human Rights (ECHR) in the context of immigration detention

The definition of deprivation of liberty

1. It is well established in the jurisprudence of this Court that a deprivation of liberty under Article 5 ECHR is defined both by reference to the classification of national law and in light of the reality of the restrictions imposed on the person concerned.¹ This includes the type of restrictions imposed, their duration, their effects on the individual, and the manner of implementation of the measure.² It is the cumulative effect of the restrictions, taking into account the particular circumstances of the affected person, that must be assessed in determining whether they have been deprived of liberty.³
2. In the migration context, therefore, persons placed in facilities classified as a 'reception', 'holding' or 'accommodation' centres, even if those persons are not considered 'detained' in national law, may be considered to be deprived of their liberty under Article 5 ECHR due to the nature of the restrictions imposed on them.⁴ These principles apply equally to measures in international zones at points of entry to a State⁵ as well as to transit zones at border strips⁶, closed areas that cannot be left⁷, and on board of vessels following interception at sea.⁸

The lawfulness of deprivation of liberty

3. Article 5(1) ECHR requires that any detention must be "in accordance with the law" which rests on the principles of the rule of law, legality and protection against arbitrariness.⁹ 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.¹⁰ It must also conform to any applicable norms of international law.¹¹
4. In the context of immigration detention, Article 5(1)(f) constitutes *lex specialis*¹² and allows the detention of a person to prevent his or her unauthorised entry, and of a person against whom action is being taken with a view to forced removal. The question as to whether the first limb of Article 5(1)(f) applies is largely dependent on national law, which in the context of EU

¹ *Amuur v. France*, No. 19776/92 (20 May 1996) para. 42; *Abdolkhani and Karimnia v. Turkey*, No. 30471/08 (22 September 2009) paras. 125-127; *Ashingdane v. United Kingdom*, No. 8225/78 (28 March 1985) para. 42.

² *Amuur v. France*, op. cit., para 42.

³ *Guzzardi v. Italy*, No.7367/76 (6 November 1980) para. 93; Similar principles are applied by the UN Human Rights Committee under Article 9 ICCPR. See *Celepli v. Sweden*, CCPR, No. 456/1991 (26 July 1994).

⁴ *Abdolkhani and Karimnia v. Turkey*, op. cit., para. 12; *Amuur v France*, op. cit., para. 43; *Riad and Idiab v. Belgium*, Nos. 29787/03 and 29810/03 (24 January 2008) para. 68.

⁵ *Amuur v. France*, op cit., para. 43; *Riad and Idiab v Belgium*, op. cit., para. 68; *Shamsa v. Poland*, No. 45355/99 (27 November 2003) para. 47; *Nolan and K v. Russia*, No. 2513/04 (12 February 2009) paras. 93-96; European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), CoE Doc. CPT/Inf/E (2002) 1 - Rev. 2010, Strasbourg, December 2010 ("CPT Standards"), pages 53-54.

⁶ See e.g. *Ilias and Ahmed v Hungary [GC]*, No. 47287/15 (21 November 2019).

⁷ See e.g. *J.A. and Others v. Italy*, No. 21329/18 (30 March 2023) para. 90-94.

⁸ See e.g. *Khlaifia and Others v Italy [GC]*, No. 16483/12 (15 December 2016).

⁹ *Louled Massoud v. Malta*, No. 24340/08 (27 July 2010) para. 61; *Medvedyev v. France [GC]*, No. 3394/03 (29 March 2010) para. 80.

¹⁰ *Louled Massoud v. Malta*, op. cit., para. 61; *Khlaifia and others v. Italy [GC]*, op. cit., para 91.

¹¹ *Medvedyev v France [GC]*, op. cit., paras.79 – 80.

¹² *J.B. and Others v. Malta*, No. 1766/23 (22 October 2024) para 103.

Member States includes the relevant EU *acquis*.¹³ A State's interpretation of national law (and therefore also of the EU *acquis*) may be subject to oversight by this Court (See §32 et seq. of this intervention).¹⁴ Regarding the second limb of Article 5(1)(f), this Court has emphasised that a detention measure will not be justified if forced removal proceedings are not in progress¹⁵ and conducted with "due diligence".¹⁶

5. This Court has held that where fixed time-limits for detention exist, a failure to comply with them may be relevant to the question of 'lawfulness', as detention exceeding the period permitted by domestic law is unlikely to be considered to be "in accordance with the law".¹⁷ The intervenors draw the Court's attention to the fact that EU law, which for the purpose of applying Article 5 ECHR is national law (see §32 et seq. of this intervention), stipulates that the detention of an international protection applicant for the purpose of deciding on the person's right of entry during a border procedure must never exceed four weeks from the date on which the application for international protection is lodged.¹⁸

Arbitrariness of immigration detention

6. It should be noted that the notion of lawfulness extends further than simply having a clear legal basis in national law and following a procedure prescribed by law. This Court has held that a person's detention under any of the grounds of Article 5(1)(f) must always 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.¹⁹ For detention to be free from arbitrariness, as required by Article 5(1) and interpreted by this Court, 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 pursued.²⁰
7. In order to comply with the above mentioned requirements, this Court held that immigration detention must, *inter alia*, be based on a reasoned decision²¹; it should not be punitive in nature²²; there must be a clear relationship between the ground of detention relied on and the place and condition of detention.²³ Detention that is imposed "[...] by virtue of an overly broad interpretation of a general provision of the law [...]" does not satisfy the criteria of quality of law and lack of arbitrariness.²⁴
8. This Court has further found that the duration of detention may, in itself, render it arbitrary. In *M.K. v. Hungary*, where the detention lasted five-and-a-half months, this Court stated that "this duration alone is capable of raising concerns,

¹³ The requirements of the applicable EU law are set out in more detail in §33-35 of this intervention.

¹⁴ *Nabil and Others v. Hungary*, No. 62116/12 (22 September 2015) para. 31.

¹⁵ *Khlaifia and others v. Italy [GC]*, op. cit., para. 90.

¹⁶ *Chahal v. The United Kingdom*, No. 22414/93 (15 November 1996) para. 113.

¹⁷ *Komissarov v. the Czech Republic*, No 20611/17 (3 February 2022) paras. 50-52.

¹⁸ Directive 2013/33/EU of the EU Parliament and Council laying down standards for the reception of applicants for international protection (recast) ('Reception Conditions Directive'), Art 8(3)(c); with Directive 2013/32/EU of the EU Parliament and Council on common procedures for granting and withdrawing international protection (recast) ('Procedures Directive'), Art 43(2); CJEU, *Commission v Hungary*, C-808/18 (17 December 2020) ECLI:EU:C:2020:1029, para. 181.

¹⁹ *Nabil and others v. Hungary*, op. cit., para. 18.

²⁰ *Saadi v. UK [GC]*, No. 13229 (29 January 2008) para 74; *Yoh-Ekale Mwanje v. Belgium*, No. 10486/10 (20 December 2011) paras. 117-119.

²¹ *Lokpo & Touré v Hungary*, No. 10816/10 (20 September 2011) para. 24.

²² *Azimov v. Russia*, No. 67474/11 (18 April 2013) para. 172.

²³ *Saadi v. UK*, op. cit., para 69.

²⁴ *R.R. and others v. Hungary*, No. 36037/17 (2 March 2021) para. 91.

even in the absence of any indication that the detention took place in inappropriate conditions.”²⁵ However, where the detention takes place in inappropriate conditions, a strict approach is necessary: In such cases, the Court has previously found a duration of four months to be unreasonable for the purposes of Article 5(1) ECHR.²⁶

9. Contracting Parties have a positive obligation to take appropriate measures to protect the liberty of persons, especially vulnerable persons.²⁷ This Court has found that asylum applicants are particularly vulnerable solely on account of their situation of migration and the trauma of flight²⁸; asylum seekers are members of a “particularly underprivileged and vulnerable population”²⁹; and Contracting Parties must “exercise particular care to avoid situations which may reproduce the plight that forced these persons to flee in the first place”.³⁰
10. Generalised or automatic decisions to detain asylum seekers without an individual assessment of the particular needs of the persons concerned – or of the possibility to apply less intrusive measures – raise an issue under 5(1)(f) of the Convention.³¹ Detention procedures need to be individualized in order to identify additional vulnerabilities and prevent detention where it may not be safe or appropriate.³² In order for adults with particular vulnerabilities to benefit from the additional safeguards that apply to them, detained individuals should have access to vulnerability assessments and be informed about the relevant procedures.³³ Such assessments must not take several months without adequate justification, as held by this Court in *Abdi Mahamud v. Malta*.³⁴
11. Disregarding the health of a person in immigration detention, or vulnerabilities due to medical conditions, is in violation of Article 5(1)(f), particularly if the national authorities did not consider less intrusive measures.³⁵ Therefore, the intervenors submit that immigration detention of adults with vulnerability beyond that arising from the fact that the adult is an asylum seeker³⁶ will not be in conformity with Article 5(1)(f) where it is not strictly necessary to achieve the aims pursued. In those cases, immigration detention must be a measure of last resort, and national authorities must verify their efforts in subjecting the person concerned to less intrusive measures.³⁷
12. Other Council of Europe bodies have similarly noted the importance of alternative measures to detention and advocated for its consideration in all cases concerning detention³⁸ The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) has stated that

²⁵ *M.K. v. Hungary*, No. 46783/14 (9 June 2020) para. 21; See also *L. v Hungary*, No. 6182/20 (21 March 2024) para. 19.

²⁶ *Kanagaratnam and Others v. Belgium*, No. 15297/09 (13 December 2011) paras. 94–95.

²⁷ *Stanev v Bulgaria [GC]*, No. 36760/06 (12 January 2012) para. 120.

²⁸ *M.S.S. v Belgium and Greece [GC]*, No. 30696/09 (21 November 2011) para. 232.

²⁹ *M.S.S. v. Belgium and Greece*, op. cit., para. 251.

³⁰ *O.M. v. Hungary*, No. 9912/15 (5 July 2016) para. 53.

³¹ *Thimothawes v. Belgium*, No. 39061/11 (4 Apr 2017) para. 73; Also *Suso Musa v Malta*, op. cit., para. 100.

³² *Thimothawes v. Belgium*, op. cit., para. 73.

³³ *Abdi Mahamud v. Malta*, No. 56796/13 (3 May 2016), para 133.

³⁴ *Abdi Mahamud v. Malta*, op. cit., para 132.

³⁵ *Yoh-Ekale Mwanje v. Belgium*, op. cit., para. 124; Also *Thimothawes v. Belgium*, op. cit., para. 73, 79-80.

³⁶ See §9 of this intervention in this regard, citing further *M.S.S.*, op. cit., para. 251.

³⁷ For recollection of case law, see *Thimothawes v. Belgium*, op. cit., para. 73; On children: *A.B. and Others v. France*, No. 11593/12 (12 July 2016,) para. 120-123; On adults with health issues: *Yoh-Ekale Mwanje*, op. cit., para. 124.

³⁸ See the Commissioner for Human Right’s Comment “High time for states to invest in alternatives to migration detention”, Strasbourg, press release published on 31 January 2017.

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.³⁹ Following a visit to Poland in 2022, the CPT noted that the detention of asylum seekers in a guarded centre cannot exceed six months.⁴⁰

13. **The intervenors submit that, to be in conformity with Article 5(1) of the Convention, 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.⁴¹ The Court’s jurisprudence must be interpreted as requiring an individualised assessment of the person’s vulnerabilities and the availability of less restrictive measures to exclude detention that is unsafe or inappropriate given the individual’s personal circumstances. The detention of vulnerable adults must be strictly necessary and a measure of last resort.**

Contracting Parties’ obligations under Article 5(4) ECHR in the context of immigration detention

14. The safeguards against arbitrariness contained in Article 5(1) are rendered ineffective if the detained individual is **unable in law or in practice** to take proceedings to establish whether the detention and its conditions are lawful. The right to challenge the lawfulness of detention judicially under Article 5(4) of the Convention is a fundamental protection against arbitrariness, as well as against torture or other ill-treatment in detention and enforced disappearance.⁴² 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 detained⁴³ and entitles the detainee to be heard before the court either in person or through a legal representative.⁴⁴ The intervenors invite the Court to find that only a personal hearing fully ensures that the reviewing judge has available all the necessary information, such as the individual's condition and state of health.
15. It is a *lex specialis* over and above the general requirements of Article 13 of the Convention. Access to such a procedure is an obligation and cannot be left to the discretion or ‘good will’ of the detaining authority.⁴⁵
16. For the remedy to be practical and effective, under Article 5(2) ECHR the authorities are required to inform the detained persons promptly in a language

³⁹ Council of Europe (CoE), European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), Factsheet: Immigration Detention (CPT/Inf(2017)3), published 10 March 2017.

⁴⁰ CoE CPT, Report to the Polish Government on the visit to Poland carried out by the CPT from 21 March to 1 April 2022, CPT/Inf(2024)10 (published 22 February 2024), para. 27.

⁴¹ *Saadi v. UK*, op. cit., para 74; *Yoh-Ekale Mwanje v. Belgium*, op. cit., paras. 117-119.

⁴² The Human Rights Committee (CCPR) held that the corresponding Article 9(4) ICCPR is a non-derogable right: CCPR, General Comment No. 35 on Article 9, Liberty and security of person, CCPR/C/GC/35, para 67.

⁴³ See *G.B. and Others v. Turkey*, No. 4633/15 (17 October 2019) para. 183; *Mooren v. Germany [GC]*, No. 11364/03, (9 July 2009) para 106; and *Ilmseher v. Germany [GC]*, No. 10211/12 (4 Dec 2018) para. 251.

⁴⁴ *Al-Nashif v. Bulgaria*, No. 50963/99 (20 June 2022) para. 92; *De Wilde, Ooms and Versyp v. Belgium*, Nos. 2832/66; 2835/66; 2899/66 (18 June 1971) para 73.

⁴⁵ *Rakevich v. Russia*, No. 58973/00 (28 October 2003) para. 44.

they understand of the reasons for detention⁴⁶ and to provide them with access to legal advice and, if needed, to interpretation.⁴⁷ Detained persons must be informed of the legal basis and legal and factual reasons for their deprivation of liberty, in a manner they understand and in such a way as to give them an opportunity to challenge its legality.⁴⁸ For this reason, legal advice may be required.⁴⁹

17. While this Court has acknowledged that authorities are not obliged to provide free legal aid in the context of detention proceedings, the lack thereof raises issues as to the accessibility of the remedy foreseen in Article 5(4), particularly where legal representation is required in the domestic context for its exercise.⁵⁰ Late access to legal assistance, such as in the case of *Černák v. Slovakia*, where the lawyer was consulted only a few hours before the hearing and was only allowed to inspect the case file and consult with the applicant for twenty minutes⁵¹, or the deployment of only one interpreter for a large group of detained individuals, may also render the remedy ineffective.⁵² Having found during its visit in 2022 that the issue of legal assistance was left almost entirely to non-governmental organisations on a ‘pro bono’ basis, the CPT recommended that “the Polish authorities take steps to ensure that immigration detainees can effectively benefit from the services of a lawyer in all phases of the legal procedures”.⁵³
18. In the course of review proceedings before a judicial body, the detained individual should enjoy procedural fairness under Article 5(4) ECHR; although that article does not impose a uniform or unvarying standard, the proceedings must always be adversarial and ensure “equality of arms” between the parties.⁵⁴ For the proceedings to ensure equality of arms, the detained individual must have access to those documents that are essential in order to raise an effective challenge to the lawfulness of detention⁵⁵ and may need to be given the opportunity to be heard in person, including with effective assistance by a lawyer⁵⁶, particularly in the case of minors.⁵⁷
19. This Court has previously emphasised the importance and value that effective access to legal assistance holds for an applicant in detention. 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 not have access to legal representation while in detention.⁵⁸ In the examination of the accessibility of a domestic remedy against detention under Article 5(4) ECHR, both the remedy’s characteristics and the context of its application must be assessed. In *Soldatenko v. Ukraine*, this Court stated that “the accessibility of a remedy implies, inter alia, that the circumstances voluntarily created by the authorities must be such as to afford applicants a realistic possibility of using

⁴⁶ *M.S. v. Slovakia and Ukraine*, No. 17189/11 (11 June 2020) para. 141.

⁴⁷ *M.S. v. Slovakia and Ukraine*, op. cit., para. 143.

⁴⁸ *R.M. and others v. Poland*, No. 11247/18 (9 February 2023) para. 29.

⁴⁹ *Louled Massoud v. Malta*, op. cit., para. 43 - 47, 71.

⁵⁰ *Suso Musa v Malta*, op. cit., para. 61; *Amuur v. France*, op. cit., para. 53.

⁵¹ *Černák v. Slovakia*, No. 36997/08 (17 December 2013) para 80.

⁵² *Conka v Belgium*, No. 51564/99 (5 February 2002) paras. 44-45.

⁵³ CoE CPT, Report to the Polish Government, op. cit., p. 4.

⁵⁴ *Lutsenko v. Ukraine*, No. 6492/11 (3 July 2012) para 96; *A. and Others v. the United Kingdom [GC]*, No. 3455/05 (19 February 2009) paras. 203 - 204, with further references.

⁵⁵ See, mutatis mutandis, *Fodale v. Italy*, No. 70148/01 (1 June 2006) para. 41.

⁵⁶ *Bouamar v. Belgium*, No. 9106/80 (29 February 1988) para. 60.

⁵⁷ *Bouamar v. Belgium*, op. cit., para 63.

⁵⁸ *S.H. v. Malta*, No. 37241/21 (20 December 2022) para 85.

the remedy”.⁵⁹ In the judgments of *Aden Ahmed v. Malta*⁶⁰ and *Mahamed Jama v. Malta*⁶¹, the Court held that lack of access to a properly structured system of legal aid makes the remedy inaccessible.

20. This Court has held that any person who wishes to consult a lawyer must be free to do so under conditions which favour a full and uninhibited discussion⁶² - a condition on which the presence of State officials, or a genuine belief that the discussion may be listened to, can have a detrimental effect.⁶³
21. During proceedings, domestic courts “cannot treat as irrelevant, or disregard, concrete facts invoked by the detainee and capable of putting into doubt the existence of the conditions essential” for the lawfulness of the detention.⁶⁴ Since an essential argument was not examined by the reviewing judges, in *S.Z. v. Greece*, this Court found that the applicant “did not have the benefit of an examination of the lawfulness of his detention to a sufficient degree”.⁶⁵ Similarly, a violation of Article 5(4) was established in *E.A. v. Greece* due to the domestic judge’s rejection of the applicant’s objections to his detention without any consideration of his asylum application or any examination of the conditions of detention.⁶⁶ Lastly, in *A.B. and others v. France*, a violation of Article 5 (1) was found on account of the reviewing court’s failure to examine whether the authorities could have taken less coercive measures.⁶⁷
22. 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.⁶⁸ In *K.A. v Cyprus*, it was reiterated that “where an individual’s personal liberty is at stake, the Court has set very strict standards for the State’s compliance with the requirement of a speedy review of the lawfulness of detention” – a standard that was found already breached by an appeal proceeding that lasted twenty-six days in the case of *Mamedova v Russia*.⁶⁹
23. **The intervenors submit that, under Article 5(4), authorities must promptly inform the detainees of the reasons for detention in a language the detainees understand, provide them with access to a lawyer and, where necessary, an interpreter. Lack of or delayed access to legal assistance in detention proceedings may render available remedies ineffective. In order to ensure equality of arms, applicants must have access to the relevant documents to challenge the lawfulness of detention, be heard in person and have access to effective and confidential legal assistance. The review procedure must consider all concrete facts invoked by the detainee and must be concluded speedily.**

⁵⁹ *Soldatenko v. Ukraine*, No. 2440/07 (23 October 2008) para. 125.

⁶⁰ *Aden Ahmed v. Malta*, No. 55352/12 (23 July 2013) para 66.

⁶¹ *Mahamed Jama v. Malta*, No. 10290/13 (26 November 2015) para 65.

⁶² *Altay v Turkey (no 2)*, No. 11236/09 (9 April 2019) para 50.

⁶³ *Castravet v. Moldova*, No. 23393/05 (13 March 2007) para 51.

⁶⁴ *Nikolova v. Bulgaria [GC]*, No. 31195/96 (25 March 1999) para. 61.

⁶⁵ *S.Z. v. Greece*, No. 66702/13 (21 June 2018) paras. 70-73.

⁶⁶ *E.A. v. Greece*, No. 74308/10 (30 July 2015) para. 97.

⁶⁷ *A.B. and Others v. France*, No. 11593/12 (12 July 2016) para. 137.

⁶⁸ *Mooren v. Germany [GC]*, op. cit., para 106.

⁶⁹ *K.A. v Cyprus*, op. cit., para. 42; *Mamedova v. Russia*, No. 7064/05 (1 June 2006) para. 96.

The prohibition of ill-treatment or inhuman and degrading treatment under Article 3 ECHR in the context of immigration detention.

The general threshold of treatment in violation of Article 3 in detention

24. Inappropriate places and conditions under which detainees are held may not only render detention arbitrary as prohibited by Article 5 of the Convention, but further give rise to issues under Article 3 thereof, which – prohibiting inhuman or degrading treatment – protects a fundamental value in democratic societies.⁷⁰ The prohibition of inhuman or degrading treatment is, as this Court regularly emphasises, absolute and allows for no derogation even in the event of a public emergency threatening the life of the nation or in the most difficult circumstances, irrespective of the conduct of the person concerned.⁷¹
25. According to the settled case law of this Court, ill-treatment must attain a minimum level of severity to fall within the scope of Article 3 and this assessment, as the Grand Chamber observed, “depends on all the circumstances of the case, principally the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim”.⁷² In making that assessment, the Court will draw comparisons to prisoners’ rights.⁷³
26. As for the conditions of detention, the requirement for a personal space of at least three square metres recurs throughout the Court’s case law.⁷⁴ In combination with other factors such as a lack of hot water, ventilation or light, the Court has considered less than four square metres space per person to reach the threshold of inhuman treatment.⁷⁵ An applicant’s situation was also found exacerbated by a lack of possibilities to exercise or move outside, and high temperatures such as an average of 28 degrees Celsius in detention facilities.⁷⁶
27. This Court has previously emphasized that “persons in custody are in a vulnerable position and the authorities are under a duty to protect them. Consequently, where an individual is taken into custody in good health and is found to be injured on release, it is incumbent on the State to provide a plausible explanation of how those injuries were caused”.⁷⁷ The Court has previously based conclusions that the conditions of detention violate Article 3 in its substantive part on plausible allegations made by the applicant that reflected the realities described by the European Committee for the Prevention of Torture.⁷⁸
28. **The intervenors submit that the requirement of an individualised assessment under Article 3 and the obligation to take positive measure combined with the widely acknowledged vulnerable position of applicants for international protection⁷⁹ as well as the vulnerable position of persons**

⁷⁰ *Khlaifia and Others v. Italy [GC]*, op. cit., para 158.

⁷¹ *Khlaifia and Others v. Italy [GC]*, op. cit., para 158; see further *Georgia v. Russia (I) [GC]*, No. 13255/07 (31 January 2019) para. 192; *Svinarenko and Slyadnev v. Russia [GC]*, No. 32541/08 and 43441/08 (17 July 2014) para. 113.

⁷² *Khlaifia and Others v Italy [GC]*, op. cit., para 159.

⁷³ *Georgia v. Russia (I) [GC]*, op. cit., paras. 192-205; *Khlaifia and Others v. Italy [GC]*, op. cit., paras. 163-167; *Sakir v. Greece*, No. 48475/09 (24 March 2016) paras. 50-53.

⁷⁴ *Mursic v Croatia [GC]*, No 7334/13 (20 October 2016) paras. 136-138; *Orchowski v Poland*, No. 17885/04 (22 October 2009) para 122; *Lind v Russia*, No. 25664/05 (6 December 2007) para. 59; *Kantjrev v Russia*, No. 37213/02 (21 June 2007) para 50-51.

⁷⁵ *Torreggiani and Others v Italy*, No. 43517/09 (8 January 2013) para. 69; See further references.

⁷⁶ *Mandic and Jovic v Slovenia*, No. 5774/10 and 5985/10 (20 October 2011) para. 78.

⁷⁷ *Salman v Turkey [GC]*, No. 21986/93 (27 June 2000) para 99.

⁷⁸ *Vasilescu v Belgium*, No. 64682/12 (25 November 2014) para. 99; see also *Valentin Bastovoi v the Republic of Moldova*, No. 40614/14 (28 November 2017) para. 25 on findings of the Court, of CPT and national Ombudsmen.

⁷⁹ See in this regard *Saadi*, op. cit., para. 74, and *A. and Others v. UK [GC]*, op. cit., para. 164.

that are detained⁸⁰ leads to an enhanced vulnerable situation that must be taken into consideration in deciding whether the threshold of Article 3 of the Convention has been reached.

With a view to specific vulnerabilities

29. As observed by this Court in *Florea v Romania*, detention calls for enhanced protection of vulnerable individuals as they find themselves entirely under the responsibility of the State, and the latter has to ensure that all detainees are detained in conditions which respect human dignity, are not subject to excessive distress or hardship, and that a detainee's health is not compromised.⁸¹ In the assessment of the appropriateness of detention conditions, this Court has considered the personal circumstances of the detained asylum applicant, examining whether the conditions were adequate from the perspective of those circumstances and the person's needs. For example, in *S.D. v. Greece* the authorities violated Article 3 by disregarding the detainee's psychological and physical situation following past torture.⁸² Similarly, in *Aden Ahmed v. Malta*, this Court found a violation of Article 3 because the detention conditions were not adapted to the specific needs of the applicant, who was an irregular migrant with "personal emotional circumstances" and "fragile health."⁸³
30. In the context of adults that present a specific vulnerability, the Court established in *Aleksanyan v Russia* that where detainees suffer from serious illness, at least three factors had to be taken into consideration, which are (a) the medical conditions from which the person concerned suffered, (b) the appropriateness of the medical assistance and provided care, and (c) the desirability of continuing the detention in view of the applicant's state of health.⁸⁴ Authorities are obliged to act with due diligence and take all measures that could reasonably be expected of them to protect the applicant's health and prevent its deterioration.⁸⁵
31. **The intervenors invite the Court to recall that Article 3 ECHR imposes both positive and negative obligations. They submit that the obligation to act with due care and to take all measures that can reasonably be expected to prevent the deterioration of a detainee's mental or physical health requires the identification of specific risks with the highest degree of care with regard to the conditions and duration of detention. If detention leads to deterioration of health, Articles 5 and 3 of the Convention require the adoption of measures to ensure the protection of the detainee's health, including their release from detention where necessary.**

Regional and international obligations as applicable to measures within the scope of Article 5 ECHR

32. Article 53 prohibits, *inter alia*, 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

⁸⁰ See in this regard *Salman v Turkey [GC]*, op. cit., para. 99.

⁸¹ *Florea v Romania*, No. 37186/03 (14 September 2010) para. 50.

⁸² *S.D. v. Greece*, No. 53541/07 (11 June 2009) paras. 52–53.

⁸³ *Aden Ahmed v. Malta*, No. 55352/12 (23 July 2013) para. 97.

⁸⁴ *Aleksanyan v. Russia*, No. 46468/06 (22 December 2008) paras. 133-140.

⁸⁵ *Yoh-Ekale Mwanje v Belgium*, op. cit., para. 98.

those human rights and fundamental freedoms already guaranteed by other international agreements to which the relevant Contracting State is a party. In relation to asylum, in countries where it is applicable, the EU asylum *acquis* is of particular relevance as it is binding as a matter of both domestic and EU law, as well as under Article 53 of the Convention.⁸⁶

33. In light of the applicable EU and international law, prevention of arbitrary detention requires consideration of less intrusive alternatives to detention. This is the case for immigration detention under the relevant EU law, in particular the recast Reception Conditions Directive (RCD)⁸⁷ and the Return Directive⁸⁸, under Article 9(1) of the International Covenant on Civil and Political Rights (ICCPR)⁸⁹, the relevant UN principles⁹⁰, and is further recommended by the UNHCR Guidelines on Detention.⁹¹
34. Interpreting the recast RCD, which sets the standards for the reception of applicants for international protection, the CJEU emphasized that Member States are obliged to undertake an individualised assessment⁹² and detention must be a last resort and proportionate to the objectives pursued.⁹³ The CJEU 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.⁹⁴
35. The Return Directive **only** applies in situations where the individual has exhausted all other avenues of regularisation and thus no longer has legal stay.⁹⁵ It does not apply in situations where an asylum application (or an appeal against a refusal) is ongoing. For those cases, where third country nationals have exhausted all procedural options under the ordinary immigration or asylum process, it provides for common procedures and standards for returning them.
36. For EU member States, the EU *acquis* is the most relevant source of law applicable under Article 53 ECHR, but it is important to identify in any given situation which EU instrument is applicable. Article 53 ECHR also applies to provisions of international law if those provisions bind the State in question.⁹⁶

⁸⁶ Poland has transposed the relevant EU law instruments, particularly the recast Reception Condition Directive and the recast Asylum Procedures Directive, *op. cit.*, in 2015. As such, they have become a part of the domestic law.

⁸⁷ Reception Conditions Directive, *op. cit.*, Art 8(2),(4); Directive 2018/115/EC of the EU Parliament and Council on common standards and procedures in Member States for returning illegally staying third country-nationals ('Return Directive'), Art 15 (1); Procedures Directive, *op. cit.*, Art 26; Regulation (EU) No 604/2013 (recast) ('Dublin III Regulation') Art 28 (2); Regulation (EU) No. 516/2014 ('Asylum, Migration and Integration Fund') Art 5(g), Article 11(a).

⁸⁸ Directive 2018/115/EC of the EU Parliament and Council on common standards and procedures in Member States for returning illegally staying third country-nationals ('Return Directive').

⁸⁹ CCPR, *C. v. Australia* (13 November 2002) CCPR/C/76/D/900/1999, para. 8.2.

⁹⁰ UNGA, Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (adopted at 43rd Sess. 9 December 1988), Principle 17(1).

⁹¹ UNHCR, Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention, 2012, Guideline 4.1; CoE, Twenty Guidelines on Forced Return (September 2005) Guideline 6.

⁹² CJEU, *VL v. Ministerio Fiscal*, C-36/20 PPU (25 June 2020) paras. 101-102.

⁹³ CJEU, *K v. Staatssecretaris*, C-18/16 (14 September 2017) paras. 48; CJEU, *FMS and others*, C-924/19 PPU & C-925/19 PPU (14 May 2020) para. 258.

⁹⁴ CJEU, *C, B and X*, Joined Cases C-704/20 and C-39/21 (8 November 2022) paras. 79-80; CJEU, *VL v. Ministerio Fiscal*, *op. cit.*, paras. 101-102; CJEU, *K v. Staatssecretaris van Veiligheid en Justitie*, *op. cit.*, para. 48; CJEU, *FMS and others*, *op. cit.*, para. 258.

⁹⁵ Return Directive, *op. cit.*, Recital 2, Article 4(2); Further, the Return Directive should not be seen as part of the EU asylum *acquis* as it applies only *after* an individual has received a final negative decision, rendering their stay on the territory illegal.

⁹⁶ Poland acceded the ICCPR on 18 March 1977.

Article 9 ICCPR⁹⁷ 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".⁹⁸ States must be able to demonstrate, in the light of the detainee's particular circumstances, that there are no less invasive means of achieving the same ends.⁹⁹ The UN Human Rights Committee (CCPR) held in *A.K. et al v Australia* that a decision to detain

"must consider relevant factors case by case, and not be based on a mandatory rule for a broad category; must take into account less invasive means of achieving the same ends such as reporting obligations, sureties or other conditions to prevent absconding; and must be subject to periodic re-evaluation and judicial review".¹⁰⁰

37. The UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, adopted by the General Assembly in 1988, provides further standards applicable to individuals in immigration detention. According to those principles, not only shall a detained person be entitled to legal counsel¹⁰¹, but they must be offered a proper medical examination promptly after admission, and thereafter medical care and treatment if necessary.¹⁰² When conducting medical examinations, States shall record the examination, names of the responsible staff members, and the result thereof.¹⁰³
38. Article 9 (4) ICCPR provides that anyone deprived of their liberty shall be entitled to take proceedings against the lawfulness of their detention. The CCPR's General Comment No. 35 has recognised this right to be non-derogable, stating that "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".¹⁰⁴
39. **The interveners invite the Court to recall that protection under the Convention - in accordance with Article 53 - must not fall short of the applicable regional and international legal frameworks that are binding on a Contracting State. These frameworks cumulatively require that detention must follow an individualised assessment, provide for the identification of vulnerabilities and adequate medical care, be subject to the principle of proportionality and necessity, and only be applied as a measure of last resort.**

⁹⁷ UN General Assembly (UNGA), International Covenant on Civil and Political Rights (ICCPR), 16 December 1966, UN, Treaty Series, vol. 999, p. 171.

⁹⁸ UN Human Rights Committee (CCPR), General Comment No. 35 on Article 9 (Liberty and security of person), 16 December 2014, CCPR/C/GC/35, para 18.

⁹⁹ CCPR, *C. v. Australia* (13 November 2002) CCPR/C/76/D/900/1999, para 8.2.

¹⁰⁰ CCPR, *A.K. et al. v Australia* (13 March 2014) CCPR/C/132/D/2365/2014, para 8.4.

¹⁰¹ UNGA, Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (adopted at 43rd Sess. 9 December 1988), Principle 17(1).

¹⁰² UNGA, Body of Principles, op. cit., Principle 24.

¹⁰³ UNGA, Body of Principles, op. cit., Principle 26.

¹⁰⁴ CCPR, General Comment No. 35, op. cit., para 67.