

BEFORE THE FOURTH SECTION,  
EUROPEAN COURT OF HUMAN RIGHTS

Application Nos. 27637/23 and 19542/24

Between

*A.B.A. and others*

Applicant

v.

*The Netherlands*

Respondent

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WRITTEN SUBMISSIONS ON BEHALF OF THE INTERVENOR

The AIRE Centre, the European Council on Refugees and Exiles, the Dutch Council of Refugees, and  
the International Commission of Jurists

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pursuant to the Registrar's notification 5<sup>th</sup> March 2025 on the Court's permission to intervene under Rule  
44 § 3 of the Rules of the European Court of Human Rights

*31st March 2025*

## **I. Article 3 obligations in the context of immigration detention of children**

1. To fall within the scope of prohibition of torture or other inhuman or degrading treatment under Article 3 of the Convention, the ill-treatment must attain a minimum level of severity. The assessment of this is relative; it depends on all the circumstances of the case, such as the purpose of ill-treatment and the context in which it is inflicted, whether the victim is in a vulnerable situation;<sup>1</sup> the duration of the treatment and its physical or mental effects, and the sex, age and state of health of the victim.<sup>2</sup> In the context of administrative detention of children in an immigration setting, this Court further considers: the age of the child; the duration of the detention; and the suitability of the premises with regard to the specific needs of children.<sup>3</sup> In *M.H. and Others v. Croatia*, this Court stated that if any detention of minors is undertaken, it shall be “for the shortest period of time” and “all efforts shall be made to release a detained minor as soon as possible”.<sup>4</sup> The conditions of detention should not create a situation of stress and anxiety which could result in harmful consequences for the child.<sup>5</sup> The extreme vulnerability of a child must be the decisive factor, taking precedence over considerations relating to his or her migration status.<sup>6</sup>
2. The Court has previously recognised that measures which might normally comply with Article 3 may nevertheless be in violation where children are concerned, as a different threshold must be applied.<sup>7</sup> For example, the involvement of masked special agents as part of a lawful police operation may increase children's feelings of fear and anxiety.<sup>8</sup> The presence of children must be considered in the planning and execution of law-enforcement operations, in order not to expose them to unnecessary harm.<sup>9</sup>
3. The Court has also considered important the vulnerability of children in terms of their health or personal history,<sup>10</sup> where children’s psychological problems had been certified by doctors<sup>11</sup> or where the children had experienced a traumatic situation in the country of origin.<sup>12</sup> **The intervenors submit that an Article 3 complaint made by children in detention will not always relate only to the material conditions of detention, but may include the role of the overall context in creating fear and anxiety and causing psychological harm to children.**

## **II. General principles under Article 5 (1) ECHR**

4. Article 5(1) requires that any deprivation of liberty must be “in accordance with the law” which encompasses the principles of legality and protection against arbitrariness.<sup>13</sup> Detention must both

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<sup>1</sup> *Khlaifia and Others v Italy* [GC], No.16483/12 (15 December 2016) §160.

<sup>2</sup> *Kudła v. Poland* [GC], No. 30210/96 (26 October 2000) §91; *M.S.S. v. Belgium and Greece* [GC], No. 30696/09 (21 January 2011) §219.

<sup>3</sup> *A.B. and Others v. France*, No. 11593/12 (12 July 2016) §109; *M.D. and A.D. v. France*, No. 57035/18 (22 July 2021) §63.

<sup>4</sup> *M.H. and Others v. Croatia*, Nos. 15670/18 and 43115/18 (18 November 2021) §§200, 254 and 257.

<sup>5</sup> *Popov v. France*, Nos. 39472/07 and 39474/07 (19 January 2012) §§101-103.

<sup>6</sup> *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, No. 13178/03 (12 December 2006) §55; *Popov v. France*, Nos. 39472/07 and 39474/07 (19 January 2012) §§91 and 119.

<sup>7</sup> *Muskhadzhiyeva and Others v. Belgium*, No. 41442/07 (19 January 2010); *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, No. 13178/03 (12 December 2006) §§81 and 83; see *Popov v. France*, Nos. 39472/07 and 39474/07 (19 January 2012); *Kanagaratnam and Others v. Belgium*, No. 15297/09 (13 December 2011).

<sup>8</sup> *Gutsanovi v. Bulgaria*, No. 34529/10 (15 October 2013) §134.

<sup>9</sup> *A v. Russia*, No. 37735/09 (12 November 2019) §67.

<sup>10</sup> *Muskhadzhiyeva and Others v. Belgium*, No. 41442/07 (19 January 2010) §§60-61 and 63.

<sup>11</sup> *Kanagaratnam and Others v. Belgium*, No. 15297/09 (13 December 2011) §67.

<sup>12</sup> *M.H. and Others v. Croatia*, No. 15670/18 and 43115/18 (18 November 2021) §201.

<sup>13</sup> *Louled Massoud v. Malta*, No. 24340/08 (27 July 2010) §61; *Medvedyev v. France* [GC], No. 3394/03 (29 March 2010) §80.

have a clear legal basis in national law, must follow a procedure prescribed by law,<sup>14</sup> and be clearly defined and foreseeable in its application.<sup>15</sup> It must also conform to other applicable legal standards in international law (see from §18 of this intervention).<sup>16</sup> Lawfulness extends further than having a clear legal basis: detention must be compatible with the overall purpose of Article 5 and must ensure that no person is deprived of liberty arbitrarily.<sup>17</sup> To be free from arbitrariness, detention must be carried out in good faith; be closely connected to a permitted ground for deprivation of liberty; 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.<sup>18</sup>

5. As with any deprivation of liberty, immigration detention, to be lawful, must be based on a reasoned decision<sup>19</sup> and there must be a clear relationship between the ground of detention relied on and the place and conditions of detention.<sup>20</sup> **A reasoned decision must be issued for every person subject to deprivation of liberty. This includes migrant children accompanying their parent(s), whose interests must not be subsumed within a decision covering only their parent(s).** 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 – are not compliant with the requirements of Article 5(1)(f) of the Convention.<sup>21</sup> Detention procedures need to be individualised in order to identify additional vulnerabilities and prevent detention where it may not be safe or appropriate.<sup>22</sup>
6. **Particular legal standards are engaged in relation to the deprivation of liberty of children, including accompanied migrant children.** In numerous cases,<sup>23</sup> this Court has affirmed that children have specific needs and a double vulnerability, stemming from their status as asylum seekers *and* as children. The jurisprudence of the Court has evolved to be more in line with the approach taken by other international bodies, such as the UN Committee on the Rights of the Child, when considering whether the immigration detention of children accompanying their families is in violation of Article 5 §1(f) ECHR (See §19 of this intervention). **The Court has also recognised that various international bodies, (e.g. the UNCRC Committee, see below IVA), and including the Council of Europe have increasingly called on States to completely cease or abolish the immigration detention of children.**<sup>24</sup>
7. It is clear from the Court’s own case law that detention of migrant children should be avoided and used only as a measure of last resort and only after establishing that no alternative measures involving lesser restrictions – non-custodial solutions – were available and considered. Case law on the assessment of whether detention is a measure of last resort is well established: in *Popov v. France*, the Court found that even though the children were accompanied by their parents and the detention centre had a special wing for the accommodation of families, a violation of Article 5 (1) *f* had taken place because the children’s particular situation was not examined and the authorities

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<sup>14</sup> *Louled Massoud v. Malta*, No. 24340/08 (27 July 2010) §61; *Khlaifia and others v. Italy* [GC], No. 16483/12 (15 December 2016) §91.

<sup>15</sup> *Enhorn v. Sweden*, No. 56529/00 (25 January 2005) §36.

<sup>16</sup> *Medvedyev v France* [GC], No. 3394/03 (29 March 2010) §§79-80.

<sup>17</sup> *Nabil and Others v. Hungary*, No. 62116/12 (22 December 2015) §18.

<sup>18</sup> *Saadi v. UK* [GC], No. 13229 (29 January 2008) § 74; *Yoh-Ekale Mwanje v. Belgium*, No. 10486/10 (20 December 2011) § 117-119.

<sup>19</sup> *Lokpo & Touré v Hungary*, No. 10816/10 (20 September 2011) §24.

<sup>20</sup> *Saadi v. UK* [GC], No. 13229 (29 January 2008) § 69.

<sup>21</sup> *Thimothawes v. Belgium*, No. 39061/11 (4 April 2017) §73; Also *Suso Musa v Malta*, No. 42337/12 (23 July 2013) §100.

<sup>22</sup> *Thimothawes v. Belgium*, No. 39061/11 (4 April 2017) §73.

<sup>23</sup> *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, No. 13178/03 (12 December 2006) §55; *Popov v. France*, No. 39472/07 and 39474/07, (19 January 2012) §91; *Tarakhel v. Switzerland*, No. 29217/12 (4 November 2014) §99.

<sup>24</sup> *M.H. and Others v. Croatia*, Nos. 15670/18 and 43115/18, (18 November 2021) §236.

did not verify that the placement in administrative detention was a measure of last resort for which no alternative could have been available.<sup>25</sup> In *A.B. and Others v. France*, the Court considered, with a view to the child's age and the duration of detention,<sup>26</sup> that the reasoning of the detention decision did not contain sufficient evidence that the authorities had actually verified that the detention had been ordered as a last resort;<sup>27</sup> In *R.K. and Others v. France*, the Court noted that the authorities placed the applicants and their children in detention after their refusal to board the flights scheduled for their return, and rejected this as establishing a risk of absconding necessitating a deprivation of liberty.<sup>28</sup> The Court went on to say it failed to understand that it was not possible to maintain the less restrictive “*la mesure d'assignation à résidence*” to which the applicants had previously been subjected before their refusal to board and with which they had scrupulously complied;<sup>29</sup> In *M.H. and Others v. Croatia*, the Court established that, as a matter of principle, the confinement of migrant children in a detention facility should be avoided.<sup>30</sup>

8. Even if the Court considers the Contracting State to have established that no less coercive measure could be resorted to and that the conditions of detention were satisfactory, the detention of migrant children can only be justified for a short period and as a last resort.<sup>31</sup> In this regard, 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”.<sup>32</sup> Even where a deprivation of liberty remains within the fixed time limits prescribed in national law, this does not necessarily mean that the detention duration was justified in light of the vulnerability of migrant children.
9. This Court has also emphasized that a decision to detain children is not in the child's best interest simply because that decision purports to keep the family (accompanying parent) together.<sup>33</sup> Also, in the context of Article 8, the Court has recognised that the best interests of the child are not confined to refraining from separating parents and their children in detention. Rather, States must comprehensively assess the interests of the child and take all the necessary steps to avoid the detention of families with migrant children.<sup>34</sup>
- 10. The intervenors submit that States must take all possible steps to avoid the deprivation of liberty of families accompanied by children. When claiming such a measure is a last resort, States must have in place, have considered and explored all alternatives.<sup>35</sup> This must be verified concretely<sup>36</sup> and in practical terms.<sup>37</sup> Such assessment must consider what less**

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<sup>25</sup> *Popov v. France*, Nos. 39472/07 and 39474/07, (19 January 2012) §119.

<sup>26</sup> *A.B. and Others v France*, No. 11593/12 (12 July 2016).

<sup>27</sup> *A.B. and Others v. France*, No. 11593/12, §§ 123 and 124, 12 July 2016

<sup>28</sup> *R.K. and Others v. France*, No. 68264/14 (12 October 2016) §86.

<sup>29</sup> *R.K. and Others v. France*, No. 68264/14 (12 October 2016) §86. An equivalent in Dutch law can be found under A5/5 Vreemdelingencirculaire (Alienscircular) 2000 (A), available at: [wetten.nl - Regeling - Vreemdelingencirculaire 2000 \(A\) - BWBR0012287](https://www.wetten.nl - Regeling - Vreemdelingencirculaire 2000 (A) - BWBR0012287)

<sup>30</sup> *M.H. and Others v. Croatia*, Nos. 15670/18 and 43115/18, (18 November 2021) §237; *A.B. and Others v France*, No. 11593/12 (12 July 2016) §123; *Bilalova and Others v. Poland*, No. 23685/14 (25 March 2020) §79; and *G.B. and Others v. Turkey*, No. 4633/15 (17 October 2019) §151.

<sup>31</sup> *M.H. and Others v. Croatia*, Nos. 15670/18 and 43115/18, (18 November 2021) §237. In *Popov v. France*, Nos. 39472/07 and 39474/07, the Court found a violation where an accompanied child was detained for 15 days; in *A.C. and M.C. v. France*, no. 4289/21, 4 May 2023, the Court found a violation where an accompanied child was detained for 9 days.

<sup>32</sup> *Komissarov v. The Czech Republic*, No. 20611/17 (3 February 2022) §50-52.

<sup>33</sup> *Nikoghosyan and Others v. Poland*, No. 14743/17 (3 June 2022) §84.

<sup>34</sup> *Bistieva and Others v. Poland*, No. 75157/14 (10 July 2018) §85; see also, *mutatis mutandis*, *Popov v. France*, Nos. 39472/07 and 39474/07, (19 January 2012) §147.

<sup>35</sup> *Nikoghosyan and Others v. Poland*, No. 14743/17 (3 June 2022) §88; *J.B. and Others v. Malta*, No. 1766/23 (22 October 2024) §118.

<sup>36</sup> *Bilalova and Others v. Poland*, no. 23685/14 (26 March 2020), § 79-80,

<sup>37</sup> *M.D and A.D v France*, No. 57035/18 (22 July 2021), § 89.

**restrictive or non-custodial measures were available and/or could have been made available. States may not rely on the fact no alternatives measures had been available simply because they had failed to put in place practical alternatives.**

### **III. Obligations under Article 5(4) ECHR in the context of immigration detention**

11. The safeguards against arbitrariness contained in Article 5(1) are rendered ineffective if the detained individual is unable in law or in practice to have access to judicial 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, Article 5(4) is a *lex specialis* over and above the general requirements of Article 13 of the Convention. Access to an Article 5(4) procedure is an obligation and cannot be left to the discretion or ‘good will’ of the detaining authority.<sup>38</sup> Article 5(4) 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<sup>39</sup> and entitles the detainee to be heard before the court either in person or through a legal representative.<sup>40</sup> This protection is all the more important in cases involving families with children or individuals in vulnerable situations, for example, pregnant women.
12. For the remedy to be practical and effective, under Article 5(2), 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.<sup>41</sup> For this reason, legal advice may be required.<sup>42</sup>
13. This Court has found on multiple occasions that Article 5(4) requires a formal decision on the detention of the children, rather than simply treating them as accompanying adult parents or relatives. Otherwise, the child may be left without a decision to challenge.<sup>43</sup> In the course of review proceedings before a judicial body, the detained individual must 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.<sup>44</sup> For the proceedings to comply with the equality of arms requirement, the detained individual must have access to any such documents and information that are essential in order to raise an effective challenge to the lawfulness of detention<sup>45</sup> and may need to be given the opportunity to be heard in person, including with effective assistance by a lawyer,<sup>46</sup> particularly in the case of minors.<sup>47</sup> In the case of children those documents must include evidence that their status as children was treated as a primary consideration (See §19-30 of this intervention below).
14. 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

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<sup>38</sup> *Rakevich v. Russia*, No. 58973/00 (28 October 2003) §44.

<sup>39</sup> See *G.B. and Others v. Turkey*, No. 4633/15 (17 October 2019) §183; *Mooren v. Germany* [GC], No. 11364/03 (9 July 2009) §106; and *Ilmseher v. Germany* [GC], No. 10211/12 (4 December 2018) §251.

<sup>40</sup> *Al-Nashif v. Bulgaria*, No. 50963/99 (20 June 2022) §92; *De Wilde, Ooms and Versyp v. Belgium*, Nos. 2832/66; 2835/66; 2899/66 (18 June 1971) §73.

<sup>41</sup> *R.M. and others v. Poland*, No. 11247/18 (9 February 2023) §29.

<sup>42</sup> *Louled Massoud v. Malta*, No. 24340/08 (27 July 2010) §§ 43-47; 71.

<sup>43</sup> *Popov v. France*, Nos. 39472/07 and 39474/07 (19 January 2012) §§122-125. This Court has also found an Art.5(4) violation on this point for the applicant’s child in the case of *A.B. and Others v France*, No. 11593/12 (12 July 2016) §§134-138 and in *R.M. and Others v. France*, No.33201/11 (12 July 2016) §§89-91.

<sup>44</sup> *Lutsenko v. Ukraine*, No. 6492/11 (3 July 2012) § 96; *A. and Others v. the United Kingdom* [GC], No. 3455/05 (19 February 2009) § 203 – 204.

<sup>45</sup> See, *mutatis mutandis*, *Fodale v. Italy*, No. 70148/01 (1 June 2006) §41.

<sup>46</sup> *Bouamar v. Belgium*, No. 9106/80 (29 February 1988) §60.

<sup>47</sup> *Bouamar v. Belgium*, No. 9106/80 (29 February 1988) §63.

*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 the remedy”.<sup>48</sup> In the judgments of *Aden Ahmed v. Malta*<sup>49</sup> and *Mahamed Jama v. Malta*,<sup>50</sup> the Court held that lack of access to a properly structured system of legal aid makes the remedy ineffective.

15. 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.<sup>51</sup> This may include the overall duration of detention that the applicant has been subjected to. 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.<sup>52</sup> In *M.D. and A.D. v France*, an Article 5(4) violation was found in respect of the second applicant, a four-month-old baby, finding that she had not had the benefit of a judicial review encompassing all the conditions required for her administrative detention to be lawful.<sup>53</sup>
16. The Grand Chamber has affirmed that Article 5(4) requires the lawfulness of detention to be determined by a speedy judicial decision.<sup>54</sup> In *K.A. v Cyprus*, the Court reiterated that “where an individual’s personal liberty is at stake, [it] has set very strict standards for the State’s compliance with the requirement of a speedy review of the lawfulness of detention” – an obligation that was found already breached by an appeal proceeding that lasted twenty-six days in the case of *Mamedova v. Russia*.<sup>55</sup>
17. **The Court will recall that, under Article 5(4), authorities must promptly inform a detainee of the reasons for detention in a language the detainees understands, 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. All these safeguards become of vital importance and must be observed scrupulously when the case involves applicants of heightened vulnerability, such as pregnant women and children.**

#### **IV. Relevant international legal standards applicable under Article 53 ECHR**

18. 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 evaluating a complaint, this Court must not construe any provision of the Convention in a manner that would reduce the protection guaranteed by any other international instrument to which the respondent State is a party.
- A. **The Convention on the Rights of the Child applicable under Article 53 ECHR**
19. The Court will recall that Article 4 of the Convention on the Rights of the Child (CRC) provides that state parties need to have undertaken all appropriate legislative, administrative and other

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<sup>48</sup> *Soldatenko v. Ukraine*, No. 2440/07 (23 October 2008) §125.

<sup>49</sup> *Aden Ahmed v. Malta*, No. 55352/12 (23 July 2013) § 66.

<sup>50</sup> *Mahamed Jama v. Malta*, No. 10290/13 (26 November 2015) §65.

<sup>51</sup> *Nikolova v. Bulgaria* [GC], No. 31195/96 (25 March 1999) § 61.

<sup>52</sup> *E.A. v. Greece*, No. 74308/10 (30 July 2015) § 97.

<sup>53</sup> *M.D. and A.D. v France*, No. 57035/18, § 99-103.

<sup>54</sup> *Mooren v. Germany* [GC], No. 11364/03 (9 July 2009) §106.

<sup>55</sup> *K.A. v. Cyprus*, No. 63076/19 (2 July 2024) §42; *Mamedova v. Russia*, No. 7064/05 (1 June 2006) §96.

measures for the implementation of rights contained in the Convention. States have no margin of discretion as to whether or not to satisfy their obligation to undertake all appropriate measures to realise children's rights.<sup>56</sup> This is particularly the case in relation to establishing and making available practical and effective alternatives to the deprivation of liberty for children subject to immigration measures. Children must not be detained because the state has failed to put in place effective alternatives to detention. This Court has already stated that a state's migration policy must be compliant with the particular protection afforded by the CRC, among other human rights.<sup>57</sup>

20. Article 3(1) CRC provides that "in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the **best interests of the child shall be a primary consideration**". The CRC Committee has specified the obligations arising from this right, especially in its General Comment No. 14 (GC14).<sup>58</sup> As with Article 4 CRC, GC14 emphasises that states parties cannot exercise discretion as to when to apply these obligations.<sup>59</sup>
21. Decisions about placing children and their families in immigration measures fall within the scope of "all actions concerning the child", and must therefore have taken the best interests of children as a primary consideration. Respecting the child's best interests, read in conjunction with children's right to life, survival and development (Article 6 CRC), requires creating an environment respecting their human dignity and ensuring their *holistic* development.<sup>60</sup>
22. The Committee in GC14 sets out the threefold obligation to ensure that the child's best interests are a primary consideration: a substantive right, a fundamental, interpretive legal principle and a rule of procedure.<sup>61</sup> As a rule of procedure, any decision affecting a child or children must include (1) an evaluation of possible impacts on the child/children; (2) procedural guarantees for the best interests assessment and determination; (3) an explanation as to how decisions have respected Article 3(1) and how children's best interests have been weighed.<sup>62</sup> Article 3(1) CRC thus requires states parties to conduct first a **best interests assessment** and then a **best interests determination** for children,<sup>63</sup> with clear procedures in place and implemented in practice, and, importantly, recorded in any decision. The Committee, in GC14 explains how states parties should conduct best interests assessments and determinations to fulfil their CRC obligations.
23. The Committee's General Comment 7 (GC7)<sup>64</sup> makes clear that children have rights that must be a primary consideration in early childhood. Early childhood refers to "all young children; at birth and throughout infancy; during the pre-school years as well as during the transition to school."
24. Applying and interpreting the international obligations under the CRC, the Joint General Comment by the CRC Committee (No. 23) and the Committee on the Protection of the Rights of All Migrant Workers and Members of their Families (CMW, No. 4) ('Joint GC'), explicitly asserts that "[e]very child, **at all times**, has a fundamental right to liberty and freedom from

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<sup>56</sup> Committee on the Rights of the Child (2016) *General Comment No. 19 on Public Budgeting for the Realization of Children's Rights*, UN Doc CRC/C/GC/19, §18 ["CRC (2016) *General Comment No. 19*"].

<sup>57</sup> *R.K. and Others v. France*, No. 68264/14 (12 July 2016) §111.

<sup>58</sup> Committee on the Rights of the Child (2013) *General Comment No. 14 on the Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration*, UN Doc CRC/C/GC/14, ["CRC (2013) *General Comment No. 14*"].

<sup>59</sup> CRC (2013) *General Comment No. 14*, §37.

<sup>60</sup> CRC (2013) *General Comment No. 14*, §42.

<sup>61</sup> CRC (2013) *General Comment No. 14*, §6.

<sup>62</sup> CRC (2013) *General Comment No. 14*, § 6(c).

<sup>63</sup> CRC (2013) *General Comment No. 14*, §47.

<sup>64</sup> Committee on the Rights of the Child (2005) *General Comment No. 7 on Implementing Child Rights in Early Childhood*, UN Doc CRC/C/GC/7/Rev.1 ["CRC (2005) *General Comment No. 7*"].

immigration detention”.<sup>65</sup> Children should **never be detained for reasons related to their own or their parent’s migration status**.<sup>66</sup> This is in line with this Court’s previous findings that a child being accompanied by his/her parents does not exempt the state from protecting the child under Article 3 ECHR.<sup>67</sup> The child’s extreme vulnerability overrides any “illegal” immigration status.<sup>68</sup>

25. Article 37(b) of the CRC prohibits the “**arbitrary**” detention of children. It provides that, regardless of the context, children may be deprived of their liberty only as a measure of last resort and for the shortest appropriate period of time. However, the Joint GC makes clear that detention as a measure of last resort under Article 37(b) CRC **is not applicable in immigration proceedings and conflicts with the child’s best interests** (Article 3(1) CRC) and right to development (Article 6 CRC).<sup>69</sup> General immigration imperatives cannot take precedence over the best interests of the child.<sup>70</sup> Nor can the need to keep a family together (articulated in Article 9 CRC)<sup>71</sup> justify depriving children of their liberty, and the imperative requirement not to deprive the child of liberty extends to the child’s parents in these circumstances.<sup>72</sup> The JGC calls for a legal prohibition of child and family immigration detention, ensured in policy and practice.<sup>73</sup> The CRC Committee has made that it considers the immigration detention of children **in any circumstances and as a matter of principle to be incompatible with CRC obligations**. In two applications against Belgium under the Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure,<sup>74</sup> the CRC Committee decided that Belgium failed to give due regard to the child’s best interests as a primary consideration by not considering any alternatives to the immigration detention of children.<sup>75</sup> It reasserted that the “deprivation of liberty of children for reasons related to their migratory status – or that of their parents – is **generally**

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<sup>65</sup> Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and Committee on the Rights of the Child (2017) *Joint General Comment No. 4 and No. 23 on State Obligations Regarding the Human Rights of Children in the Context of International Migration in Countries of Origin, Transit, Destination and Return*, UN Doc CMW/C/GC/4-CRC/C/GC/23., §5 [“CMW and CRC (2017) *Joint General Comment Nos. 4 and 23*”].

<sup>66</sup> CMW and CRC (2017) *Joint General Comment Nos. 4 and 23*, §5.

<sup>67</sup> *A.B. and Others v. France*, No.11593/12 (12 July 2016) §110; *R.K. and Others v. France*, No. 68264/14 (12 July 2016) §67. See also *Muskhadzhiyeva and Others v. Belgium*, No. 41442/07 (19 January 2010), §58.

<sup>68</sup> *A.B. and Others v. France*, No.11593/12 (12 July 2016); *Popov v. France*, Nos. 39472/07 and 39474/07 (19 January 2012) §91.

<sup>69</sup> CMW and CRC (2017) *Joint General Comment Nos. 4 and 23*, §10; Committee on the Rights of the Child (2022) *Views Adopted by the Committee under the Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure, Concerning Communication No. 73/2019*, UN Doc CRC/C/89/D/73/2019, §10.9; Committee on the Rights of the Child (2022) *Views Adopted by the Committee under the Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure, Concerning Communication No. 55/2018*, UN Doc CRC/C/89/D/55/2018, §13.9 [“CRC, *Views Adopted Concerning Communication No. 55/2018*”].

<sup>70</sup> Committee on the Rights of the Child (2005) *General Comment No. 6 on Treatment of Unaccompanied and Separated Children Outside Their Country of Origin*, UN Doc CRC/GC/2005/6, §86 [“CRC, *General Comment No. 6*”]; CMW and CRC (2017) *Joint General Comment Nos. 4 and 23*, §33.

<sup>71</sup> *Convention on the Rights of the Child*, opened for signature 20 November 1989, UNGA Res 44/25, UN Doc A/44/49 (entered into force 2 September 1990), Art. 9 The right not to be separated from parents.

<sup>72</sup> CMW and CRC (2017) *Joint General Comment Nos. 4 and 23*, §11.

<sup>73</sup> CMW and CRC (2017) *Joint General Comment Nos. 4 and 23*, §12.

<sup>74</sup> UN General Assembly (16 December 2011) *Resolution 66/138 on the Rights of the Child*, UN Doc A/RES/66/138.

<sup>75</sup> CRC, *Views Adopted Concerning Communication No. 73/2019*, CRC/C/89/D/73/2019, 22 March 2022, §10.13; CRC, *Views Adopted Concerning Communication No. 55/2018*, §§10.13, 13.14CRC/C/89/D/55/2018.



**disproportionate and therefore arbitrary** within the meaning of article 37 (b)”. Immigration detention of children may also violate multiple other CRC rights.<sup>76</sup>

26. This is in line with growing international consensus that immigration detention of children is never justified under international law. For example, the UN Global Study on Children Deprived of Liberty has made it clear that that immigration detention of children **never** meets the high standards of last resort in Article 37(b) or of the best interests of the child, as there are **always** possible non-custodial solutions.<sup>77</sup>
27. Instead of detention, states must adopt and implement solutions that apply the best interests of the child and keeping the child and their family together in non-custodial and community-based contexts.<sup>78</sup> States should provide “all the material, social and emotional conditions necessary to ensure the comprehensive protection of the rights of the child, allowing for children’s holistic development”.<sup>79</sup> Such measures should be “based on ethic of care and protection.”<sup>80</sup> Accordingly, the Court has found that the failure by the State to prove that it was impossible to use an alternative to detention contributed to a violation Article 3 ECHR.<sup>81</sup> It also considered that the immigration detention of a child was contrary to Article 5§1 ECHR because national authorities had not looked what other possible alternatives to detention **could or should have** existed.<sup>82</sup>
28. **The CRC Committee’s latest Concluding Observations on the Netherlands** expressed concern about the immigration detention of children.<sup>83</sup> The Committee recommended that the Netherlands **ensure** (emphasis added) that the best interests of asylum-seeking children are a primary consideration in all asylum processes and that their views are heard and given due weight. It also recommended that the Netherlands ensure the prohibition and prevention of the detention and/or deportation of children on the basis of their or their parents’ migration status.<sup>84</sup>
29. It is of “paramount importance” that children in migration procedures are empowered to claim their rights, and have a “fair, effective and prompt access to justice.”<sup>85</sup> The CRC Committee has clarified that the right to effective remedies is a requirement implicit in the CRC, and must be

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<sup>76</sup> It may go against children’s right to appropriate protection and humanitarian assistance in the enjoyment of their rights (Article 22 CRC). Detention for migration-related reasons may violate children’s right to life, survival and development, and may amount to cruel, inhuman and degrading treatment, respectively against Articles 6 and 37(a) of the CRC. Since the JGC has made clear that the deprivation of liberty of children is viewed as inherently harmful, and can have a negative impact on children’s physical and mental health, going against their rights to the highest attainable standards of health (Article 24 CRC) and physical and mental violence (Article 19 CRC). Other rights may come into consideration, such as their right to protection and care for their wellbeing (Article 3(2) CRC), to privacy (Article 16 CRC), to a standard of living adequate to their “physical, mental, spiritual, moral and social development” (Article 27 CRC), or to education (Articles 28 and 29 CRC). See, Manfred Nowak (2019) *Global Study on Children Deprived of Liberty*, Ch. 13; CMW and CRC (2017) *Joint General Comment Nos. 4 and 23*, §9.

<sup>77</sup> UN General Assembly (2019) *Report of the Independent Expert Leading the United Nations Global Study on Children Deprived of Liberty*, UN Doc A/74/136, §90.

<sup>78</sup> CMW and CRC (2017) *Joint General Comment Nos. 4 and 23*, §11.

<sup>79</sup> CMW and CRC (2017) *Joint General Comment Nos. 4 and 23*, §12.

<sup>80</sup> CMW and CRC (2017) *Joint General Comment Nos. 4 and 23*, §12.

<sup>81</sup> *R.K. and Others v. France*, No. 68264/14 (12 October 2016) §67.

<sup>82</sup> *Popov v. France*, Nos. 39472/07 and 39474/07 (19 January 2012) §119; *A.B. and Others v. France*, No. 11593/12 (12 July 2016) §125; *R.K. and Others v. France*, No. 68264/14 (12 October 2016) §§85-86.

<sup>83</sup> Committee on the Rights of the Child (2022) *Concluding Observations on the Combined Fifth and Sixth Periodic Reports of the Kingdom of the Netherlands*, UN Doc CRC/C/NLD/CO/5-6, §36(d), [“CRC (2022) *Concluding Observations Netherlands*”].

<sup>84</sup> CRC (2022) *Concluding Observations Netherlands*, §37(d).

<sup>85</sup> CMW and CRC (2017) *Joint General Comment Nos. 4 and 23*, §14.

available to redress violations.<sup>86</sup> Effective and child-sensitive procedures should therefore be available to children, including the “provision of child-friendly information, advice, advocacy, including support for self-advocacy, and access to independent complaints procedures and to the courts with necessary legal and other assistance”.<sup>87</sup> Decisions regarding the placement of a child for immigration-related purposes should follow a “child-sensitive due process”. This requires their right to be heard and to have their views given due weight to be respected and recorded in any decision (Article 12 CRC). Decisions should be taken through speedy proceedings, unless against the child’s best interests or if non-compliant with due process guarantees.<sup>88</sup> Children should have access to effective remedies if immigration detention is enforced,<sup>89</sup> and should be able to appeal decisions to a higher court or independent authority, with suspensive effect.<sup>90</sup> Read together with the ECHR, access to effective remedies must be “practical and effective” for children as well as for adults. The JGC specifies due process guarantees that states parties must put in place, including to receive advice and representation in a child-friendly manner by trained professionals and be assisted by an attorney trained or experienced in representing children.<sup>91</sup>

- 30. The detention of children for immigration related purposes is never justified and proportionate, and will always be violation of the rights enshrined in the CRC. In accordance with Article 53 ECHR, states parties must thus put in place - and use - alternatives to detention in immigration contexts to comply with rights under the CRC including the best interests of the child, including where the child is accompanied by parents. Children must have access to effective remedies for decisions related to their placement which are child-friendly and fully respect their rights, including their right to be heard. Young children may need a trained professionals to assist them in vindicating their rights.**

**B. EU law standards on the immigration and asylum detention of children and Article 53 ECHR**

31. In relation to asylum, 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. In light of the applicable EU 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)<sup>92</sup> and the Return Directive.<sup>93</sup>
32. Interpreting the recast RCD, the Court of Justice of the EU (CJEU) emphasised that Member States are obliged to undertake an individualised assessment<sup>94</sup> and detention must be a last resort and proportionate to the objectives pursued.<sup>95</sup> The CJEU underlined in *C, B and X* that where the

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<sup>86</sup> Committee on the Rights of the Child (2003) *General Comment No. 5 on General Measures of Implementation of the Convention on the Rights of the Child*, UN Doc CRC/GC/2003/5, §24 [“CRC (2003) *General Comment No. 5*”].

<sup>87</sup> CRC (2003) *General Comment No. 5*, §24.

<sup>88</sup> CMW and CRC (2017) *Joint General Comment Nos. 4 and 23*, §15.

<sup>89</sup> CMW and CRC (2017) *Joint General Comment Nos. 4 and 23*, §§12 and 15.

<sup>90</sup> CMW and CRC (2017) *Joint General Comment Nos. 4 and 23*, §17.

<sup>91</sup> CMW and CRC (2017) *Joint General Comment Nos. 4 and 23*, §§14-19.

<sup>92</sup> 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), Art 8(2),(4)

<sup>93</sup> Directive 2008/115/EC of the EU Parliament and Council on common standards and procedures in Member States for returning illegally staying third country-nationals.

<sup>94</sup> CJEU, *VL v. Ministerio Fiscal*, C-36/20 PPU, 25 June 2020, § 101-102.

<sup>95</sup> CJEU, *K v. Staatssecretaris*, C-18/16, 14 September 2017, § 48; CJEU, *FMS and others*, C-924/19 PPU & C-925/19 PPU, 14 May 2020, § 258.

conditions for lawful detention are not met or cease to be met, the individual must be released immediately.<sup>96</sup>

33. The Return Directive **only** applies in situations where the individual has exhausted all other avenues of regularisation and thus no longer lawfully present.<sup>97</sup> It does not apply in situations where an asylum application (or an appeal against a refusal) is ongoing.<sup>98</sup> In 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.
34. This Directive sets out instances when detention is possible “*unless other sufficient but less coercive measures can be applied effectively*” and furthermore provides that “*any detention shall be for as short a period as possible and only maintained as long as removal arrangements are in progress and executed with due diligence*”.<sup>99</sup> The CJEU held in a case concerning a third country national’s detention for removal that a risk of absconding could be a justification for deprivation of liberty, only where an individual assessment finds that the enforcement of the return decision risks being compromised and where there is an absence of other sufficient but less coercive measures available.<sup>100</sup>
35. EU primary law is relevant, namely the Charter of Fundamental Rights of the EU (CFR),<sup>101</sup> which enshrines the fundamental rights and freedoms protected by the EU. 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.<sup>102</sup>
36. The CJEU ruled that in cases affecting children Member States must carry out in-depth assessments of the situation of the minor concerned, taking into account the best interests of the child.<sup>103</sup> Further, it reiterated that, “*Member States must in particular take due account of factors such as the minor’s well-being and social development, taking into particular consideration the minor’s background such as safety and security considerations.*”<sup>104</sup>
37. The CJEU has furthermore confirmed that Article 24 CFR affirms the fundamental nature of the rights of the child, including in the context of third-country nationals in irregular stay<sup>105</sup> and that the provision applies to return decisions against a third-country national who is the parent of a minor, even if not addressed to that minor but when it has significant consequences for them.<sup>106</sup>
38. 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, with consideration 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.<sup>107</sup>

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<sup>96</sup> CJEU, *C, B and X*, Joined Cases C-704/20 and C-39/21, 8 November 2022, § 79-80; CJEU, *VL v. Ministerio Fiscal*, C-36/20 PPU (25 June 2020) §§101-102; CJEU, *K. v. Staatssecretaris van Veiligheid en Justitie and H.F. v. Belgische Staat*, C-331/16 (2 May 2018) §48; CJEU, *Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság*, Joined Cases C-924/19 PPU and C-925/19 PPU (14 May 2020) §258.

<sup>97</sup> Return Directive, 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.

<sup>98</sup> CJEU, *Arslan*, C-534/11 (30 May 2013).

<sup>99</sup> Return Directive (op cit), Chapter IV, Article 15 (1).

<sup>100</sup> CJEU, *Landkreis Gifhorn*, C-519/20, 10 March 2022, § 37.

<sup>101</sup> Charter of Fundamental Rights of the European Union, (2000/C 364/01) (‘CFR’)

<sup>102</sup> Article 24 CFR effectively incorporates the UNCRC.

<sup>103</sup> CJEU, *TQ*, C-441/19, 14 January 2021, §§46, 60.

<sup>104</sup> CJEU, *Zubair Haqbin* C-233/18, 12 November 2019, § 54.

<sup>105</sup> CJEU, *TQ*, C-441/19, 14 January 2021, § 45.

<sup>106</sup> CJEU, *Etat Belge*, C-112/20, 11 March 2021, § 36.

<sup>107</sup> 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).