

BEFORE THE FIRST SECTION
EUROPEAN COURT ON HUMAN RIGHTS

Sh. D. and others v. Greece and others

Application no. 14165/16

WRITTEN SUBMISSIONS ON BEHALF OF THE AIRE CENTRE (ADVICE ON INDIVIDUAL RIGHTS IN EUROPE), THE EUROPEAN COUNCIL ON REFUGEES AND EXILES (ECRE) AND THE INTERNATIONAL COMMISSION OF JURISTS (ICJ)

INTERVENERS

pursuant to the Registrar's notification dated 6 June 2016 that the Court had granted permission under Rule 44 § 3 of the Rules of the European Court of Human Rights

12 August 2016

Summary

I. Under the European Convention on Human Rights (ECHR) and the jurisprudence of this Court, and in line with the States' duty not to limit or derogate from their obligations under other international agreements pursuant to Article 53 ECHR; the UN Convention on the Rights of the Child (CRC) must be implemented in all of the European Court of Human Rights (ECtHR) decisions that concern children. Under Article 3(1) CRC, the principle of the best interests of the child must be upheld as a primary consideration in all actions concerning children. Therefore, children must never be deprived of their liberty, under 5(1) ECHR, without a rigorous examination of the individual circumstances of the case, of the necessity and proportionality of the proposed detention, including a mandatory and prior assessment of less coercive measures.

II. For children to have effective enjoyment of their rights under international law, in particular the ECHR, and EU law, including the right to liberty and security and the right to asylum, their needs, welfare and well-being must be individually assessed. The discharge of State obligations to ensure enjoyment of these rights is reliant on the appointment of a guardian with the necessary expertise and who has the specific duty to assist the child by enabling him or her to access rights under EU law. Such appointment must be made as soon as possible and prior to any judicial or administrative decision affecting the rights of the child being taken. Where no appointment is speedily undertaken the enjoyment of child's rights under international law and EU law, will be severely impaired or effectively nullified.

III. The interveners recall that, since measures affecting the right to liberty and other Convention rights must be undertaken in accordance with national law, they must also, where Contracting Parties are EU Member States, be undertaken in accordance with EU law. Children, under EU asylum law, are entitled to specific identification and tailored procedural and reception guarantees in order to effectively exercise their right to asylum.¹ As a result, the child's best interests and concomitant needs of international protection must form part of a specific and individualised assessment. Analogous to the safeguards under the ECHR, adherence to these guarantees militates strongly against the lawfulness of imposing administrative detention upon children.

I. International law and standards on detention of migrant children

1. Introduction – detention under Article 5(1) ECHR

1. Under this Court's jurisprudence, whether a restriction on freedom of movement amounts to a deprivation of liberty does not depend on its classification in national law, but rather on the type, duration, effects and manner of the restriction.² Since classification in national law is not determinative, accommodation at a facility classified as a "reception", "holding" or "accommodation centre", and officially not defined as a deprivation of liberty under national law or practice, may, depending on the nature of the restrictions on freedom of movement and their cumulative impact, be considered under international human rights law to be a deprivation of liberty.³ An assessment of whether there is a *de facto* deprivation of liberty under Article 5 ECHR therefore needs to be undertaken, regardless of the name or characterisation given to a particular place or type of accommodation.⁴

¹ Articles 11, 17, 18, 21-24 of Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down the standards for the reception of applicants for international protection (recast) [2013] OJ L180/96 (Recast Reception Conditions Directive) (**Annex 1**); Articles 7, 15, 25 and 31(7)(b) Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast) [2013] OJ L180/60 (Recast Asylum Procedures Directive) (**Annex 2**).

² Engel and Others v. Netherlands (Nos. 5100/71; 5101/71; 5102/71; 5354/72; 5370/72), 8 June 1986, para. 59; Guzzardi v. Italy (No. 7367/76), 6 November 1980, para. 92; Amuur v. France (No. 19776/920), 25 June 1996, para. 42; Nolan and K. v. Russia (No. 2512/04), paras. 93–96; 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.

³ Guzzardi v. Italy (No. 7367/76), 6 November 1980.

⁴ United Nations High Commissioner for Refugees (UNHCR), Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention, 2012, para. 7 (UNHCR Guidelines on Detention) (**Annex 3**).

2. The interveners recall that, under Article 5 ECHR, any deprivation of the individual's right to liberty must not be arbitrary; must be based on one of the grounds specified in Article 5 (1) ECHR; and must be subject to appropriate and effective safeguards.⁵ This Court held that detention under Article 5(1)(b) and (d) must include an assessment of the necessity and proportionality of the detention in the circumstances of the individual case, and should be imposed as a measure of last resort.⁶ In addition to these safeguards detention of children under Article 5(1)(b) and (d) could only be imposed if truly necessary for the purpose of bringing them before the competent legal authority prior to civil or administrative proceedings and must not be punitive in character.⁷ The interveners submit that such a competent legal authority must be in a position to ensure the special needs, welfare and well-being of the child.

3. This Court has also established key principles, which must be upheld for detention to comply with Article 5(1)(f) ECHR and with the purpose, the spirit and the letter of the ECHR.⁸ In particular, to avoid being considered arbitrary, detention "must be carried out in good faith; it must be closely connected to the purpose of preventing unauthorised entry of the person to the country; the place and conditions of detention should be appropriate, and the length of the detention should not exceed that reasonably required for the purpose pursued."⁹ Detention must be based on an appraisal of the individual's circumstances¹⁰ and must be for the purpose of achieving the identified legitimate aim in the circumstances of each case. The requirement of good faith includes awareness that, in case of members of vulnerable groups, detention must be a measure of last resort and that in light of the individual's circumstances there must be no less coercive means of achieving the same end.¹¹

2. Assessment of vulnerability and detention of children under Article 5(1)(f) ECHR

4. The Court has frequently referred to the special consideration that has to be given to members of vulnerable groups with respect to decisions on detention and has noted that any "margin of appreciation" that might apply in relation to the rights of such individuals is much narrower than in relation to other people.¹²

5. The Court has frequently held that children, due to their age and personal situation, are amongst the most vulnerable persons in society.¹³ Where children are also seeking asylum their extreme vulnerability is compounded¹⁴ given that asylum seekers themselves form part of a vulnerable group.¹⁵ Respect for the double vulnerability of a child asylum seeker, *qua* child and *qua* asylum seeker, must take precedence over his/her irregular status.¹⁶ This is particularly so since the effects and conditions of detention on children can amount to a breach of Article 3 ECHR even where this would not be so for an adult.¹⁷

⁵ O.M. v Hungary (No. 9912/15), 5 July 2016, paras. 40-41; Medvedyev and Others v. France, (No. 3394/03), 29 March 2010, para. 80; Čonka v. Belgium, (No. 51564/99), 5 February 2002, para. 39; Amuur v. France, (No. 19776/92), 25 June 1996, para. 51; Simons v. Belgium (No. 71407/10), 28 August 2012, para. 32.

⁶ Saadi v. United Kingdom (No. 13229/03), 29 January 2008, paras. 75–80; O.M. v Hungary (No. 9912/15), 5 July 2016, para. 42

⁷ Iliya Stefanov v. Bulgaria, no. 65755/01, 22 May 2008, para. 72; O.M. v Hungary (No. 9912/15), 5 July 2016, paras. 42 – 44.

⁸ Amuur v. France (No. 19776/92), para. 50; Chahal v. the United Kingdom (No. 22414/93), para. 118; Saadi v. the United Kingdom (No. 13229/03, GC), para. 74; Al Husin v. Bosnia and Herzegovina (No. 3727/08), para. 65; Abdi v. the United Kingdom (No. 27770/08), para. 68; Azimov v. Russia (No. 67474/11), para. 161; Suso Musa v. Malta (No. 42337/12), para. 89; Akram Karimov v. Russia (62892/12), para. 143.

⁹ Saadi v. United Kingdom (No. 13229/03), 29 January 2008, para. 74.

¹⁰ Chahal v. United Kingdom (No. 22414/93), 15 November 1996, para. 113; A. v. United Kingdom (No. 3455/05), 19 February 2009, para. 164.

¹¹ Yoh-Ekale Mwanje v. Belgium (No. 10486/10), para. 124; Rahimi v. Geece (No.8687/080), 5 July 2011, para.109.

¹² Kiyutin v. Russia (No. 2700/1010), 10 March 2011; Gorelov v. Russia (No. 49072/11), 9 January 2014.

¹³ Rahimi v. Greece (No.8687/080), 5 July 2011, para. 87; Mubilanzila Mayeka and Kaniki Mitunga v. Belgium (No. 13178/03), 12 October 2006, para. 55.

¹⁴ Mubilanzila Mayeka and Kaniki Mitunga v. Belgium (No. 13178/03), 12 October 2006, para. 55; Popov v. France (Nos. 39472/07 and 39474/07), 19 April 2012, para. 91; Tarakhel v. Switzerland (No. 29217/12), para. 99.

¹⁵ M.S.S. v. Belgium and Greece (No. 30696/09), 21 January 2011, para. 232.

¹⁶ Mubilanzila Mayeka and Kaniki Mitunga v. Belgium (No. 13178/03), 12 October 2006, para. 55; Popov v. France (Nos. 39472/07 and 39474/07), 19 April 2012, para. 91; Tarakhel v. Switzerland (No. 29217/12), para. 99; R.M. and Others v. France (No. 33201/11), 12 July 2016, para. 71; A.B. and Others v. France (No. 11593/12), 12 July 2016, para. 110.

¹⁷ Muskhadzhiyeva and Others v. Belgium (No. 41442/07), 19 January 2010; Mubilanzila Mayeka and Kaniki Mitunga (No. 13178/03), 12 October 2006, paras. 81 and 83; Popov v. France (Nos 39472/07 and 39474/07), 19 April 2012; Kanagaratnam and Others v. Belgium (No. 15297/09), 13 December 2011; Neulinger and Shuruk v. Switzerland (No. 41615/07), 6 July 2010.

6. In instances where children have been administratively detained, the Court has highlighted the consequences of depriving them of their liberty, which, by virtue of their age, are particularly harmful.¹⁸ Indeed, for other “vulnerable” groups, such as LGBT persons, the Court has recently held that detention may reproduce the plight that forced them to flee in the first place.¹⁹ It is due to the specific and double vulnerability of child asylum seekers that the Court, applying the principle of proportionality, has paid particular attention, in the application of Article 5(1)(f) ECHR, to whether States have considered alternatives prior to authorizing the detention of children.²⁰ As said above, where less coercive measures as alternatives to detention have not been considered in respect of a child, this Court has found the detention to be arbitrary and therefore unlawful under 5(1)(f) ECHR.²¹

7. The principle that detention of children must be a measure of last resort, and that alternative measures should be given priority, is reflected in the UN Convention on the Rights of the Child (CRC) and in standards developed under the International Covenant on Civil and Political Rights (ICCPR), as well as Council of Europe standards.²² Article 37(b) CRC stipulates that “detention ... of a child ... shall be used only as a measure of last resort and for the shortest appropriate period of time”. The Committee on the Rights of the Child has made clear in *General Comment No. 6 (2005)* on the Treatment of unaccompanied and separated children outside their country of origin (**Annex 7**) that “unaccompanied or separated children should not, as a general rule, be detained. Detention cannot be justified solely on the basis of the child being unaccompanied or separated, or on their migratory or residence status, or lack thereof.” Where detention is exceptionally justified for other reasons, it must be a measure of last resort and for the shortest appropriate period of time.²³

8. The Human Rights Committee in its *General Comment No. 35 (Annex 6)* setting out the scope of Article 9 of the ICCPR also affirmed that children should not be deprived of liberty, except as a measure of last resort and for the shortest appropriate period of time, taking into account their best interests as a primary consideration with regard to the duration and conditions of detention, and also taking into account the extreme vulnerability and need for care of unaccompanied minors.²⁴ *UNHCR Guidelines on Unaccompanied Children (Annex 11)* confirm that children seeking asylum should not be kept in detention.²⁵

9. In *Rahimi v. Greece*, this Court held that it was incumbent upon the Greek State to protect and care for the child by taking appropriate measures in light of its positive obligations under Article 3 ECHR, due to the child’s extreme vulnerability, characterised in this case by his age, his arrival to an unfamiliar country, and his status as an unaccompanied child and thus solely reliant on himself.²⁶ Whilst this finding was specific to Article 3 ECHR, the interveners submit that similar principles apply, *mutatis mutandis*, to the assessment of whether detention is arbitrary under Article 5(1)(f) ECHR, especially given the accepted requirement to assess the individual child’s circumstances and the recognised deleterious effect of detention on a child’s physical and mental health.

¹⁸ *Rahimi v. Greece* (No. 8687/080), 5 July 2011, para. 86.

¹⁹ *O.M. v. Hungary* (No. 9912/15), 5 July 2016, para. 53.

²⁰ On vulnerable groups see *Yoh-Ekale Mwanje v. Belgium* (No. 10486/10), para. 124; on children see *Rahimi v. Greece* (No.8687/080), 5 July 2011.

²¹ *Ibid.*

²² Council of Europe: Committee of Ministers, *Twenty Guidelines on Forced Return*, September 2005, Guideline 6 (**Annex 4**); Council of Europe: Parliamentary Assembly, *Resolution 1707 (2010) on Detention of Asylum Seekers and Irregular Migrants in Europe*, 28 January 2010 (**Annex 5**); UN Human Rights Committee, *General comment No. 35 Article 9 (Liberty and security of person)*, 16 December 2014, CCPR/C/GC/35 (**Annex 6**).

²³ UN Committee on the Rights of the Child (UN CRC), *General comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin*, 1 September 2005, CRC/GC/2005/6, para. 61 (**Annex 6**); Council of Europe: *Guidelines of the Committee of Ministers of the Council of Europe on child friendly justice*, 2010, para. 19 (**Annex 8**); UNHCR *Guidelines on Detention*, Guideline 9.2 (**Annex 3**).

²⁴ UN Human Rights Committee (HRC), *D. and E. and their two children v. Australia*, 9 August 2006, CCPR/C/87/D/1050/2002, para. 7.2 (**Annex 9**); *Convention on the Rights of the Child*, arts. 3(1) and 37(b); UN Human Rights Committee, *Concluding observations on the third periodic report of the Czech Republic*, 22 August 2013, CCPR/C/CZE/CO/3, para. 17 (**Annex 10**).

²⁵ UN High Commissioner for Refugees (UNHCR), *Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum*, February 1997, para. 7.6 (**Annex 11**).

²⁶ *Rahimi v. Greece* (No.8687/080), 5 July 2011, para. 87.

3. The principle of the best interests of the child

10. The principle that the best interests of the child shall be the primary consideration in all cases concerning children is a fundamental principle of international law on the rights of the child.²⁷ It is established in Article 3(1) CRC and has been recognized in the jurisprudence of this Court.²⁸

11. The Court in *Rahimi v. Greece* confirmed that in all actions relating to children an assessment of the child's best interests must be undertaken separately and prior to a decision that will impact that child's life. Procedurally, the principle of the best interests of the child requires that any decision making process involving children includes an evaluation of the possible impact of the decision on the child, particularly in the enjoyment of affected rights, and the decision must expressly refer to such assessment.²⁹ In the migration context, it requires a special regime in respect of asylum procedures distinct from that applicable to adults whereby an assessment of all elements of a child's interests in a specific situation is undertaken.³⁰

12. The Committee on the Rights of the Child has stipulated that, in the case of a displaced child, the "best interest" principle must be respected during all stages of the displacement cycle. At any of these stages, a "best interests" determination must be documented in preparation of any decision fundamentally impacting on the unaccompanied or separated child's life. A determination of what is in the best interests of the child requires a clear and comprehensive assessment of the child's identity, including his or her nationality, upbringing, ethnic, cultural and linguistic background, particular vulnerabilities and protection needs.³¹

13. The principle engages substantive and procedural obligations.³² It is aimed at ensuring the child's full, equal and effective enjoyment of human rights, including non-discrimination, family reunification, the right to be heard, protection from abuse, access to asylum, the receipt of appropriate protection and a standard of living adequate for the child's development.³³ It imposes an obligation to identify and evaluate in the specific factual context the relevant elements of a best interests assessment and to follow a procedure, which ensures legal guarantees and the proper application of the right.³⁴ In light of this obligation, numerous international authorities, including the UN Special Rapporteur on the human rights of migrants,³⁵ the Parliamentary Assembly of the Council of Europe,³⁶ the European Parliament Committee on Civil Liberties, Justice and Home Affairs,³⁷ the UN Human Rights Council's Working Group on Arbitrary Detention³⁸ and the Inter-American Court of Human Rights³⁹ have all held that administrative detention of a child for immigration purposes can never be understood as a measure that responds to the child's best interest.

²⁷ *Rahimi v. Greece* (No.8687/080), 5 July 2011, para. 108; Moreover, with regards to Article 8 ECHR, see *Neulinger and Shuruk v. Switzerland* (No. 41615/07); *Gnahoré v. France* (No. 40031/98).

²⁸ *Neulinger and Shuruk v. Switzerland* (No. 41615/07), para. 135.

²⁹ *Ibid*, paras. 6 and 14.

³⁰ *Ibid*, para. 43.

³¹ UNCRC General comment No. 6, paras. 19-20 (**Annex 6**)

³² UN Committee on the Rights of the Child, *General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration* (art. 3, para. 1), 29 May 2013, CRC /C/GC/14 (**Annex 7**).

³³ Articles 2, 5, 10, 12, 19, 22 and 27 Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3; UN CRC General comment No. 14, paras. 4, 51, 82 (**Annex 7**); UN Committee on the Rights of the Child (CRC), General comment no. 5 (2003): General measures of implementation of the Convention on the Rights of the Child, 27 November 2003, CRC/GC/2003/5, para. 12 (**Annex 12**).

³⁴ UNCRC General comment No. 14, para. 46; *N.T.s.v. Georgia* (No. 71776/12), 2 February 2016 (**Annex 7**)

³⁵ United Nations, Human Rights, Office of the High Commissioner, *UN Special Rapporteur on the human rights of migrants concludes his follow up country visit to Greece*, 16 May 2016 (**Annex 13**).

³⁶ CoE, PACE: Resolution 2020 (2014), The alternatives to immigration detention of children, 3 October 2014 (36th Sitting) (**Annex 14**); Recommendation 1703 (2005), Protection and assistance for separated children seeking asylum, 28 April 2005 (15th Sitting) (**Annex 15**).

³⁷ European Parliament Committee on Civil Liberties, Justice and Home Affairs, Ref. IP/C/LIBE/IC/2006-181, Ref. 12/2007, December 2007 p. 22, affirming that "The confinement of minors should be banned. The best interests of the child should form the basis of any decision made about that child. Depriving a child of their freedom can in no way be in their best interests, other practices can be used and have already been implemented in some countries."

³⁸ U.N. G.A., Human Rights Council, 13th Session, Report of the Working Group on Arbitrary Detention, Chairperson- Rapporteur: El Hadji Malick Sow, U.N. Doc. A/HRC/13/30, 15 January 2010, pp. 24-25, 58-61 (**Annex 16**).

³⁹ Inter-American Court of Human Rights, Advisory Opinion, OC-21/14, "Rights and guarantees of children in the context of migration and/or in need of international protection", 19 August 2014. Series A No.21, para. 157 (**Annex 17**).

14. Moreover, in *Recommendation 1703 (2005)* by the Parliamentary Assembly of the Council of Europe, cited in *Rahimi v. Greece*, the Committee stated that “the detention of separated children in the asylum process in open disregard of the obligation to provide care and reception in structures suitable for children and in violation of Article 37 of the United Nations Convention on the Rights of the Child, which states that detention shall only be used as a measure of last resort and for the shortest appropriate period of time.”⁴⁰

4. Detention of children under international human rights law

15. Where children are held in immigration detention in circumstances where their best interests had not been a primary consideration, the Human Rights Committee has considered that article Article 9(1) ICCPR would be engaged and such detention may be arbitrary and constitute an Article 9 violation. Such situation also engages Article 24 ICCPR, which guarantees the rights of the child to measures of protection required by his or her status as a minor, without discrimination. Thus, in *Bakhtiyari v. Australia*, the Committee held that mandatory immigration detention of an Afghan refugee with five children for two years and eight months constituted arbitrary detention⁴¹ as well as a violation of Article 24(1) ICCPR since the measures had not been guided by the best interests of the children.⁴²

16. In discharging their obligations under the ECHR, States must not limit or derogate from their obligations under other international agreements, as implied by the terms of Article 53. This Court has affirmed that States remain bound by their obligations under Articles 3 and 37 CRC in the implementation of their obligations under the European Convention on Human Rights. The Court has determined that, when decisions on detention involve children, the best interest of the child (Article 3 CRC) and the provision on detention (Article 37 CRC) require that State authorities consider alternatives to detention before resorting to this measure in order to satisfy its lawfulness under Article 5(1)(f) ECHR.⁴³

17. Article 5 ECHR is predicated on a presumption of liberty. The *UNHCR Guidelines on Detention*,⁴⁴ and the *Conclusions* adopted by the Executive Committee on the International Protection of Refugees⁴⁵ similarly recognize a presumption of liberty, and the need to justify individual detention decisions as necessary for the specified purposes.⁴⁶ Detention must therefore never be automatic, should be used only as a last resort where there is evidence that other lesser restrictions would be inadequate in the particular circumstances of the case, and should never be used as a punishment. Where detention is imposed, it should be seen as an exceptional measure, and must last for the shortest possible period.⁴⁷

18. With regard to the detention of asylum seekers or refugees, the *UNHCR Guidelines on Detention*,⁴⁸ as well as the *UNHCR Guidelines on Refugee Children*,⁴⁹ state that asylum seeking children should not be detained. They reaffirm the principle in Article 37 CRC that detention of children should be a measure of last resort, and for the shortest possible period of time; and specify that where children accompany their parents, they should be detained only where detention is the *only* means of maintaining family unity.⁵⁰ Where this is the case, it follows that the best interests of the children must inform any decision to detain their parents. Similarly, the *Council of Europe Guidelines on human rights protection in the context of*

⁴⁰ CoE, PACE, Recommendation 1703 (2005), Protection and assistance for separated children seeking asylum, 28 April 2005 (15th Sitting) (**Annex 15**).

⁴¹ UN Human Rights Committee, *Ali Aqsar Bakhtiyari and Roqaiha Bakhtiyari v. Australia*, 6 November 2003, CCPR/C/79/D/1069/2002, para. 9.3 (**Annex 18**).

⁴² *Ibid.*, para. 9.6.

⁴³ *Rahimi v. Greece* (No.8687/080), 5 July 2011, paras. 108-109; *Popov v. France* (Nos. 39472/07 and 39474/07), 19 April 2012, para. 91.

⁴⁴ UNHCR, *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum Seekers and Alternatives to Detention* (Revised Detention Guidelines), Guideline 2, 2012 (**Annex 3**).

⁴⁵ UNHCR, *Conclusions Adopted by the Executive Committee on the International Protection of Refugees*, December 2009 (**Annex 19**).

⁴⁶ *Ibid.*

⁴⁷ UNHCR, *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum Seekers and Alternatives to Detention* (Revised Detention Guidelines), Guidelines 3 and 6, 2012 (**Annex 3**).

⁴⁸ *Ibid.*, Guideline 9.2.

⁴⁹ UN High Commissioner for Refugees (UNHCR), *Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum*, February 1997, p.2 (**Annex 19**).

⁵⁰ UNHCR, *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum Seekers and Alternatives to Detention* (Revised Detention Guidelines) (**Annex 3**).

accelerated asylum proceedings state that “children, including unaccompanied minors should, as a rule, not be placed in detention. In those exceptional cases where children are detained, they should be provided with special supervision and assistance”.⁵¹

19. Where children are in fact detained, then the *UNHCR Guidelines* as well as other international standards⁵² require that it should be in places and conditions appropriate to their age. The Committee on the Rights of the Child has affirmed in its *General Comment* No. 10 (2007) rules and principles that need to be observed in all cases of deprivation of liberty⁵³ and highlighted that child’s best interests principle “does not mean for the convenience of the States parties”.

20. Under Article 22(1) CRC, States must take all appropriate measures to ensure that a child refugee or asylum seeker shall receive appropriate protection and humanitarian assistance and Article 39 CRC requires States to take measures to ensure the physical and psychological recovery and social reintegration of child victims of armed conflict, torture or inhuman or degrading treatment, neglect, exploitation or abuse.

21. The interveners therefore submit that detention of children will be arbitrary under Article 5(1)(f) ECHR where no adequate consideration has been given to an individual child’s circumstances or where detention will not meet the particular needs of the individual child.⁵⁴ Under international human rights law, in light of children’s inherent vulnerability, the best interests of the child must prevail and guide all measures and decisions, which should be based on an individual needs assessment. The principle of the best interests of the child militates strongly against any resort to detention for children, whatever the context, and in particular when the detaining measures are being contemplated pursuant to immigration control.

5. Guardianship under International Human Rights Law and procedural rights of children

22. The principle of the best interests of the child established in Article 3 UN CRC is inextricably intertwined with the right of the child to be heard, guaranteed in Article 12 CRC. Article 12 CRC constitutes a general principle of the CRC, and should be considered in the interpretation and implementation of all other rights. The Committee on the Rights of the Child has affirmed in its *General comment No. 12 (2009)*⁵⁵ on Article 12 CRC that there are several important prerequisites for the effective exercise of the right to be heard. These include the appointment of a competent guardian as expeditiously as possible and access to and provision of all relevant information - in the child’s own language and adapted to their maturity and age - on entitlements, services available and the immigration and asylum process. By virtue of the requirement to ensure the best interests of the child, and in order to defend their interests, ensure their well-being and guarantee the right to personal liberty, a competent guardian must be appointed prior to administrative or judicial proceedings.

23. The Committee on the Rights of the Child stated in its *General comment No. 6 (2005) on Treatment of unaccompanied and separated children outside their country of origin*, that the appointment of a competent guardian as expeditiously as possible, serves as a key procedural safeguard to ensure respect for the best interests of an unaccompanied or separated child.⁵⁶ States are required to create the underlying legal framework and to take necessary measures to secure proper representation of an unaccompanied or separated child’s best interests. Therefore, States should appoint a guardian or adviser as soon as the unaccompanied or separated child is identified.⁵⁷ The guardian should be consulted and informed regarding

⁵¹ Council of Europe: Committee of Ministers, Guidelines on human rights protection in the context of accelerated asylum procedures, 1 July 2009, principle XI.2 (**Annex 20**).

⁵² UN CRC, Article 37(c)

⁵³ UN Committee on the Rights of the Child (CRC), General comment No. 10 (2007): Children’s Rights in Juvenile Justice, 25 April 2007, CRC/C/GC/10, paras. 85, 89 (**Annex 21**).

⁵⁴ O.M. v Hungary (No. 9912/15), 5 July 2016, para. 53.

⁵⁵ UN Committee on the Rights of the Child (CRC), General comment No. 12 (2009): The right of the child to be heard, 20 July 2009, CRC/C/GC/12 (**Annex 22**).

⁵⁶ UNCRC General comment No. 6, para. 21 (**Annex 6**).

⁵⁷ *Ibid*, para. 33.

all actions taken in relation to the child and should be present during all interviews.⁵⁸ The PACE has also stressed that all interviews with an unaccompanied child “should be conducted individually by specialised and well-trained staff and in the presence of the child’s guardian”.⁵⁹

24. The unaccompanied or separated child should also, in all cases, be given access, free of charge, to a qualified legal representative, including where the application for refugee status is processed under the normal procedures for adults.⁶⁰

25. The interveners therefore submit that, if the state fails to appoint a guardian for an unaccompanied child, it fails to respect the procedural aspect of the best interests of the child. Where there is no guardian or no effective guardian for a detained child, the detention risks being arbitrary, and not in the best interests of the child in the circumstances of the case.

II. Obligations under EU law

1. Relevance of EU law under Article 53 ECHR

26. Article 53 ECHR makes clear that the provisions of the ECHR must not be applied in such a way as to diminish human rights protection, “which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a party.” Therefore, where Member States are bound by EU law the Court must ensure that the Convention rights are interpreted and applied in a manner, which does not diminish the rights and reduces protection guaranteed under the applicable EU law.

27. In addition, the Convention requires that all measures carried out by the Contracting Parties that affect an individual’s protected right must be “in accordance with the law”. This Court has consistently held that the ordering and carrying out of detention must adhere to the criteria and process of national law.⁶¹ Compliance with both the substantive and procedural rules of national law⁶², including avoiding arbitrariness, is a prerequisite for the lawfulness of detention.⁶³

28. The requirement that a measure be in accordance with the law is, however, not solely a matter of domestic law but also relates to the “quality of the law requiring it to be compatible with the rule of law”, a concept which runs like a golden thread through the Convention.⁶⁴ Where the situations are regulated by EU law, compliance with that law will also be necessary. For the purposes of Article 5 ECHR, “in accordance” with the procedure and content of the law will therefore relate to the Respondent States legal obligations under EU and international law insofar as they are in accordance with the minimum standard set out in the Convention.

⁵⁸ *Ibid.*, paras. 33, 72.

⁵⁹ Parliamentary Assembly, Unaccompanied children in Europe: issues of arrival, stay and return, Resolution 1810 (2011), para. 5.7 (**Annex 23**).

⁶⁰ UNCRC General comment No. 6, para. 69 (**Annex 6**).

⁶¹ *Nabil and others v. Hungary* (No. 62116/12), 22 September 2015, para. 30: “detention must conform to the substantive and procedural rules of national law”; *O.M. v Hungary* (No. 9912/15), 5 July 2016, para. 41.

⁶² *Jusic v. Switzerland* (No. 4691/06), 2 December 2010, para. 82; *Abdi v. UK* (No. 27770/08), 9 April 2013, para. 69; *Voskuil v. Netherlands* (No. 64752/01), 22 November 2008, para. 83.

⁶³ According to Greek legislation unaccompanied children shall not be detained and only in exceptional cases where the child has applied for international protection while in detention can they remain in detention to ensure that they are safely referred to appropriate accommodation facilities for minors. This must be a last resort, limited to the necessary time to ensure referral and cannot exceed 25 days. This can be extended to a further 20 days in exceptional circumstances. Legal representation must be provided, detainees must be informed in a language they understand of the reasons and the duration of their detention, their right and means to challenge the detention decision and their right to free legal assistance. Article 46 Greek Law 4375/2016 In the context of removal proceedings Article 32 of Law No. 3907 of 2011 allows detention of unaccompanied minors as a measure of last resort, only when no other adequate and less coercive measure can be used and for the shortest appropriate period of time. *Suso Musa v. Malta* (No. 42337/12), 23 July 2013, para. 92; *Nabil and Others v. Hungary* (No. 62116/12), 22 September 2015, para. 30; *O.M. v Hungary* (No. 9912/15), 5 July 2016, para. 41.

⁶⁴ *Massoud v. Malta* (No. 24340/08), 27 July 2010, para. 61; *Lokpo and Touré v. Hungary* (No. 10816/10), 20 September 2011, para. 18. The Convention’s preamble recalls the rule of law.

2. EU fundamental rights

29. The EU Charter of Fundamental Rights (CFR)⁶⁵ has, since the Treaty of Lisbon (Article 6 TEU), equal status with the EU treaties, and as a matter of EU law, the provisions of the Common European Asylum System (CEAS) must be read in conformity with the CFR. Within the context of EU law, the principle of the best interests of the child is enshrined in Article 24 CFR as well as all secondary legislative instruments which make up the CEAS. EU asylum *acquis* implemented in light of Court of Justice of the European Union (CJEU) jurisprudence requires that the best interests of the child underpin all decisions taken with regards to children and that Member States are required to ensure the child's protection and care as necessary for their well-being.⁶⁶ As a consequence, children under EU asylum law are entitled to specific identification and tailored procedural and reception guarantees in accordance with their special needs.⁶⁷

30. Additionally, EU law encompasses the right to effective legal protection⁶⁸ as well as the right to good administration,⁶⁹ the right to an effective remedy⁷⁰ and the right to be heard, which guarantees every person "the opportunity to make known his views effectively during an administrative procedure and before the adoption of any decision liable to affect his interests adversely."⁷¹ The EU Charter of Fundamental Rights stipulates the right to asylum (Article 18 CFR), a subjective and enforceable right of individuals who are entitled to be granted international protection under EU law. Since asylum is a shared competence between the Union and its Member States, the protection of Article 18 CFR applies in all areas of activity of the Union and its Member States that fall within the scope of application of EU law.

3. The EU asylum *acquis* – procedural rights and guardianship

31. In determining whether the Contracting Parties' obligations under the Convention are engaged in any particular case - and, if so, the scope and content of these obligations - this Court has had regard to the EU asylum *acquis* materially relevant to those questions when the Respondent States are themselves legally bound by that corpus of law.⁷²

32. The EU asylum *acquis* is comprised of a number of legal instruments and their interpretation by the CJEU. Of those instruments, the most pertinent for this intervention is the Asylum Procedures Directive⁷³ (in force from 2 January 2006 to 20 July 2015) and the recast Asylum Procedures Directive⁷⁴ (in force on 20 July 2015 and had to be transposed by 20 July 2015), which provides for effective access to the asylum procedure for all applicants, without any exception.⁷⁵ Moreover, the Reception Conditions Directive⁷⁶ (in force from 6 February 2003 to 20 July 2015) and the recast Reception Conditions Directive⁷⁷ (in force on 20

⁶⁵ European Union, Council of the European Union, Charter of Fundamental Rights of the European Union (2007/C 303/01), 14 December 2007, C 303/1.

⁶⁶ CJEU, C-648/11, MA, BT and DA v Secretary of State of the Home Department, 6 June 2013

⁶⁷ Articles 11, 17, 18, 21-24 Recast Reception Conditions Directive; Articles 7, 15, 25 and 31(7)(b) Recast Asylum Procedures Directive.

⁶⁸ Case C-62/00 Marks and Spencer plc v. Commission of Customs & Excise [2002] ECR I-6348, para. 27.

⁶⁹ Case C-604/12 H.N. v. Minister for Justice, Equality and Law Reform and others [2014] ECLI:EU:C:2014:302, paras. 49-50.

⁷⁰ Case C-279/09 DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v. Bundesrepublik Deutschland [2010] ECR I-13849; Case C-418/11 Texdata Software GmbH [2013], para. 84.

⁷¹ Case C-277/11 M. M. v. Minister for Justice, Equality and Law Reform, Ireland, Attorney General [2012] ECLI:EU:C:2012:744, para. 87.

⁷² See M.S.S. v. Belgium and Greece (No. 30696/09), 21 January 2011, paras. 57-86 and para. 250, where the Grand Chamber analysed the scope and content of the Contracting Parties' obligations under Article 3 of the Convention in the light of relevant provisions of EU law by which the Greek authorities were bound; Rahimi v. Greece (No. 8687/08), 5 April 2011, para. 108, where the scope and content of Article 5(1)(f) was analysed by the Court in light of Article 3 and 37 of the UN Convention on the Rights of the Child.

⁷³ Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status [2003] OJ L 326/13 (Asylum Procedures Directive).

⁷⁴ Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast) [2013] OJ L 180/60 (recast Asylum Procedures Directive) (**Annex 2**).

⁷⁵ *Ibid*, Recital 25.

⁷⁶ Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers [2003] OJ L 31/18 (Reception Conditions Directive).

⁷⁷ Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down the standards for the reception of applicants for international protection (recast) [2013] OJ L180/96 (Recast Reception Conditions Directive) (**Annex 1**).

July 201 and had to be transposed by 20 July 2015), which provides for the dignified standard of living and living conditions for asylum applicants.⁷⁸

33. The EU asylum *acquis* envisages effective access to all who may wish to apply for asylum to the appropriate procedures contained in the recast Asylum Procedures Directive (recast APD). **For unaccompanied children and in line with the best interests of the child, the requirement to safeguard the rights in the recast APD and the EU right to good administration⁷⁹ an effective access to the asylum procedure requires the prior appointment of a competent guardian as well as the provision of free specialist legal information and representation.**⁸⁰ Indeed, Article 24 of the recast Reception Conditions Directive (recast RCD) and Article 25 of the recast APD requires measures to be taken as soon as possible to ensure that a competent representative assists and represents an unaccompanied child in order for the child to benefit from the rights under both Directives. It is crucial that the appointment of the guardian is done rapidly, as material reception conditions must be made available to applicants “when they make their application for international protection.”⁸¹ Moreover, in line with the principle of effectiveness, which requires rights under EU law to be effectively protected and prohibits national rules and procedures, which render the exercise of EU rights impossible in practice⁸² - a principle, which corresponds with the ECtHR’s requirement that rights be practical and effective⁸³ - the child’s representative must be appointed before any administrative proceedings are undertaken. The representative must also have the necessary expertise in child protection and be aware of the child’s specific interests and situation in order for the best interest of the child to be safeguarded.⁸⁴ As per Article 24(1) of the recast RCD, prior appointment and expertise of the representative are required in order to ensure the child’s well-being and social development.⁸⁵

34. As a matter of EU law, States are required to transpose Directives in their entirety into national law by the appointed deadline.⁸⁶ Once the transposition deadline expires, if the Directive has not been transposed - or has been transposed incorrectly or incompletely - it will have direct effect where its provisions are unconditional, sufficiently clear and precise.⁸⁷ In these circumstances, its provisions can therefore be considered to be incorporated in national law.

4. Detention of children in EU law

35. The recast Reception Conditions Directive (RCD) requires Member States to enforce detention of asylum seekers only under the six permissible grounds listed in the Directive and must adhere to the requirements of necessity and proportionality. The recast RCD states that it must be a measure of last resort and only applied after an assessment of the effectiveness of less coercive alternative measures.⁸⁸ Moreover, asylum applicants cannot be held in detention for the sole reason that they are seeking asylum.⁸⁹ Under Article 31 of the Refugee Convention⁹⁰ and in light of the EU right to good administration, Member States should not impose penalties – including detention – on asylum seekers. This covers

⁷⁸ *Ibid*, Recitals 11 and 25

⁷⁹ National measures must be applied in such a way as to achieve the result sought by the Directive. See Case C-62/00 Marks & Spencer plc v. Commissioners of Customs & Excise [2002] ECR I-06325, para. 27; Case C-604/12 H.N. v. Minister for Justice, Equality and Law Reform and others [2014] ECLI:EU:C:2014:302, para. 56; Case C-277/11 M. M. v. Minister for Justice, Equality and Law Reform, Ireland, Attorney General [2012] ECLI:EU:C:2012:744, para. 84.

⁸⁰ Recast Asylum Procedures Directive, Article 25(1)(a) and (4)

⁸¹ Recast Reception Conditions Directive, Article 17

⁸² Case C-33/76 Rewe-Zentralfinanz eG et Rewe-Zentral AG v. Landwirtschaftskammer für das Saarland [1976], ECR I-1989, para. 5; Case C-13/01 Safalero Srl v. Prefetto di Genova [2003] ECR I-08679, para. 49.

⁸³ *Artico v. Italy* (No. 6694/74), 13 May 1980.

⁸⁴ Recast Reception Conditions Directive, Article 24(4); Inter-American Court of Human Rights, Advisory Opinion, OC-21/14, “Rights and guarantees of children in the context of migration and/or in need of international protection”, August 19, 2014. Series A No.21, paras. 132-133.

⁸⁵ Note on administrative and judicial practice in relation to the guardianship and special needs assessment of unaccompanied children in Europe (**Annex 24**).

⁸⁶ Member States are obliged to transpose into their domestic legislation the Recast Reception Conditions Directive as well as the Asylum Procedures Directive with the exception of Article 31(3) (4) and (5) by 20 July 2015.

⁸⁷ Case C-149/78 *Publico Ministero and Tullio Ratti* [1979] ECR I-1629; Joined Cases C-465/00, C-138/00, C-139/01 *Rechnungshof v Osterreich Rundfunk and others* [2003] ECR I-4989.

⁸⁸ Recast Reception Conditions Directive, Article 8(2) (**Annex 1**).

⁸⁹ Recast Reception Conditions Directive, Recital 15 and Article 8 (**Annex 1**).

⁹⁰ Article 78 Treaty on the Functioning of the European Union, Official Journal C 326 , 26/10/2012 P. 0001 – 0390.

instances whereby a party to the proceedings would be penalised by virtue of the fact that they didn't comply with procedural rules "when this non-compliance arises from the behaviour of the administration itself".⁹¹

36. Article 11 of the recast RCD specifies that unaccompanied children should only be detained in exceptional circumstances with all efforts made to release the child as soon as possible. There must be regular monitoring, and tailored support provided to their needs, indeed the conditions must be suitable and tailored to children with appropriate recreational activities and the possibility to engage in leisure activities. Member States must provide free legal assistance and representation to those detained in judicial review proceedings.⁹²

37. In EU Member States, a failure to appoint a competent and qualified guardian and/or legal representative, initiate the processes necessary to identify the children's protection needs,⁹³ provide them with procedural and legal information, as well as offering them possibility of applying for asylum, violates the safeguards of both EU Directives. Detention imposed in such circumstances therefore amounts to an unlawful deprivation of liberty. Furthermore, without such guarantees in place and observed in practice it is extremely difficult to see how the requirements of necessity, proportionality and alternatives to detention under Article 5 ECHR, read in light of the UN CRC, and of national law, including EU law, can be adhered to.

38. The interveners recognize that the arrival of significant numbers of migrants can put a strain on national resources but recourse to detention and circumvention of relevant safeguards under international law, including under the ECHR, cannot be justified because of this. The interveners submit that, consistently with this Court's jurisprudence, difficulties associated with migration flows cannot justify recourse to practices incompatible with States' obligations under the Convention.⁹⁴

39. The interveners submit that, under Article 53 ECHR, Article 5(1)(f) ECHR falls to be interpreted in a manner consistent with standards and principles of international human rights law on the rights of the child and the EU law obligations binding on States as a matter national law. In the light of this, an individualised assessment of the child's specific needs must be undertaken within a formal process with strict procedural safeguards designed to assess and determine the child's best interests. It should also facilitate the active involvement of the child through the appointment of a guardian. Where such a formalised assessment is not undertaken any imposition of detention will be arbitrary for the purposes of Article 5(1)(f) ECHR.⁹⁵ Furthermore, to conform with obligations under EU law, a guardian for an unaccompanied child must be appointed as soon as possible, before any administrative proceedings take place. A failure of doing so is in breach of the principle of effectiveness and primary consideration of the best interests of the child.

⁹¹ CJEU, Case C-428/05, Firma Laub GmbH & Co. Vieh & Fleisch Import-Export v Hauptzollamt Hamburg-Jonas, 21 June 2007

⁹² Recast Reception Conditions Directive, Article 9(6) (**Annex 1**).

⁹³ Note on administrative and judicial practice in relation to the guardianship and special needs assessment of unaccompanied children in Europe (**Annex 24**); Sections I.3 and II.5 of the present submission.

⁹⁴ Georgia v. Russia (I) (No. 13255/07), 3 July 2014, para. 177; Hirsi Jamaa v. Italy (No. 27765/09), 23 February 2012, para. 179; Sharifi and Others v. Italy and Greece (No. 16643/09), 3 November 2014, para. 224.

⁹⁵ Analogous case law concerning Article 3 ECHR has required a prior and separate best-interest assessment for children before the imposition of detention: Muskhadzhiyeva and Others v. Belgium (No. 41442/07), 19 January 2010; Mubilanzila Mayeka and Kaniki Mitunga (No. 13178/03), 12 October 2006, paras. 81 and 83; Popov v. France (Nos 39472/07 and 39474/07), 19 April 2012; Kanagaratnam and Others v. Belgium (No. 15297/09), 13 December 2011; Neulinger and Shuruk v. Switzerland (No. 41615/07), 6 July 2010.