

Trawalli and Others v. Italy

Application no. 47287/17

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

INTERVENERS

pursuant to the Section Registrar's notification dated 23 May 2018 that the President of the Section had granted permission under Rule 44 § 3 of the Rules of the European Court of Human Rights

12 June 2018

I. Introduction: the status of migrant children under the ECHR, UN treaties and EU law

1. This Court, in consonance with other international authorities, has consistently emphasized that children, due to their age and personal situation, are typically more vulnerable to risks of harm in a variety of situations in society. Where children are also seeking asylum that vulnerability is necessarily heightened.¹ Recognition of this heightened vulnerability² must be a primary consideration, taking precedence over their irregular migration status.³ This is particularly so concerning the detention of and reception conditions provided for children, since the effects of the conditions in which they are detained or accommodated can amount to a breach of Article 3 and/or Article 8 of the European Convention on Human Rights (ECHR) even where there might be no breach for similarly situated adults.⁴

2. This Court has consistently held that the ECHR does not exist in a vacuum and States necessarily remain bound by and must continue to give effect to their other obligations under international law when implementing the Convention.⁵ In this respect, particular importance should be given, under Article 53 ECHR, to the obligations incumbent on all ECHR Contracting Parties as Parties to the UN Convention on the Rights of the Child (CRC) and UN treaties when applying the ECHR to children. The CRC, as well as the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights⁶ (ICESCR) oblige States, including all ECHR Contracting Parties, to provide specific safeguards and guarantees for the protection and care of children and acknowledge the particularly vulnerable situation of a child and the extreme vulnerability of unaccompanied children in migration. Migrant children should be “treated first and foremost as children” and should be regarded as “individual rights holders.”⁷

3. As recognized by this Court and the CRC, the principle that the best interests of the child shall be a primary consideration in all actions concerning children is a fundamental general and interpretative legal principle, a substantive right and a rule of procedure under international law.⁸ In *Rahimi v. Greece*, this Court 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 affect that child’s life.⁹ Any such decisions taken must clearly reflect the assessment that has followed from this approach.¹⁰ In the migration context, a special regime is required regarding the child’s best interests, distinct from that applicable to adults, whereby an assessment of all elements of a child’s interests in a specific situation is undertaken.¹¹ The UN Committee on the Rights of the Child has affirmed that, in the case of a displaced child, the “best interest” principle must be respected during all stages of the displacement.¹²

¹ *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* [GC] (No. 29217/12), 4 November 2014, para. 99.

² *M.S.S. v. Belgium and Greece* [GC] (No. 30696/09), 21 January 2011, para. 232; *Rahimi v. Greece* (No. 8687/080), 5 July 2011, para. 87. See also, Joint General Comment No. 3 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 22 (2017) of the Committee on the Rights of the Child on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return, para. 3.

³ *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, *op. cit.*, para. 55.

⁴ *Muskhadzhieyeva and Others v. Belgium* (No. 41442/07), 19 January 2010, para. 58; *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, *op. cit.*, para. 50.

⁵ *Pini and Ors v. Romania* (No. 78028/01), 22 June 2004, para. 138.

⁶ Convention on the Rights of the Child (CRC), 20 November 1989, Articles 2(1), 22(1) and 39; International Covenant on Civil and Political Rights (ICCPR), 16 December 1966, Article 24; International Covenant on Economic, Social and Cultural Rights (ICESCR), 16 December 1966, Article 10.

⁷ CRC/CMW, Joint General Comment No. 22/3 (2017) *op. cit.*, para. 11.

⁸ *Rahimi v. Greece*, *op. cit.*, para. 108. It is established in Article 3(1) CRC and applies to public or private social welfare institutions, courts of law, administrative authorities or legislative bodies who must assess and be guided by the principle in all their acts. See, UN CRC, General Comment No. 14 (2013), on the right of the child to have his or her best interests taken as a primary consideration, UN Doc. CRC/C/GC/14, 29 May 2013; *Neulinger and Shuruk v. Switzerland* [GC] (No. 41615/07), 6 July 2010, para. 135.

⁹ *Rahimi v. Greece*, *op. cit.*, para. 108.

¹⁰ UN CRC, General comment No. 14, *op. cit.*, paras 6(c) and 14(b).

¹¹ *Ibid.*, para 54.75 -76.

¹² 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, paras. 19-20.

4. In procedural terms, the Committee clarified that adherence to this principle must be ensured "explicitly through individual procedures as an integral part of decisions [on] the entry, residence or ... placement or care of a child"¹³. The relevant assessment must be carried out "systematically",¹⁴ "by actors independent of the migration authorities" and ensure "a meaningful participation" of the child, his/her representative and child-protection authorities¹⁵.

5. The interveners submit that, also under Article 53 ECHR, with regard to EU Member States responsibilities in the field of immigration and asylum, the relevant Convention obligations must be interpreted by this Court in a manner consistent with the EU law obligations binding on States as a matter of national law, particularly when this law provides for particular human rights protections. The principle of the best interests of the child is enshrined in EU law in Article 24 of the Charter of Fundamental Rights (CFR)¹⁶ and is embedded in all secondary legislative instruments which make up the Common European Asylum System (CEAS) as far as asylum seeking children are concerned. In light of the CFR and the Court of Justice of the European Union's (CJEU) jurisprudence, the EU asylum *acquis* requires that the best interests of the child principle underpins all decisions taken with regard to children, and that Member States must ensure the child's protection and care as necessary for their well-being.¹⁷ The CJEU has also held that children must have access to legal procedures and benefit from conditions which enable them to express their views freely.¹⁸ With regard to asylum seeking children, the EU recast Reception Conditions Directive (rRCD), explicitly defines children, including unaccompanied, as vulnerable asylum seekers¹⁹ and affords them dedicated assistance and protection standards.

II. Deprivation of liberty of children in immigration under international law

2.1. Detention and restriction of freedom of movement

6. Under this Court's jurisprudence and international law, whether a restriction on freedom of movement amounts to a deprivation of liberty under Article 5 ECHR does not depend on its classification in national law, but rather on the degree and intensity of the restriction, based on its type, duration, effects and manner.²⁰ The availability of support, information, advice, and other procedural safeguards necessary to overcome restrictions on freedom of movement, is relevant to an assessment of whether there is deprivation of liberty.²¹

7. The interveners refer to the judgment of the Grand Chamber in *Khlaifia and others v. Italy* where the confinement of the applicants in a reception centre was found by the Court to constitute a deprivation of liberty under Article 5 ECHR:

...the Court finds that the classification of the applicants' confinement in domestic law cannot alter the nature of the constraining measures imposed on them Moreover, the applicability of Article 5 of the Convention cannot be excluded by

¹³ CRC/CMW, Joint General Comment No. 22/3 (2017) *op. cit.*,

¹⁴ *Ibid.*, para. 31.

¹⁵ *Ibid.*, para. 32(c).

¹⁶ The EU Charter of Fundamental Rights (CFR) is a primary EU law to which the provisions of the Common European Asylum System (CEAS) must conform. The EU asylum *acquis* is comprised of a number of legal instruments and their interpretation by the CJEU. The most pertinent for this intervention is the recast Reception Conditions Directive (rRCD), which provides for the dignified standard of living and living conditions for asylum applicants.

¹⁷ CJEU, C-648/11, *MA, BT and DA v Secretary of State of the Home Department*, 6 June 2013.

¹⁸ CJEU, C- 491/10, *Joseba Andoni Aguirre Zarraga v Simone Pelz*, 22 December 2010, paras 65-66. See, further, Article 12 CRC.

¹⁹ Article 21 rRCD.

²⁰ *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; *Austin and others v. United Kingdom* (Nos. 39692/09, 40713/09 and 41008/09), 15 March 2012, para 57; *De Tommaso v. Italy* [GC] (No. 43395/09), 23 February 2017, paras. 79-92; *Khlaifia and others v. Italy* [GC] (No. 16483/12), 15 December 2016, para. 64; 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).

²¹ *Amuur v France*, *op. cit.*, paras. 45 and 48; See also *Riad and Idiab v. Belgium* (Nos. 29787/03 and 29810/03), para 68.

*the fact, relied on by the Government, that the authorities' aim had been to assist the applicants and ensure their safety Even measures intended for protection or taken in the interest of the person concerned may be regarded as a deprivation of liberty.*²²

2.2. Lawfulness and arbitrariness

8. Any deprivation of liberty must be imposed in good faith for one of the purposes set out in Article 5(1) (a)-(f) ECHR. Where the deprivation of liberty is not based on a clear and accessible legal basis in national law, does not follow a procedure prescribed by law, does not conform to international law or no formal decision has been taken by the authorities, the individual's detention will not meet the requirement of lawfulness under Article 5(1).²³ The same holds true for restrictions to freedom of movement.²⁴ Furthermore, the Contracting Parties have a positive obligation under Article 5(1) to take appropriate measures to protect the liberty of persons, especially vulnerable persons.²⁵

9. This Court has held that a person's detention under any of the grounds of Article 5(1)²⁶ must still be compatible with the overall purpose of Article 5, namely, to safeguard liberty and ensure that no person is deprived of his or her liberty in an arbitrary fashion.²⁷ In *Rahimi v. Greece*, this Court held that it was incumbent upon the 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, in this case, owing to his age, his arrival to an unfamiliar country, and his status as an unaccompanied child and thus solely reliant on himself.²⁸ Similar principles apply, *mutatis mutandis*, to the assessment of whether detention is arbitrary under Article 5(1)(f) ECHR. Moreover, in *Popov* this Court has found that the authorities are required to verify that the detention of children (even if accompanied) was ordered as a measure of last resort for which no alternative was available in order to avoid it being arbitrary in violation of Article 5.1.f.²⁹

10. Even in situations where the restrictions imposed on adults held in the same centre with children do not amount to deprivation of liberty, the assessment of otherwise similarly situated children must be separate and stricter, in respect of the degree and intensity of the restrictions and having regard to the effects of the special supervision and the manner of its implementation.³⁰ When justified under article 5(1)(d), i.e. for educational supervision, this Court has held that even 'temporary detention centres' must a) be designed to provide educational supervision and b) actually be for the purpose of educational supervision.³¹ It is incumbent on the State to provide an appropriate infrastructure, adapted to the security and pedagogical objectives.³² 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.³³

11. For comparative purposes, the interveners underline that the Inter-American Court of Human Rights has ruled that "*States may not resort to the deprivation of liberty of children ... as a precautionary measure in immigration proceedings; nor may States base*

²² *Khlaifia and Others v. Italy, op. cit.*, para. 71.

²³ *Ilias and Ahmed v. Hungary* (No. 47287/15), 14 March 2017, para 68; *Khlaifia and Others v. Italy, op. cit.*, paras. 91, 106-107; *Louled Massound v. Malta* (No. 24340/08), 27 July 2010 para.61; *Medvedyev v. France* [GC],(No. 3394/03), 29 March 2010, para.80.

²⁴ *De Tommaso v. Italy, op. cit.*, paras. 106-109.

²⁵ *Stanev v. Bulgaria* [GC] (No. 36760/06), 12 January 2012, para 120.

²⁶ *Nabil and Others v. Hungary* (No. 62116/12), 22 September 2015, para. 18.

²⁷ *Saadi v. the United Kingdom* [GC] (No. 13229/03), 29 January 2008, para. 66; *Khudoyorov v. Russia* (No. 6847/02), 8 November 2005, para. 137; *Rahimi v. Greece, op. cit.*, para. 102.

²⁸ *Rahimi v. Greece, op. cit.*, para. 87.

²⁹ *Popov v. France, op. cit.*, paras. 119-121; *M.S.S. v. Belgium and Greece, op. cit.*, para. 232,118.

³⁰ *Guzzardi v. Italy, op. cit.*, para. 93; *Rantsev v. Cyprus and Russia*, No. 25965/04, 7 January 2010, para. 314; *Stanev v. Bulgaria*, No. 36760/06, 17 January 2012 [GC], para. 115.

³¹ *Blohin v. Russia* [GC] (No. 47152/06), 23 March 2016, para 153.

³² *D.L. v Bulgaria* (No. 7472/14), 19 May 2016, para 64; *Blohin v. Russia* [GC] (No. 47152/06), 23 March 2016, para. 167.

³³ *Saadi v. United Kingdom, op. cit.*, paras. 75-80; *O.M. v Hungary* (No. 9912/15), 5 July 2016, para. 42; *Iliya Stefanov v. Bulgaria*, no. 65755/01, 22 May 2008, para. 72.

this measure on failure to comply with the requirements to enter and to remain in a country, on the fact that the child is alone or separated from her or his family, or on the objective of ensuring family unity, because States can and should have other less harmful alternatives and, at the same time, protect the rights of the child integrally and as a priority."³⁴

12. As highlighted above, the European Court of Human Rights has consistently held that, in order to be in compliance with the Convention, the ordering and carrying out of detention must also be compliant with the substantive and procedural requirements of national law.³⁵ Where situations are regulated by EU law, Contracting Parties must also comply with that law.³⁶ The recast Reception Conditions Directive (rRCD) permits the detention of asylum seekers only on the six grounds listed, the assessment of which must adhere to the requirements of necessity and proportionality.³⁷ The rRCD states that detention must be a measure of last resort and only applied after an assessment of the effectiveness of less coercive alternative measures.³⁸ Asylum seekers must not be held in detention for the sole reason that they are seeking asylum.³⁹ Detention must be ordered in writing stating the reasons in fact and in law on which it is based.⁴⁰

2.3. Necessity and proportionality and the prohibition of detention of children under international law

13. 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.⁴¹ 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.⁴² Indeed, it has affirmed that, when applying the ECHR,⁴³ States remain bound by their obligations under Articles 3 and 37 CRC.⁴⁴ The Court's jurisprudence in this respect has been largely assimilated by the Council of Europe Steering Committee on Human Rights, in a seminal study endorsed by the Committee of Ministers.⁴⁵

14. The UN Committee on the Rights of the Child has recently affirmed in its General Comment no. 23 that pursuant to State obligations under the CRC "*any kind of child immigration detention should be forbidden by law and such prohibition should be fully implemented in practice.*"⁴⁶ It has further clarified that "*the possibility of detaining children as a measure of last resort, which may apply in other contexts such as juvenile criminal justice, is not applicable in immigration proceedings as it would conflict with the*

³⁴ 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. 160.

³⁵ *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*, *op. cit.*, para. 41. *Del Río Prada v. Spain* (No. 42750/09) [GC], para. 125.

³⁶ For the purposes of Article 5 ECHR, "in accordance" with the procedure and content of the law will therefore relate to the respondent State's legal obligations under EU law insofar as they relate to the minimum standards set out in the Convention.

³⁷ CJEU, C-528-15, *Al Chodor*, 15 March 2017, paras 39-40.

³⁸ Article 8(2) rRCD.

³⁹ Recital 15 and Article 8 rRCD.

⁴⁰ Article 9(2) rRCD. See, CJEU, C-146/14, *Mahdi*, 5 June 2014 and Dutch Council of State, 201502024/1/V3, 10 April 2015; 201504413/1/V3, 12 June 2015.

⁴¹ *Rahimi v. Greece*, *op. cit.*, para. 86. See, for other "vulnerable" groups, such as LGBT persons, *O.M. v. Hungary*, *op. cit.*, para. 53.

⁴² On vulnerable groups see *Yoh-Ekale Mwanje v. Belgium* (No. 10486/10), 20 December 2011, para. 124; on children see *Rahimi v. Greece*, *op. cit.*, paras. 108-109; *Popov v. France*, *op. cit.*, para. 91. See also, Council of Europe: Committee of Ministers, Twenty Guidelines on Forced Return, September 2005, Guideline 6; Council of Europe: Parliamentary Assembly, Resolution 1707 (2010) on Detention of Asylum Seekers and Irregular Migrants in Europe, 28 January 2010; UN Human Rights Committee, General comment No. 35 Article 9 (Liberty and security of person), 16 December 2014, CCPR/C/GC/35.

⁴³ *Rahimi v. Greece*, *op. cit.*, paras. 108-109; *Popov v. France*, *op. cit.*, para. 91.

⁴⁴ The Article states that no child should be deprived of their liberty unlawfully or arbitrarily and that the arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time.

⁴⁵ Steering Committee for Human Rights (CDDH), *Analysis of the legal and practical aspects of effective alternatives to detention in the context of migration*, CDDH(2017)R88add2, 26 January 2018, p. 4.

⁴⁶ Joint General Comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 (2017) of the Committee on the Rights of the Child on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return, para. 5.

principle of the best interests of the child and the right to development."⁴⁷

15. In light of this obligation to respect and protect the best interest of the child, numerous international authorities, including the Inter-American Court of Human Rights,⁴⁸ the UN Special Rapporteur on the human rights of migrants,⁴⁹ the Parliamentary Assembly of the Council of Europe,⁵⁰ the European Parliament Committee on Civil Liberties, Justice and Home Affairs,⁵¹ the UN Human Rights Council's Working Group on Arbitrary Detention⁵² and UNHCR⁵³ 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.

16. Under EU law, the rRCD, interpreted in light of the CFR,⁵⁴ requires the best interests principle to be a primary consideration in all actions involving children, which should be applied and assessed before considering whether minors can be detained. Moreover, the rRCD provides that children shall only be detained 'as a measure of last resort', and, *inter alia*, only once other less coercive alternative measures have been explored and for the shortest period of time, with all efforts made to release the child as soon as possible. Unaccompanied minors specifically, shall only be detained 'in exceptional circumstances' and in any event shall be 'accommodated separately from adults'.⁵⁵ There must be regular monitoring and tailored support provided to their needs; the conditions must be suitable and tailored to children with appropriate recreational activities; education and the possibility to engage in leisure activities must be made available. Member States must provide free legal assistance and representation to those detained in judicial review proceedings.⁵⁶

17. The European Commission has indeed stressed that "*[g]iven the negative impact of detention on children, administrative detention should be used, in line with EU law, exclusively in exceptional circumstances, where strictly necessary, only as a last resort, for the shortest time possible, and never in prison accommodation. Moreover, where there are grounds for detention, everything possible must be done to ensure that a viable range of alternatives to the administrative detention of children in migration is available and accessible ...*"⁵⁷

18. The interveners submit that, taking into consideration migrant children's status as persons in situations of vulnerability and the principle of the best interests of the child, article 5 ECHR should be read in light of the rising consensus in international law towards a prohibition of detention of children on immigration grounds, in particular based on the consolidated and clear position of the UN Committee on the Rights of the Child. This applies to all instances of deprivation of liberty irrespective of their classification under domestic law.

19. In addition to the above, detention under article 5.1 ECHR will in any event be unlawful and arbitrary where it lacks a clear and accessible legal basis, outlining the permissible grounds of detention as well as the relevant

⁴⁷ UN CRC/CMW, Joint General Comment No. 4/23, *op. cit.*, para. 10. See, UN CRC, General comment No. 6, *op. cit.*, para. 61; Council of Europe: Guidelines of the Committee of Ministers of the Council of Europe on child friendly justice, 2010, para. 19; UNHCR Guidelines on Detention, Guideline 9.2.

⁴⁸ Inter-American Court of Human Rights, Advisory Opinion, OC-21/14, *op. cit.*, para 157.

⁴⁹ 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.

⁵⁰ CoE, PACE: Resolution 2020 (2014), The alternatives to immigration detention of children, 3 October 2014 (36th Sitting); Recommendation 1703 (2005), Protection and assistance for separated children seeking asylum, 28 April 2005 (15th Sitting).

⁵¹ European Parliament Committee on Civil Liberties, Justice and Home Affairs, Ref. IP/C/LIBE/IC/2006-181, Ref. 12/2007, December 2007 p. 22.

⁵² Report of the Working Group on Arbitrary Detention, U.N. Doc. A/HRC/13/30, 15 January 2010, pp. 24,25, 58-61. Working Group on Arbitrary Detention, Revised Deliberation no. 5 on deprivation of liberty of migrants, 7 February 2018, para. 11.

⁵³ UNHCR's position regarding the detention of refugee and migrant children in the migration context, Jan 2017 p. 2. In UNHCR's view, "[R]eferences to the application of Art.37(b), "exceptional circumstances / measure of last resort", are not appropriate for cases of detention of any child for immigration related purposes..

⁵⁴ Article 24 CFR, *mutatis mutandis* CJEU, C-648/11, *MA, BT and DA v Secretary of State of the Home Department*, 6 June 2013, paras. 57 -59.

⁵⁵ Articles 11(2) and (3) rRCD.

⁵⁶ Article 9(6) rRCD.

⁵⁷ European Commission, Communication from the Commission to the European Parliament and the Council: The protection of children in migration, COM/2017/0211, p. 8-9.

procedural guarantees and remedies available to detainees, including judicial review and access to legal advice and assistance. In light of the obligations of EU Member States under EU law, the interveners submit that detention of asylum seeking children falling within the scope of the rRCD will result in a breach of the Convention standards also where it is not used as a measure of last resort, but rather is imposed without consideration of less onerous alternative measures and where the child's best interests assessment has not been carried out and reflected in this decision.

III. Article 3 and 8 ECHR and children in detention

20. This Court has held that, in some circumstances, inadequate detention conditions which rise to a certain gravity and are attributable to the States' actions or omissions may give rise to a violation of Article 3 ECHR. Noting also the explicit provisions governing children in detention under article 37 CRC, the interveners submit that the same prohibition applies to situations involving children.⁵⁸ In order to constitute a violation under this Article, the inadequacy of the living conditions "*must attain a minimum level of severity ... the assessment of [which] depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim*".⁵⁹

21. This Court has considered children's "*extreme vulnerability*" to be the "*decisive factor*" in the broader migration context, including when examining conditions in detention centres.⁶⁰ In *Mayeka and Mitunga v. Belgium*, the Court held that the detention of a five-year-old unaccompanied child for nearly two months in a closed centre for adults constituted treatment contrary to Article 3 ECHR as well as a violation of Article 5.⁶¹ In *Rahimi*, the Court held that the detention of a 15-year-old unaccompanied minor in an overcrowded detention centre for adults, with 'deplorable' hygiene standards, no contact with the outside world and no possibility of fresh air or leisure, even though it was only for two days, constituted a violation of Article 3 ECHR.⁶²

22. Article 3 ECHR imposes positive obligations to take appropriate measures to protect and care for a migrant child.⁶³ Indeed, the interveners recall that under Article 27 of the CRC, State Parties must respect the right of children to have a standard of living adequate to their physical, mental, spiritual, moral and social development.

23. Furthermore, this Court has made clear that the protection of personal autonomy is protected under the obligation to respect "*private life*" pursuant to Article 8 ECHR, that includes a person's physical and mental integrity⁶⁴ and is intended to ensure the development, without outside interference, of the personality of each individual in his relations with other human beings.⁶⁵ The notion of personal autonomy applies to children as well as adults and is a fundamental principle underlying the interpretation of the guarantees of Article 8.⁶⁶ These aspects of the concept extend to situations of deprivation of liberty.⁶⁷ In this connection and, under this Court's jurisprudence, the detention of migrant children has attracted the protection of Article 8, under its private life limb.⁶⁸

⁵⁸ See, *Khlaifa and others v Italy*, *op. cit.*, paras. 161-162; *Z. and Others v. the United Kingdom* (No. 29392/95) [GC], para. 73, and *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, *op. cit.*, para. 53.

⁵⁹ *M.S.S. v. Belgium and Greece*, *op. cit.*, para. 219; *Sufi and Elmi v. the United Kingdom*, (Nos. 8319/07 and 11449/07), 28 June 2011, para. 213.

⁶⁰ *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, *op. cit.*, para. 55; *Popov v. France*, *op. cit.*, para. 91.

⁶¹ *Ibid.*

⁶² *Rahimi v. Greece*, *op. cit.*

⁶³ *Rahimi v. Greece*, *op. cit.*, para. 87.

⁶⁴ *X and Y v. the Netherlands*, judgment of 26 March 1985, Series A no. 91, p. 11, para.22; *Niemietz v. Germany*, judgment of 16 December 1992, Series A no. 215-B, p. 11, para. 29; and *Costello-Roberts v. the United Kingdom*, judgment of 25 March 1993, Series A no. 247-C, pp. 60-61, paras. 34 and 36.

⁶⁵ *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, *op. cit.*, para 83, *Niemietz v. Germany*, *op.cit.*, para. 29, Series A no. 251-B; *Botta v. Italy*, 24 February 1998, para. 32, Reports 1998-I; and *Von Hannover v. Germany* (No. 59320/00), 24 June 2004, para. 50.

⁶⁶ *Ternovszky v. Hungary* (no. 67545/09), 14 december 2010, par. 22.

⁶⁷ *Rainen .v Finland* (No. 20972/92), 16 December 1997, para. 63.

⁶⁸ See, *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, *op. cit.*, para 83.

24. This Court has found that subjecting children to living conditions typical of a custodial institution can be regarded as an interference with the effective exercise of their family life.⁶⁹ These principles apply *mutatis mutandis* to the right to private life under Article 8 ECHR. Any interference must be in accordance with the law,⁷⁰ necessary in a democratic society to achieve the legitimate aim in question in the particular case⁷¹ and should be proportionate to that aim.⁷²

25. The interveners submit that, due to children's extreme vulnerability, their detention for immigration purposes risks leading to a violation of Article 3 ECHR because of inadequate living conditions and/or to a violation of Article 8 ECHR because of a disproportionate and unnecessary interference with their development and personal autonomy, as protected under Article 8. In this sense, Article 8 must be regarded as affording protection from conditions of detention which would not reach the level of severity required to engage Article 3.⁷³

IV. Guarantees for children in immigration detention and the right to an effective remedy

26. For unaccompanied and separated children, and in order to ensure full compliance with the principle of the best interest of the child, State authorities, as an initial step, must ensure children's prioritized identification and prompt registration in a specific child-sensitive procedure.⁷⁴ Additionally, State authorities must take action to appoint a competent guardian or adviser as soon as the unaccompanied or separated child is identified⁷⁵ and, at the very latest, prior to administrative or judicial proceedings.⁷⁶ They also must allow for the child to access a qualified legal representative free of charge.⁷⁷ Where a formalised assessment of the child's specific needs is not undertaken and reflected in a relevant decision any imposition of detention will be arbitrary for the purposes of Article 5(1)(f) ECHR.⁷⁸

27. The UN Committee on the Rights of the Child has affirmed that decisions on placement of unaccompanied or separated children into (alternative) care "*have to be taken within a child-sensitive due process framework, including the child's rights to be heard, to have access to justice and to challenge before a judge any decision that could deprive him or her of liberty, and should take into account the vulnerabilities and needs of the child, including those based on their gender, disability, age, mental health, pregnancy or other conditions.*"⁷⁹ It also stated 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.⁸⁰

⁶⁹ See, *mutatis mutandis*, *Popov v. France*, *op. cit.* para. 134; *A.B. and Others v. France* (No. 11593/12), 12 July 2016, para. 145; *R.K. and Others v. France* (No. 68264/14), 12 July 2016, para. 106; *A.M. and Others v. France* (No. 24587/12), 12 July 2016, para. 86; and *R.C. and V.C. v. France* (No. 76491/14), 12 July 2016, para. 72.

⁷⁰ *Malone v. the United Kingdom* (No. 8691/79), 2 August 1984, paras. 66-68; *Hasan and Chaush v. Bulgaria* [GC] (No. 30985/96), 26 October 2000, para. 84 with further references.

⁷¹ *Coster v. the United Kingdom* [GC] (No. 24876/94), 18 January 2001, para. 104, with further references.

⁷² *Connors v. the United Kingdom* (No. 66746/01), 27 May 2004, paras. 81-84.

⁷³ *Rainen v. Finland*, *op. cit.*, para. 63

⁷⁴ UN CRC General comment No. 6, *op. cit.*, para. 31. See further United Nations High Commissioner for Refugees (UNHCR), *Guidelines on Policies and Procedures in dealing with Unaccompanied Children Seeking Asylum*, February 1997, para. 5.

⁷⁵ *Ibid.*, paras. 21 and 33.

⁷⁶ See *ibid.*, paras. 21, 33 and 72; UN CRC, General Comment No. 14, *op. cit.* para. 96; Parliamentary Assembly of the Council of Europe (PACE), *Unaccompanied children in Europe: issues of arrival, stay and return*, Resolution 1810 (2011), para. 5.7.

⁷⁷ *Ibid.*, paras. 36-69.

⁷⁸ Analogous case law concerning Article 3 ECHR has required a prior and separate best-interest assessment for children before the imposition of detention: *Muskhadzhievaya and Others v. Belgium*, *op. cit.*; *Mubilanzila Mayeka and Kaniki Mitunga*, *op. cit.*, paras. 81 and 83; *Popov v. France*, *op. cit.*; *Kanagaratnam and Others v. Belgium* (No. 15297/09), 13 December 2011; *Neulinger and Shuruk v. Switzerland* (No. 41615/07), 6 July 2010.

⁷⁹ UN CRC/CMW, Joint General Comment No. 23/4, *op. cit.*, para. 13.

⁸⁰ UN CRC General Comment No. 6, *op. cit.*, para. 21, 33, 72 and Parliamentary Assembly, *Unaccompanied children in Europe: issues of arrival, stay and return*, Resolution 1810 (2011), para. 5.7.

3.1. Right to information and guardianship

28. An integral part of protecting an individual's right to liberty under Article 5 is the requirement that anyone who is arrested or detained⁸¹ be informed promptly of the genuine reasons for their deprivation of liberty.⁸² This is reflected in Article 37 CRC. If, following an individualised and child-specific assessment, a child's detention is nonetheless ordered, she or he must be explained, in simple, non-technical language that the child can understand, the legal, factual grounds, the reasons for their detention, and the process available for reviewing or challenging the decision to detain. For the information to be accessible, it must be presented in a form that takes account of the child's maturity and level of education.⁸³ This will necessarily require the appointment of a competent guardian prior to any action affecting children, the provision of legal advice or assistance from a legal representative and translation.⁸⁴ This obligation is predicated on two grounds: children's unfamiliarity with the legal system and language barriers, and their status as vulnerable persons due to their age and lack of independence.⁸⁵

29. Under EU law, the right to be heard guarantees to 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.*"⁸⁶ The EU asylum *acquis* specifies that the appointment of a competent guardian for the child must take place as soon as possible.⁸⁷ The general 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 practice,⁸⁸ must be read as requiring that the child's representative must be appointed before any administrative proceedings, including proceedings regarding detention, are undertaken. The appointment of the representative only after detention would render the child's rights ineffective.

3.2. Right to challenge the lawfulness of detention

30. An effective judicial review of detention in accordance with Article 5.4, clearly prescribed by law and accessible in practice, is an essential safeguard against arbitrary detention, including measures adopted in the context of immigration control. Access to legal aid and advice is important in ensuring the accessibility and effectiveness of judicial review⁸⁹ and the absence of provision for legal assistance in law or in practice should be taken into consideration in assessing both the arbitrariness of detention under Article 5.1.f and the adequacy of judicial review under Article 5.4.⁹⁰

31. According to the UN Committee on the Rights of the Child, all children "*should be able to bring complaints before courts, administrative tribunals or other bodies at lower levels that are easily accessible to them ... and should be able to receive advice and representation in a child-friendly manner by professionals with specialized knowledge of children and migration issues when their rights have been violated.*"⁹¹

⁸¹ *Shamayev and Others v. Georgia and Russia* (No.36378/02), 12 April 2005, paras. 413 -414.

⁸² *Abdolkhani and Karimnia v. Turkey*, *op. cit.*, para. 136; *Saadi v. United Kingdom*, *op. cit.*, para 84.

⁸³ *Vakhitov and Others v. Russia* (Nos. 18232/11, 42945/11, 31596/14), 31 January 2017, para 60; *Nasrulloev v. Russia* (No. 656/06), 11 October 2007, para. 77; *Chahal v. United Kingdom* [GC] (No. 22414/93), 15 November 1996, para. 118; *Saadi v. the United Kingdom* [GC] (No. 13229/03), 29 January 2008, para. 74; *Abdolkhani and Karimnia v. Turkey*, *op. cit.*, paras.131-135; *Amuur v. France*, *op. cit.*, para. 42; *Soldatenko v. Ukraine* (No. 2440/07), 23 October 2008.

⁸⁴ *Rahimi v. Greece*, *op. cit.*, paras. 120-121; Article 40 CRC; UN CRC, General Comment No. 12, *op. cit.*, para. 60 and UN CRC General Comment No. 6, *op. cit.*, para. 25.; CPT Immigration Detention Factsheet, March 2017, p 9; UNHCR, Guidelines on the applicable criteria and standards relating to the detention of asylum seekers and alternatives to detention, 2012, Guideline 9 on the appointment of the independent and mqualified guardian and legal adviser.

⁸⁵ *Tarakhel v. Switzerland* [GC] (No. 29217/12), 4 November 2014, para. 99.

⁸⁶ CJEU, *M. M. v Minister for Justice, Equality and Law Reform and Others*, C-277/11, para. 87.

⁸⁷ Recast Article 24(1) and (4) rRCD.

⁸⁸ CJEU, C-33/76 *Rewe-Zentralfinanz eG et Rewe-Zentral AG v. Landwirtschaftskammer für das Saarland* [1976], ECR I-1989, para. 5; CJEU, C-13/01 *Safalero Srl v. Prefetto di Genova* [2003] ECR I-08679, para. 49.

⁸⁹ *Suso Musa v. Malta*, (No. 42337/12), 23 June 2013, para. 61.

⁹⁰ Account should also be taken of the UNHCR Detention Guidelines which provide for a range of procedural safeguards, including access to legal advice and judicial review, Guideline 7.

⁹¹ UN CRC/CMW, Joint General Comment No, 23/4, *op. cit.*, para. 16.

3.3. The right to an effective remedy to challenge inadequate conditions of detention

32. States must provide all persons deprived of their liberty with an effective remedy to complain about their conditions of detention when they allege a violation of the right not to be subject to inhuman or degrading treatment under article 3 ECHR.⁹² A remedy to challenge only the lawfulness of removal or detention would be insufficient.⁹³ Similarly, the UN Human Rights Committee, has affirmed that complaints under the ICCPR must be investigated promptly and impartially by competent authorities so as to make the remedy effective.⁹⁴ Ensuring that the voice of the child is heard is essential to guaranteeing full compliance with the above standards.⁹⁵

33. In EU law, the right to an effective remedy under Article 47 CFR includes a right of access to such a remedy against any violation of the Charter's rights. This includes the violation of Article 4 CFR as well as the rights guaranteed by the rRCD. Article 47 encompasses the general attributes of an effective remedy under international law, including that such remedies be prompt, accessible, and available before an independent authority and leading to cessation and reparation.⁹⁶ The accessibility element is made explicit in Article 47, which requires that free legal aid be provided when necessary to ensure effective access to justice. Furthermore, the CJEU has considered that Article 47 comprises the right of access to a court or tribunal even in those matters that are not recognised as falling within the scope of Article 6 ECHR by the ECHR's jurisprudence.⁹⁷ Finally, the recast RCD also provides for the right to judicial review of detention⁹⁸ and the right to free legal aid and representation in regard to such review,⁹⁹ which must comply with the guarantees provided for in Article 47 CFR.¹⁰⁰

34. The interveners submit that, when the authorities deprive or seek to deprive a child of her or his liberty, they must ensure that he/she effectively benefits from an enhanced set of guarantees in addition to undertaking the diligent assessment of her/his best interest noted above. The guarantees include: prompt identification and appointment of a competent guardian; a child-sensitive due process framework, including the child's rights to receive information in a child-friendly language, the right to be heard and have her/his views taken into due consideration depending on his/her age and maturity, to have access to justice and to challenge the detention conditions and lawfulness before a judge; free legal assistance and representation, interpretation and translation. The Contracting Parties must also immediately provide the child access to an effective remedy.

V. Reception conditions and the rights of the child

35. This Court has stated that, even when children are not detained and alternative reception arrangements are available, as far as reception conditions for children seeking asylum are concerned, such conditions could still attain the threshold of severity required to come within the scope of the prohibition under Article 3 of the Convention. This would in particular be the case when such conditions create "a situation of stress and anxiety, with particularly traumatic consequences."¹⁰¹

⁹²Article 13 and 3 ECHR; Articles 2.3, 7 and 10 ICCPR. See General Comment No. 5 of the CRC, para. 24.

⁹³ *Khlaifia and others*, *op. cit.*, paras 270-271.

⁹⁴ UN Human Rights Committee, General Comment No. 31, UN Doc. No. CCPR/C/21/Rev.1/Add. 13, 26 May 2004, para. 15 and General Comment No. 35, *op. cit.*

⁹⁵ UN CRC General Comment 12, *op. cit.*, p. 7; UN CRC General Comment No. 6, *op. cit.*, para 25; UN CRC/CMW, Joint general comment No. 23/4, *op. cit.*, para 12.

⁹⁶ International Commission of Jurists, *The Right to a Remedy and to Reparation for Gross Human Rights Violations: a Practitioners' Guide* (International Commission of Jurists 2006), 46-49.

⁹⁷ CJEU, C-199/11 *Europese Gemeenschap v. Otis NV*, 6 November 2012, para 49; CJEU, C-279/09 *DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v. Bundesrepublik Deutschland*, 22 December 2010, para 60.

⁹⁸ Article 9(4) rRCD.

⁹⁹ Article 9 rRCD.

¹⁰⁰ Article 47 of the CFR codified the EU law *acquis* on effective judicial protection, bringing the right to an effective remedy (Article 13 ECHR) and that to a fair trial (Article 6(1) ECHR), under the same provision. The explanations to the CFR in relation to its Article 47(2) make it expressly clear that the standards and requirements of Article 6(1) ECHR apply in the interpretation of its provisions. Article 47 applies in full to matters of EU law, including migration and asylum.

¹⁰¹ *Tarakhel v. Switzerland*, *op. cit.*, para. 104.

36. A child's special protection and assistance and the requirement to undertake a holistic assessment of what is suitable and necessary for his or her accommodation, in light of their own specific vulnerabilities, has been reiterated by the UN Committee of the Rights of the Child¹⁰² and the European Committee of Social Rights.¹⁰³ Unaccompanied non-national children should not be accommodated with unrelated adults, to ensure protection from trafficking, and from sexual and other forms of exploitation, abuse and violence to which they are particularly vulnerable.

37. EU law provides expressly under Article 1 CFR that human dignity is inviolable and must be respected and protected. The CJEU has given particular consideration to human dignity when reaffirming the Member States' obligations to provide minimum standards of reception at all times through the asylum procedure.¹⁰⁴ It has held that 'saturation of the reception networks' is not a justification for any derogation from meeting the required standards.¹⁰⁵

38. The rRCD also provides an exhaustive list of accommodation options in which Member States shall place unaccompanied asylum seeking children: (a) with adult relatives, (b) with a foster family, (c) in accommodation centres with special provisions for minors, and (d) in other accommodations suitable for minors.¹⁰⁶ Unaccompanied minors must be placed in one of these four options from the moment they are admitted to the territory until the moment they are obliged to leave, limiting changes of residence to a minimum.¹⁰⁷ Member States must ensure a standard of living adequate for the minor's physical, mental, spiritual, moral and social development.

39. This requirement applies both to temporary and long-term reception centres. EU Member States must ensure that children have access to leisure activities adapted to their age.¹⁰⁸ Regardless of where children are accommodated, States must ensure they also have access to rehabilitation services when they have been victims of "any form of abuse, neglect, exploitation, torture or cruel, inhuman and degrading treatment, or who have suffered from armed conflict";¹⁰⁹ the minor's well-being and social development, taking into particular consideration the minor's background, must also be safeguarded. States must also ensure that appropriate mental health care is developed and that children are provided qualified counselling when needed.¹¹⁰

40. The interveners submit that in order to fully comply with their obligations under the Convention, Contracting Parties must guarantee that asylum seeking children are accommodated in reception facilities which are adapted to their specific needs and provide adequate material conditions adapted to their age, condition of dependency and enhanced vulnerability. To do otherwise results in a failure by States to comply with their obligations under Article 3 ECHR and their specific obligations under EU law.

¹⁰² UN CRC General Comment No. 6, *op. cit.*, paras 39-40.

¹⁰³ Committee on Economic, Social and Cultural Rights, General Comment 4, The right to adequate housing (Sixth session, 1991), U.N. Doc. E/1992/23, annex III at 114 (1991), para. 11.

¹⁰⁴ CJEU, C-79/13, *Cimade and Gisti* 27 September 2012, para. 56. Article 1 CFR recognises that human dignity is inviolable and must be respected and protected. The Explanations Relating to the CFR, under Title 1, Article 1, further suggests that human dignity "is not only a fundamental right in itself but constitutes the real basis of fundamental rights." Particularly, human dignity has been recognised as "closely linked" to the prohibition of inhuman and degrading treatment under Article 4 (Joined Cases C-404/15 and C-659/15, para. 85). In doing so the CJEU stated that the rights guaranteed by Article 4 of the Charter are absolute, which is confirmed by Article 3 ECHR, to which Article 4 CFR corresponds (Joined Cases C-404/15 and C-659/15, para. 86).

¹⁰⁵ CJEU, C-79/13, *Cimade and Gisti*, *op. cit.*, para. 50.

¹⁰⁶ Article 24(2) rRCD.

¹⁰⁷ *Ibid.*

¹⁰⁸ Article 23(4) rRCD.

¹⁰⁹ *Ibid.*

¹¹⁰ *Ibid.*