

BEFORE THE FIFTH SECTION,
EUROPEAN COURT OF HUMAN RIGHTS

Application No. 26364/24

Between

Al-Khalidi

Applicant

v.

Bulgaria

Respondent

WRITTEN SUBMISSIONS ON BEHALF OF THE INTERVENERS

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

pursuant to the Registrar's notification dated 29 September, 2025, on the Court's
permission to intervene under Rule 44 § 3 of the Rules of the European Court of
Human Rights

16 October 2025

Contracting Parties' Obligations under Article 5 of the European Convention for Human Rights (ECHR)

General Principles

1. Article 5 of the European Convention for Human Rights (ECHR) enshrines the fundamental protection of the individual against arbitrary interference with their right to liberty.¹ Sub-paragraphs (a) to (f) of Article 5(1) ECHR contain an exhaustive list of permissible grounds on which persons may be deprived of their liberty. Only a narrow interpretation of those grounds is consistent with the aim of Article 5 ECHR.² Article 5(1)(f) allows for the detention of a person to prevent their effecting an unauthorised entry into the country (first limb) or against whom action is being taken with a view to deportation or extradition (second limb).³ In the context of immigration detention, Article 5(1)(f) constitutes a *lex specialis*.⁴
2. Article 5(1) ECHR requires that any such detention must be 'in accordance with a procedure prescribed by law', which rests on the general principles of the rule of law, legal certainty, and protection against arbitrariness.⁵ In that regard, this Court requires detention to have a clear basis in national law and to conform to the substantive and procedural rules of that law.⁶ The interveners submit that, when the respondent State is an EU Member State, this includes the EU *acquis*.⁷ Measures must further conform to applicable norms of international law.⁸
3. Clear provisions must exist for ordering and extending detention, for setting time-limits for detention, and the existence of an effective remedy by which the applicant can contest the 'lawfulness' and 'length' of their detention ('quality of law' criteria).⁹ Detention that is imposed "by virtue of an overly broad interpretation of a general provision of the law" does not satisfy that criteria.¹⁰ **The interveners submit that where national procedures undermine those foreseen by its national law, for instance if release orders are not promptly enforced, such deficiencies should weigh in the Court's assessment of the 'quality of law' for the purposes of Article 5(1)(f) ECHR.**¹¹
4. The notion of 'lawfulness' extends further than simply having a clear legal basis in national law and following a procedure prescribed by that law. This Court has established that a person's detention on the grounds of Article 5(1)(f) ECHR must always be compatible with the overall purpose of Article 5 ECHR, namely, to safeguard liberty and ensure that no person is deprived of their liberty in an

¹ ECtHR, *Suso Musa v. Malta*, No. 42337/12, 23 July 2013, para 89.

² ECtHR, *Medvedyev and Others [GC]*, op. cit., para. 78; *Engels and Others v. the Netherlands*, No. 5100/71 and four others, 8 June 1976, para. 58; *Amuur v. France*, No. 19776/92, 25 June 1996, para. 42; *Khlaifia and Others v. Italy [GC]*, No. 16483/12, 15 December 2016, para. 88.

³ Council of Europe (CoE), European Convention for Human Rights, Article 5(1)(f).

⁴ ECtHR, *J.B. and Others v. Malta*, No. 1766/23, 22 October 2024, para 103.

⁵ ECtHR, *Amuur*, op. cit., para. 50; *Medvedyev and Others [GC]*, op. cit., para. 80; *Louled Massoud v. Malta*, No. 24340/08, 27 July 2010, para. 61; *Khlaifia and Others [GC]*, op. cit., para. 91-92.

⁶ *Khlaifia and Others [GC]*, op. cit., para. 91.

⁷ For more info on the transposition of EU law in Bulgarian national law, see European Council for Refugees and Exiles (ECRE) and the Bulgarian Helsinki Foundation, *AIDA Country Report: Bulgaria 2025*, published in March 2025, page 126.

⁸ ECtHR, *Medvedyev v. France [GC]*, op. cit., paras. 79-80.

⁹ ECtHR, *J.N. v The United Kingdom*, No. 37289/12, 19 May 2016, para. 77; *Louled Massoud*, op. cit., para. 71; *Abdolkhani and Karimnia v. Turkey*, No. 30471/08, 22 September 2009, para. 135.

¹⁰ ECtHR, *R.R. and others v. Hungary*, No. 36037/17, 2 March 2021, para. 91.

¹¹ Compare to ECtHR, *J.N. v. The United Kingdom*, op. cit., para. 84.

arbitrary fashion.¹² Immigration detention must be carried out in good faith; it must be closely connected to the permitted ground of detention relied on by the Government; the place and conditions of detention must be appropriate, bearing in mind that the measure is applicable not to those who have committed criminal offences but to aliens who have fled from their own country; and the length of detention must not exceed what is reasonably required for the purpose pursued.¹³

Close connection to the permitted ground

5. The Grand Chamber of this Court has offered a comprehensive interpretation in *Saadi v. The United Kingdom* of the first limb of Article 5(1)(f) ECHR. It has taken into consideration relevant international law documents such as the Guidelines offered by the United Nations High Commissioner for Refugees (UNHCR).¹⁴ In the case of Bulgaria, the EU *acquis* also constitutes part of the body of law to be considered when interpreting Article 5(1)(f) ECHR.¹⁵
6. In this regard, the interveners wish to highlight that Article 8(3)(e) of Directive 2013/33/EU of 26 June 2013, in *contrast* to Article 5(1)(a-f) ECHR, specifically allows for detention pending an application for international protection on grounds of national security and public order (see §§ 27-28 of this intervention) under the strict condition that it is both *proportionate* and *necessary* in the individual case.¹⁶ This is in line with the UNHCR Guidelines, which allow for detention pending an application for international protection if clear evidence shows the *necessity and proportionality* for the protection of national security or public order (see §§ 35-36 of this intervention). This distinction between the frameworks has been emphasised by this Court in *M.B. v. The Netherlands*, holding that “Although Article 8(3)e of the Reception Conditions Directive permits, from an EU-law standpoint, detention when national security or protection of public order so requires, this has no bearing on the fact that Article 5 § 1 (f) of the ECHR only allows for immigration detention to prevent unauthorised entry or to effect deportation.” The ECHR thus does not allow for immigration detention based on reasons of protection of national security unless detention is at the same time pursuing one of those two aims.¹⁷
7. The mere fact that an asylum application is pending does not justify an applicant’s detention for the purpose of preventing their unauthorised entry. This Court recently rejected a *close* connection between detention and permissible ground in *B.A. v. Cyprus*. In this case, the detention order was issued only *after* the applicant’s interview had identified him as matching the profile of a foreign fighter. The Court held that the detention – based then solely on national security grounds and ordered following the applicant’s interview which revealed those grounds – could not be justified under the first limb of Article 5(1)(f) ECHR.¹⁸

¹² ECtHR, *Nabil and others v. Hungary*, op. cit., para. 18.

¹³ ECtHR, *Saadi v. The United Kingdom [GC]*, No. 13229, 29 January 2008, para 74; *Yoh-Ekale Mwanje v. Belgium*, No. 10486/10, 20 December 2011, para. 117-119; *Suso Musa*, op. cit., para. 93.

¹⁴ These Guidelines have been further considered by the Grand Chamber of the CJEU in *J.N. v. Staatssecretariat van Veiligheid en Justitie [GC]*, C-601/15 (PPU), 15 February 2016.

¹⁵ See § 23 of this intervention.

¹⁶ CJEU, *V.L. v. Ministerio Fiscal; K. v. Staatssecretaris; F.M.S. and Others v. Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság*.

¹⁷ ECtHR, *M.B. v. the Netherlands*, No. 71008/16, 23 April 2024, para. 72.

¹⁸ ECtHR, *B.A. v. Cyprus*, No. 24607/20, 2 July 2024, paras. 62-64.

8. In *MB v. The Netherlands*, the Court stressed that reliance on public order grounds to justify detention while an asylum application remains undecided would risk excessive immigration detention, entailing an expansion of the grounds for deprivation of liberty not foreseen by Article 5(1)(f) ECHR.¹⁹
9. Contracting States to the ECHR must justify immigration detention under either of the two limbs under Article 5(1)(f) ECHR, which are *exhaustive and to be interpreted narrowly*. For the immigration detention of an applicant for international protection to be *closely* connected to the purpose of preventing unauthorised entry to the country, there must be a need to complete necessary tasks for the purpose of preventing unauthorised entry into the country under the meaning of Article 5(1)(f) ECHR. The Grand Chamber has highlighted in *Saadi v. The United Kingdom*, with reference to the above mentioned UNHCR Guidelines, that these tasks include for example “...identity checks [...] or when elements on which the asylum claim is based have to be determined”.²⁰
10. **The interveners submit that immigration detention of an international protection applicant under the first limb of Article 5(1)(f) ECHR, as interpreted by this Court and in accordance with international law, is justified only for as long as is reasonably required to establish the identity or to determine the elements necessary to assess the international protection claim, provided that these proceedings are conducted with due diligence. Detention under the first limb of Article 5(1)(f) ECHR must be closely connected to the permitted grounds relied on by the Government, and is justified only for the time period reasonably required for that purpose (on length of detention see §§ 14-20 of this intervention).**

Clear relationship between permitted ground and place and conditions

11. Immigration detention must further show a clear relationship between the permitted ground of detention relied on and the place and conditions of detention.²¹ As this Court has highlighted in *Saadi v. The UK*, places of detention should be specifically adapted to holding asylum-seekers. A minimal degree of interference with liberty and comfort may be acceptable, but detention exceeding such levels does not reflect the permitted ground of detention relied on by the Government.²² In *Saadi*, the Grand Chamber pointed towards the availability of facilities for recreation, religious observance, medical care and legal assistance in that regard. As put by this Court in *Azimov v. Russia*, immigration detention may not be punitive in nature.²³
12. Generalised or automatic detention decisions not only raise doubts as to whether there is in fact a close link between detention and the permitted grounds relied on by the Government, but the absence of an individual assessment of the particular needs of the persons concerned risks inadequate detention conditions.²⁴ Detention procedures need to be individualized in order to identify additional vulnerabilities and prevent detention where it may not be safe or appropriate.²⁵ In order for adults with particular vulnerabilities to benefit from

¹⁹ ECtHR, *M.B. v. the Netherlands*, op. cit., paras. 74.

²⁰ ECtHR, *Saadi [GC]*, op. cit., para. 66.

²¹ ECtHR, *Saadi [GC]*, op. cit., paras. 69, 73.

²² ECtHR, *Saadi [GC]*, op. cit., para. 78.

²³ ECtHR, *Azimov v. Russia*, No. 67474/11, 18 April 2013, para. 172.

²⁴ ECtHR, *Thimothawes v. Belgium*, No. 39061/11, 4 Apr 2017, para. 73; See also *Suso Musa*, op. cit., para. 100.

²⁵ ECtHR, *Thimothawes v. Belgium*, op. cit., para. 73.

the additional safeguards applying to them, detained individuals should have effective access to vulnerability assessments.²⁶

13. Disregarding the health of a person in immigration detention, or their vulnerabilities due to medical conditions, is in violation of Article 5(1)(f) ECHR, particularly if the national authorities did not consider less intrusive measures.²⁷ **Therefore, the interveners submit that immigration detention of adults with vulnerabilities beyond that arising from the fact that the adult is an asylum seeker²⁸ will not conform with Article 5(1)(f) ECHR if it is not strictly necessary to achieve the aims pursued. In those particular 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.²⁹**

Length of detention

14. Lastly, the length of detention must not exceed what is reasonably required for the purpose pursued. The question as to when the first limb of Article 5(1)(f) ECHR ceases to apply because the individual has been granted formal authorisation to enter or stay, has been held by this Court to depend largely on national law.³⁰ However, as the immigration detention must be *closely* connected to the permitted grounds relied on, this Court held in *Saadi* that the principle of proportionality applied to detention under Article 5(1)(f) to the extent that the detention should not continue for an unreasonable length of time.³¹ **Immigration detention under both limbs of Article 5(1)(f) ECHR is thus only justified as long as the pending proceedings are conducted with due diligence.³²**
15. A number of judgments indicate that, depending on the circumstances of the case and the appropriateness of detention conditions, detention under the first limb of Article 5(1)(f) ECHR that lasts between three to six months may raise issues of arbitrariness. In *Kanagaratnam and Others v. Belgium*, the Court considered three months of detention pending a determination of an asylum claim to be unreasonably lengthy when coupled with inappropriate conditions.³³ In *Suso Musa v. Malta*, the Court considered that the six months for which one applicant was detained for the purpose of the first limb of Article 5(1)(f) ECHR was arbitrary with a view to detention conditions, while, more generally, one year to determine an applicant's asylum claim would exceed the period of detention reasonably required for the purpose of preventing a person effecting their unauthorised entry.³⁴
16. In *B.A. v. Cyprus*, this Court emphasized that detention under the first limb of Article 5(1)(f) ECHR would have already been rendered arbitrary, irrespective of other factors, on account of its length of over two years and nine months.³⁵

²⁶ ECtHR, *Abdi Mahamud v. Malta*, No. 56796/13, 3 May 2016, para 133.

²⁷ ECtHR, *Yoh-Ekale Mwanje*, op. cit., para. 124; Also *Thimothawes*, op. cit., para. 73, 79-80.

²⁸ ECtHR, *M.S.S. v. Belgium and Greece [GC]*, No. 30696/09, 21 January 2011, para. 251.

²⁹ ECtHR, *Thimothawes*, op. cit., para. 73; Children: *A.B. and Others v. France*, No. 11593/12, 12 July 2016, para. 120-123; Adults with health issues: *Yoh-Ekale Mwanje*, op. cit., para. 124.

³⁰ ECtHR, *Suso Musa v. Malta*, op. cit., 97.

³¹ ECtHR, *Saadi [GC]*, op. cit., para 72.

³² ECtHR, *Saadi [GC]*, op. cit., para. 72-73.

³³ ECtHR, *Kanagaratnam and Others v. Belgium*, No. 15297/09, 13 December 2011.

³⁴ ECtHR, *Suso Musa v. Malta*, op. cit., para. 102.

³⁵ ECtHR, *B.A. v. Cyprus*, op. cit., para. 65.

17. The interveners note that, in line with this Court’s jurisprudence, detention will be justified under the first limb of Article 5(1)(f) ECHR only for so long as is reasonable to establish the identity or to determine the elements on which the protection claim is based. As put by this Court’s Committee in *M.K. v. Hungary*, in which the applicant was detained for five to six months,

“this duration alone is capable of raising concerns, even in the absence of any indication that the detention took place in inappropriate conditions [...] During that time, the authorities repeatedly relied on two elements: the need to confirm his identity and nationality, and the need to ensure that he would be available for the asylum procedure. In the Court’s view, even if those objectives were initially justified, with the passage of time it was less and less so, especially after [...] his asylum case was admitted for examination on the merits [...]. For the Court, that stage of the applicant’s detention cannot be said to have corresponded to the requirement of close connection “to the purpose of preventing unauthorised entry of the person to the country” (see Saadi, cited above, § 74).”³⁶

18. This Court indicated that excessive duration of asylum procedures cannot justify continuing detention: where the asylum procedure itself has time-limits, these act as safeguards against arbitrariness.³⁷ It highlighted in *B.A. v. Cyprus* that “the fact that the Refugee Law does not establish a time-limit for the detention of an asylum-seeker is not in itself sufficient to justify an almost three-year detention”.³⁸
19. Other Council of Europe bodies have noted the importance of alternative measures to detention and advocated for its consideration in all cases concerning detention.³⁹ The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) has stated that deprivation of liberty “should only be a measure of last resort, after a careful and individual examination of each case.” It has emphasised that alternatives 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.⁴⁰ The Committee of Ministers of the Council of Europe recommended in 2003 that, since the aim of detention is not to punish asylum-seekers, measures of detention should, *inter alia*, be applied only after a careful examination of their necessity in each individual case. Those measures should be specific, temporary and non-arbitrary and should be applied for the shortest possible time.⁴¹
20. **Article 5(1)(f) ECHR permits detention only in narrowly defined circumstances: to prevent unauthorised entry (first limb), or with a view to deportation or extradition (second limb). The interveners submit that, in**

³⁶ ECtHR, *M.K. v. Hungary*, No. 46783/14, 9 June 2020, para. 21.

³⁷ ECtHR, *Komissarov v. the Czech Republic*, op. cit., para. 51.

³⁸ ECtHR, *B.A. v. Cyprus*, op. cit., para. 66.

³⁹ See the Commissioner for Human Rights’ Comment “High time for states to invest in alternatives to migration detention”, Strasbourg, press release published on 31 January 2017.

⁴⁰ Council of Europe, 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.

⁴¹ Council of Europe Committee of Ministers, Recommendation Rec(2003)5 to Member States on measures of detention of asylum seekers, adopted 16 April 2003, No. 4.

respect of the first limb, detention of applicants for international protection is permissible only for as long as is reasonable to establish the identity or to determine the elements on which the claim for international protection is based. With the passage of time, the connection to that purpose weakens. Prolonged detention throughout the international protection procedure may no longer be considered ‘closely connected’ to its purpose, especially as soon as the merits of the application are under examination.

21. The list of grounds for detention under Article 5(1)(a-f) ECHR is exhaustive and must be interpreted narrowly. Detention under the first limb of Article 5(1)(f) ECHR cannot be ordered or continued solely on the ground of national security but must be closely connected to preventing unauthorised entry. Where detention is ordered or continued solely on the basis of national security reasons that have occurred throughout the asylum procedure, it will fall outside the permissible scope of the first limb of Article 5(1)(f) ECHR. National security concerns by themselves, however pressing, do not justify detention under 5(1)(f) ECHR.

The relevant regional and international standards relating to the detention of applicants for international protection

22. Article 53 ECHR prohibits, *inter alia*, a construction of ECHR 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 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 ECHR.⁴² This Court accepted that a State’s interpretation of its national law (therefore also the EU *acquis*) may be subject to oversight by it.⁴³ Article 53 ECHR also applies to provisions of international law if those provisions bind the State in question.⁴⁴

European Union law

23. Article 6 of the Charter of Fundamental Rights of the European Union (CFREU) holds that “Everyone has the right to liberty and security of person”.
24. Directive 2013/33/EU (‘recast Reception Conditions Directive’) prohibits Member States from detaining an applicant for international protection for the sole reason that that person is an applicant for international protection (Article 8(1)). An applicant may be detained only as a measure of last resort and on the basis of the exhaustive list of grounds set out in Article 8(3)(a-f). These grounds include the determination or verification of the applicant’s identity or nationality, the determination of the elements on which the application is based

⁴² Bulgaria transposed Directive 2013/32/EU into its national law on 25 December 2015 (State Gazette No. 101/22), with amendments on 19 October 2020 (State Gazette No. 89/16). Directive 2013/33/EU was transposed on 19 October 2020 (State Gazette No. 89/16).

⁴³ ECtHR, *Nabil and Others v. Hungary*, No. 62116/12, 22 September 2015, para. 31; *Amie and Others v. Bulgaria*, No. 58149/08, 12 February 2013, para. 73.

⁴⁴ Bulgaria ratified the ICCPR on 21 September 1970 and the 1st Optional Protocol on 26 March 1992.

which could not be obtained in the absence of detention, to decide on the applicant's right to enter, and when the protection of national security or public order so requires. Article 9(3) requires that, when a judicial review finds detention to be unlawful, the applicant must be released immediately. Judicial reviews must be conducted *ex officio* at reasonable intervals or upon the request of the applicant. Directive 2024/1346/EU of 14 May 2024, replacing the above Directive, retains the same principles in Article 10(1, 2, 4(a-g)).

25. Interpreting Directive 2013/33/EU, the CJEU emphasized that Member States are obliged to undertake an individualised assessment⁴⁵ and detention must be a last resort and proportionate to the objectives pursued.⁴⁶ 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.⁴⁷
26. In the *J.N.* case, the CJEU Grand Chamber held, interpreting Article 8(3)(e) of Directive 2013/33/EU and Article 6 of the Charter, that placing or keeping an applicant in detention, in view of the requirement of necessity, is justified on the ground of national security or public order only if the applicant's individual conduct represents a 'genuine, present and sufficiently serious threat', affecting a fundamental interest of society or the internal or external security of the Member State concerned.⁴⁸ In the respective case, the Grand Chamber of the CJEU saw this condition fulfilled in view of *a series of offences* that the applicant had committed in the country where he sought asylum prior to his application, and the fact that he had been issued with a return decision including a ten-year entry ban, both of which had become final.⁴⁹ In that regard, the CJEU considered his detention an action taken 'with a view to deportation' within the meaning of the second limb of Art. 5(1)(f) ECHR.⁵⁰
27. The CJEU further stated that even if the applicant poses a threat to national security, this fact alone cannot automatically lead to detention being ordered under Article 8(3)(e) of the Reception Directive. National authorities are required to assess, on a case-by-case basis, whether the threat that the person concerned poses is at least proportionate to the severity of the interference with the applicant's liberty before ordering detention.⁵¹
28. **Under EU law, the detention of migrants must be a measure of last resort and must be based on one of the grounds set out in the exhaustive list in Article 8(3)(a-f) Directive 2013/33. Should a Member State detain an applicant for international protection on grounds of national security, EU law, as interpreted by the CJEU, requires an individual assessment of the case, including proportionality and necessity of the measure, to determine whether the applicant poses a 'real, present and sufficiently serious threat'. If as a result of a judicial review detention is held to be unlawful, the applicant must be released immediately. At the same time, such detention needs to be *closely* connected to the prevention of unauthorised entry, in order to be permitted under the ECHR (see §§ 5-10 of this intervention).**

⁴⁵ CJEU, *VL v. Ministerio Fiscal*, C-36/20 PPU, 25 June 2020, paras. 101-102.

⁴⁶ 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.

⁴⁷ 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*, op. cit., para. 48; CJEU, *FMS and Others*, op. cit., para. 258.

⁴⁸ CJEU, *J.N. v. Staatssecretaris [GC]*, op. cit., para. 67.

⁴⁹ CJEU, *J.N. v. Staatssecretaris [GC]*, op. cit., para. 71.

⁵⁰ CJEU, *J.N. v. Staatssecretaris [GC]*, op. cit., para. 81.

⁵¹ CJEU, *J.N. v. Staatssecretaris [GC]*, op. cit., para. 69.

International Refugee and Human Rights Law

29. The 1951 Refugee Convention prohibits Contracting States from applying “to the movements of such refugees restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularised or they obtain admission into another country.”⁵²
30. Article 9 of the International Covenant for Civil and Political Rights (ICCPR)⁵³ 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”.⁵⁴ 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.⁵⁵
31. The UN Human Rights Committee (CCPR) recalled in *F.K.A.G. et al. v. Australia* that the notion of ‘arbitrariness’ in the context of immigration detention must not be equated with ‘against the law’ but be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability, and due process of law. Asylum seekers who unlawfully enter a State party’s territory may be detained for a brief initial period in order to document their entry, record their claims and determine their identity if it is in doubt.⁵⁶ The Committee concluded that detention of applicants for international protection must be based on particular reasons specific to the individual; not be based on a mandatory rule; must take into account less invasive means; must be subject to periodic re-evaluation and judicial review; and must take into account the mental health conditions of those detained. In any case, *individuals must not be detained indefinitely on immigration control grounds* if the State party is unable to conclude their proceedings.⁵⁷ The Committee also noted that detainees should be kept informed of the efforts undertaken by the authorities to find solutions which would allow them to obtain their liberty.⁵⁸
32. The Committee stressed in *Shams et al.* that “detention should not continue beyond the period for which the State party can provide appropriate justification”.⁵⁹ Even where a State party may advance particular reasons to justify the individual detention, it must not fail to demonstrate that those reasons justify the continued detention in the light of the passage of time and intervening circumstances such as the hardship of prolonged detention.⁶⁰ Similarly, while the Committee considered in *Al-Gertani* the detention of an asylum-seeker following an intervention of the national security agency to be justified at the

⁵² UN General Assembly (UNGA), 1951 Convention Relating to the Status of Refugees, United Nations, Treaty Series, vol. 189, p. 137, 28 July 1951, Article 31(2).

⁵³ UN General Assembly (UNGA), International Covenant on Civil and Political Rights (ICCPR), 16 December 1966, UN, Treaty Series, vol. 999, p. 171.

⁵⁴ 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.

⁵⁵ CCPR, *C. v. Australia*, No. 900/1999, 13 November 2002, para 8.2.

⁵⁶ CCPR, *F.K.A.G. et al. v. Australia*, No. 2094/2011, 26 July 2013, para. 9.3; See also *M.M.M. et al v. Australia*, No. 2136/2012, 28 October 2013, para. 10.2-10.4; *Fofana v. Ecuador*, No. 2290/2013, 8 October 2018, para. 8.5.

⁵⁷ CCPR, *F.K.A.G. et al. v. Australia*, op. cit., para. 9.3.

⁵⁸ CCPR, *F.K.A.G. et al. v. Australia*, op. cit., para. 9.4.

⁵⁹ CCPR, *Shams et al. v. Australia*, No. 1255 and 7 others/2004, 20 July 2007, para. 7.2.

⁶⁰ CCPR, *Baban v. Australia*, No. 1014/2001, 6 August 2003, para. 7.2.

outset and on the basis of information available to the State party, failing to justify the necessity of continued and prolonged detention constitutes a violation of Article 9(1) ICCPR.⁶¹

Conclusions and Guidelines adopted by the United Nations High Commissioner for Refugees (UNHCR) and the General Assembly

33. In 1986, the Executive Committee of the UNHCR's Programme adopted Conclusions relating to the detention of asylum-seekers in situations of large-scale influx, expressing that,

“detention should normally be avoided. If necessary, detention may be resorted to only on grounds prescribed by law to verify identity; to determine the elements on which the claim to refugee status or asylum is based; to deal with cases where refugees or asylum-seekers have destroyed their travel and/or identity documents or have used fraudulent documents in order to mislead the authorities of the State in which they intend to claim asylum; or to protect national security or public order”.⁶²

34. In 1999, UNHCR published Guidelines to give effect to the above Conclusions, which were reviewed and replaced in 2012.⁶³ Guideline No. 4 establishes that detention is an exceptional measure and can only be justified for a legitimate purpose, which include **(4.1.1)** public order, including **(i)** when there are strong grounds for believing that the specific asylum-seeker is likely to abscond or refuse to cooperate; **(ii)** in connection with accelerated procedures for manifestly unfounded or clearly abusive claims; **(iii)** for initial identity and/or security verification for minimal periods in cases where this is in dispute, or there are indications of security risks. In this regard, the Guidelines establish that detention must last only as long as reasonable efforts are being made to establish identity or to carry out security checks, and within strict time limits established in law; **(iv)** to record the elements on which the application for international protection is based, which could not be obtained in the absence of detention; **(4.1.2.)** public health; and **(4.1.3.)** to protect national security, for which purpose detention must be necessary, proportionate to the threat, non-discriminatory, and subject to judicial oversight.
35. Guideline 6 stipulates that the test of proportionality applies in relation to both the initial order of detention as well as any extensions. The length of detention can render an otherwise lawful decision to detain disproportionate and, therefore, arbitrary. Maximum periods of detention should be set in national legislation to guard against arbitrariness, which may not be circumvented by ordering the release of an asylum-seeker only to re-detain them on the same grounds shortly after.
36. In December 1998, the United Nations Working Group on Arbitrary Detention recommended that Governments should ensure the detention of asylum-seekers to be a measure of last resort and only for reasons recognised as legitimate under

⁶¹ CCPR, *Al-Gertani v. Bosnia and Herzegovina*, No. 1955/2010, para. 10.4.

⁶² Executive Committee of the High Commissioner's Programme (ExCom), Conclusion No. 44: Detention of Refugees and Asylum-Seekers, adopted on 13 October 1986, Conclusion B.

⁶³ UN High Commissioner for Refugees, Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention, adopted February 1999.

international standards. Alternative and non-custodial measures, such as reporting requirements, should always be considered before resorting to detention. A compelling need must be demonstrated that is based on the personal history of each asylum-seeker. An absolute maximum duration for the detention of asylum seekers should be specified in national law. Governments should concentrate the use of detention on appropriate cases of rejected asylum seekers where removal is imminent and there are reasons to believe it cannot be effected unless the individual is detained.⁶⁴

37. **The interveners submit that international law equally requires that detention to prevent unauthorised entry may only be justified for minimal time periods to establish the elements necessary for assessing the international protection claim. There is a consensus that detention must be reasonable, necessary and proportionate in the light of the circumstances and reassessed as it extends in time. The relevant sources of international law also emphasise the importance of strict time limits, as the length of detention can render an initially lawful detention decision disproportionate and thus arbitrary, in violation of Article 5(1)(f) ECHR.**

⁶⁴ UN Economic and Social Council Commission on Human Rights, Report on the visit of the Working Group to the United Kingdom on the issue of immigrants and asylum seekers, adopted on 18 December 1998, E/CN.4/1999/63/Add.3, paras. 26-40.