BY FAX (+33 3 8841 2730) AND POST

The Registrar
European Court of Human Rights
Council of Europe
Strasbourg
France

Application No 12427/22, A.D. against Malta

17 October 2022

Dear Sir/Madam,

The above organisations, the AIRE Centre (Advice on Individual Rights in Europe), the International Commission of Jurists (ICJ), The Global Campus of Human Rights and the European Council on Refugees and Exiles (ECRE), are attaching their third-party intervention in the above case for the attention of the Court, Section I. The Global Campus of Human Rights is represented by Professor Manfred Nowak and Dr. Chiara Altafin who intervene as part of the Global Study component of the ACRiSL project.

Yours faithfully,

On behalf of the interveners

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BEFORE THE FIRST SECTION

OF THE EUROPEAN COURT OF HUMAN RIGHTS

Application No. 12427/22

A.D.

v.

Malta

WRITTEN SUBMISSIONS ON BEHALF OF THE INTERVENERS:

ADVICE ON INDIVIDUAL RIGHTS IN EUROPE (AIRE CENTRE)
EUROPEAN COUNCIL ON REFUGEES AND EXILES (ECRE)
INTERNATIONAL COMMISSION OF JURISTS (ICJ)
GLOBAL CAMPUS OF HUMAN RIGHTS

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pursuant to the Registrar's notification dated 20 September 2022 on the Court's permission to intervene
under Rule 44 § 3 of the Rules of the European Court of Human Rights

17 October 2022

I. Summary

1. To meet the standards of Article 5 ECHR detention must comply with the requirements of legality, be free from arbitrariness and comply with a provision prescribed by law both substantively and in procedure. Detention, which is a measure of last resort, may be imposed if following an individualised and thorough examination it is concluded that less severe measures cannot be applied effectively.
2. Detention under Article 5 (1) ECHR will be unlawful and arbitrary where it lacks a clear and accessible legal basis, clearly setting forth the permissible grounds of detention as well as the relevant procedural guarantees and remedies available to detainees, including judicial review and access to legal advice and assistance. In light of the obligations of Contracting Parties under European Union (EU) law and international law, the interveners submit that detention of non-national children or those individuals undergoing an age assessment will result in a breach of the Convention obligations, especially where it is not used as a measure of last resort, but rather is imposed without a thorough consideration of less onerous alternative measures and where the child's best interests assessment has not been carried out and reflected in this decision. where it is not used as a measure of last resort, but rather is imposed without a thorough consideration of less onerous alternative measures and where the child's best interests assessment has not been carried out and reflected in this decision.
3. Accessible and effective judicial review in accordance with Article 5 (4) ECHR is an essential safeguard against arbitrary detention and access to legal aid and advice should be taken into consideration in this regard. Contracting Parties bound by EU law should comply with their relevant obligations particularly under the Reception Conditions Directive which provides that applicants may only be detained for as short a period as possible and should have access to a speedy, judicial review of the lawfulness of their detention.
4. Finally, applicants must have access to an effective remedy in accordance with Article 13 ECHR, which meets the requirements of effectiveness in law and in practice. Where vulnerable applicants are concerned, remedies must be exercised with special diligence and speediness in light *inter alia* with international and EU standards providing for effective remedies.

II. Lawfulness of detention under Article 5 (1)

1. The interveners note that detention can only be considered lawful and meet the requirements of legality if it is *"in accordance with a provision prescribed by law*", and that the conditions for the deprivation of liberty are clearly defined in national law and therefore foreseeable in their application.[1]
2. The requirement of Article 5(1) that detention must be in accordance with the law has its foundation in principles of the rule of law, legality and protection against arbitrariness.[2] To be in accordance with the law, detention must both have a clear legal basis in national law, and must follow a procedure prescribed by law.[3] It must also conform to any applicable norms of international law.[4] This Court has held that a person's detention under any of the grounds of Article 5(1)[5] must be compatible with the overall purpose of Article 5, namely, to safeguard liberty and ensure that no person is deprived of their liberty in an arbitrary fashion.[6]
3. For detention to be free from arbitrariness, as required by Article 5(1), it must be carried out in good faith; be closely connected to a permitted ground; the place and conditions of detention must be

[1] Enhorn v. Sweden, App No. 56529/00, (25 January 2005), para 36.
[2] Louled Massoud v Malta, App No. 24340/08, (27 July 2010), para.61; Medvedyev v. France [GC], App. No.3394/03, (29 March 2010), para.80.
[3] Louled Massoud v. Malta, op. cit., para.61, Khlaifia and others v. Italy [GC], App No. 16483/12, (15 December 2016), para 91.
[4] Medvedyev v France [GC], App. No.3394/03, (29 March 2010), paras.79 – 80.
[5] Nabil and others v. Hungary, App No. 62116/12, (22 September 2015), para. 18.
[6] Saadi v. the United Kingdom [GC] App No. 13229/03, (29 January 2008), para. 66; Khudoyorov v. Russia App No. 6847/02, (8 November 2005), para 137; Rahimi v. Greece, App No. 8687/08 (5 July 2011), para. 102.

appropriate; and the length of detention must not exceed what is reasonably required for the purpose pursued.[7]

4. Furthermore, the Court has reiterated that detention is such a serious measure that unless justified as a last resort where alternative and less severe measures have been considered and deemed insufficient to safeguard an individual or public interest, it may be found to be arbitrary.[8]
5. The need to consider less severe or alternative measures to detention has been emphasised by this Court, notably in cases relating to applicants with a particular vulnerability.[9] Other Council of Europe bodies have similarly noted the importance of alternative measures to detention and advocated for its consideration in all cases concerning detention.[10] The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) has stated that deprivation of liberty "*should only be a measure of last resort, after a careful and individual examination of each case*." The CPT has emphasised that alternatives should be developed and used when possible and that detention without a time limit and with unclear prospects for release could be considered as amounting to inhuman treatment.[11] Furthermore, a Steering Committee for Human Rights (CDDH) publication underlined that under the principle of proportionality, States are obliged to examine alternatives to detention and that "*they should inter alia: respect the principle of necessity, proportionality and non-discrimination, never amount to deprivation of liberty or arbitrary restrictions on freedom of movement, always rely upon the least restrictive measure possible, be established in law and subject to judicial review, ensure human dignity and respect for other fundamental rights."*[12]
6. Under Article 53 ECHR, where Contracting Parties to the ECHR are also 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 guaranteed under the applicable EU law. The Convention requires that all measures carried out by Contracting Parties that affect an individual's protected rights be "*in accordance with the law*"[13], which in some circumstances will be EU law.
7. The EU Charter of Fundamental Rights (CFR)[14] enshrines guarantees fundamental to the rights under consideration, namely through Article 6 which provides that "*everyone has the right to liberty and security of person."*
8. The EU asylum *acquis* comprises a number of legal instruments and their interpretation by the Court of Justice of the EU (CJEU). The recast Reception Condition Directive (rRCD)[15] provides guarantees for detained applicants to the asylum procedure. The Court will recall that in *MSS v. Belgium and Greece*[16], the Grand Chamber took into account Greece's obligations under the Reception Conditions Directive (RCD)[17], as part of its national law, to ensure adequate material reception conditions, finding that the situation of extreme poverty brought about by the inaction of the State was treatment contrary to Article 3 ECHR. Article 8 RCD reinforces that a Member State may only detain an applicant if it proves necessary on the basis of an individual assessment and if less coercive, alternative measures cannot be applied, which has been reiterated by the CJEU, namely in the case of *V.L. v. Ministerio Fiscal*.[18] The applicant raised questions as to the conditions in Article 8 and whether Member States

[7] Saadi v UK, op. cit, para 74; Yoh-Ekale Mwanje v Belgium, App No. 10486/10, (20 December 2011) paras. 117-119.
[8] Rusu v. Austria, App No. 34082/02, (2 October 2008), para 58.
[9] Yoh-Ekale Muanje v. Belgium, op. cit., para 124, Popov v. France, App No. 39472/07, (19 January 2012), para 119.
[10] For example, in the Commissioner for Human Right's Human Rights Comment "High time for states to invest in alternatives to migration detention" on 31 January 2017, the Commissioner for Human Rights at the time emphasised the importance of alternative measures to "safeguard the human rights of migrants" and that these alternatives apply to all forms of detention.
[11] European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), Factsheet: Immigration Detention, March 2017.
[12] Council of Europe, Practical Guide: Alternatives to immigration detention: Fostering effective results, 25 November 2019.
[13] See Article 1 and 8 (2) ECHR
[14] European Union, Charter of Fundamental Rights of the European Union, 26 October 2012, 2012/C 326/02
[15] Directive 2013/33 of the European Parliament and the Council of 26 June 2013 on laying down standards for the reception of applicants of international protection (recast) [2013] OJ L 180/96
[16] MSS v. Belgium and Greece, [GC] App No. 30696/09, (21 January 2011).
[17] Directive 2013/33 of the European Parliament and the Council of 26 June 2013 on laying down standards for the reception of applicants of international protection (recast) [2013] OJ L 180/96
[18] CJEU, Judgment of 25 June 2020, VL v. Ministerio Fiscal, C-36/20 PPU, ECLI:EU:C:2020:495; CJEU, Judgment of 14 September 2017, K, C-18/16, ECLI:EU:C:2017:680.

may hold a third-country national in detention if the conditions are not met, in a situation where the applicant has indicated their intention to apply for international protection. Indeed, in *V.L. v. Ministerio Fiscal*, the CJEU highlighted that "*Articles 8 and 9 of that directive, read in conjunction with recitals 15 and 20 thereof, place significant limitations on the Member State's power to hold a person in detention*". It subsequently emphasised that "*an applicant for international protection may be held in detention only where, following an assessment carried out on a case-by-case basis, that is necessary and where other less coercive measures cannot be applied effectively. It follows that national authorities may hold an applicant for international protection in detention only after having determined, on the basis of an individual assessment, whether such detention is proportionate to the aims pursued by detention.*"[19] The CJEU, in *K v. Staatssecretaris van Veiligheid en Justitie*[20] and *FMS and others v Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóságup*[21] affirmed these limitations and obligations of Member States to undertake an individualised assessment, enforce detention as a last resort and ensure if used it is a proportionate measure for the objectives pursued.

9. In addition, the Return Directive [22], which provides for the common procedures and standards for returning third country nationals, lays out the instances when detention is possible "*unless other sufficient but less coercive measures can be applied effectively*" and furthermore provides that "*any detention shall be for as short a period as possible and only maintained as long as removal arrangements are in progress and executed with due diligence".*[23] The CJEU emphasised that "*it makes the use of coercive measures expressly subject to the principles of proportionality and effectiveness with regard to the means used and objectives pursued."*[24] Similar arguments were subsequently used in *Bashir Mohamed Ali Mahdi*[25] to determine that less coercive measures must be considered in the decision as to an extension of detention. Although these arguments largely relate to detention on the grounds of removal, the above cases show their repeated relevance to other grounds for detention.
10. Article 53 is also applicable to provisions of international law. Article 9 of the International Covenant on Civil and Political Rights (ICCPR)[26] sets out that everyone has the right to liberty and security of person and must not be subject to arbitrary detention. Similarly, the ICCPR's General Comment No. 35, clarified that "*detention must be justified as reasonable, necessary and proportionate in the light of the circumstances and reassessed as it extends in time*".[27]
11. The interveners submit that when assessing the lawfulness of detention, the ground for an applicant's detention is relevant and should be verified when detention is considered and extended. Article 5 (1) (e) ECHR presents the ground "f*or the prevention of the spreading of infectious disease*." This Court clarified in *Enhorn v. Sweden* the essential criteria when assessing the lawfulness of detention for the prevention of spreading infectious diseases as "*whether the spreading of the infectious disease is dangerous to public health or safety, and whether detention of the person infected is the last resort in order to prevent the spreading of the disease, because less severe measures have been considered and found to be insufficient to safeguard the public interest*."[28]
12. **The interveners thereby submit that detention must meet the requirements of legality, not be arbitrary and be in accordance with a provision prescribed by law. The consideration of less invasive alternatives to detention must form part of an individualised assessment, which takes**

[19] CJEU, Judgment of 25 June 2020, VL v. Ministerio Fiscal, C-36/20 PPU, ECLI:EU:C:2020:495, paras 101-102.
[20] CJEU Judgment of 14 September 2017, K v. Staatssecretaris van Veiligheid en Justitie, C-18/16, ECLI:EU:C:2017:680, para 48.
[21] CJEU Judgment of 14 May 2020, FMS and others v Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóságup, C-924/19 PPU and C-925/19 PPU, ECLI:EU:C:2020:367, para 258.
[22] Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2018 on common standards and procedures in Member States for returning illegally staying third-country nationals [2008] OJ L 348/98
[23] Directive 2008/115/EC (op cit) Chapter IV, Article 15 (1)
[24] CJEU, Judgment of 28 April 2011, Hassen El Dridi, alias Karim Soufi, C-61/11 PPU, ECLI:EU:C:2011:268
[25] CJEU, Judgment of 5 June 2014, Bashir Mohamed Ali Mahdi, C-146/14 PPU, ECLI:EU:C:2014:1320
[26] UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, U N, Treaty Series, vol. 999, p. 171
[27] UN Human Rights Committee, General comment no. 35, Article 9 (Liberty and security of person), 16 December 2014, CCPR/C/GC/35, para 18.
[28] Enhorn v. Sweden, App No. 56529/00, (25 January 2005), para 44.

into account all circumstances of the case and applicant concerned. The grounds of detention should be considered in this assessment and must be justified when a decision is made regarding an applicant's detention.

III. Deprivation of liberty and children

13. The interveners submit that particular concerns arise in relation to deprivation of liberty when a minor is involved. This Court has clearly stated that the Contracting Parties have a positive obligation under Article 5(1) to take appropriate measures to protect the liberty of persons, especially vulnerable persons.[29] Furthermore, the Court has previously considered that a person's vulnerability may accentuate the distress and negative effects of the detention.[30] It has frequently referred to the special consideration that has to be given to members of vulnerable groups with respect to decisions on deprivation of liberty and has noted that any margin of appreciation that might apply in relation to the rights of such individuals is necessarily much narrower than in relation to other people.[31]
14. The vulnerability of the person concerned is increasingly relevant to the obligation to consider alternative measures for detention. The Court has applied this principle to the situation of unaccompanied children. In *HA and others v. Greece,*[32] the Court, in its decision that the applicant's detention was not lawful under Article 5(1), made reference to national law which provided that authorities should avoid the detention of minors and that unaccompanied minors should only be detained as a measure of last resort for the shortest appropriate period of time. The Court subsequently referred to the obligation under the 1989 United Nations Convention on the Right of the Child (UN CRC) [33] directly relevant under Article 53 ECHR, to take the best interests of children into account when making decisions regarding them. Similarly, in *Rahimi v. Greece*, this Court placed significance on the facts that the Contracting State in question had not considered the best interests of the minor concerned or whether the applicant's detention was a measure of last resort.[34] This reasoning was upheld in *Housein v. Greece*, where it was held that an unaccompanied minor's detention in an adult detention facility was not lawful under the Convention.[35]
15. These considerations and lines of reasoning have been reflected in other international law decision making bodies and treaties. The UN CRC, the International Covenant on Civil and Political Rights ('ICCPR') and the International Covenant on Economic, Social and Cultural Rights ('ICESCR')[36] all acknowledge the specific vulnerability and status of a child and the extreme vulnerability of unaccompanied children. The competent organs for the interpretation of these instruments have consistently held that children should not be deprived of their liberty, except as a measure of last resort, for the shortest appropriate period of time and taking into account their best interests as a primary consideration.[37]
16. In particular, the UN CRC General Comments are authoritative and interpretative tools which should also be considered under Article 53 ECHR. This can be seen through General Comment 6, which stresses that on application of Article 37 UN CRC and the principle of the best interests of the child, unaccompanied children should not be detained.[38] Furthermore, UN CRC General Comment 10 refers

[29] Stanev v Bulgaria [GC] App No. 36760/06, (12 January 2012), para 120.
[30] MSS v. Belgium and Greece, [GC] App No. 30696/09, (21 January 2011), para 233.
[31] Kiyutin v. Russia App No. 2700/1010, (10 March 2011); Gorelov v. Russia App No. 49072/11, (9 January 2014).
[32] HA and others v. Greece, App No. 19951/16, (28 February 2019), para 205.
[33] United Nations, Convention on the Rights of the Child, General Assembly Resolution 44/25, 20 November 1989.
[34] Rahimi v. Greece, op. cit. para 108-110.
[35] Housein v. Greece, App No. 71825/11, (24 October 2013), paras 76-78.
[36] International Covenant on Economic, Social and Cultural Rights, 16 December 1966, United Nations, Treaty Series, vol. 993, Article 10.
[37] UN Committee on the Rights of the Child (CRC), 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 4); 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; UN Human Rights Committee, D. and E. and their two children v. Australia, 9 August 2006, CCPR/C/87/D/1050/2002, para. 7.2; HRC, Concluding observations on the third periodic report of the Czech Republic, 22 August 2013, CCPR/C/CZE/CO/3, para. 17.
[38] UN Committee of the Rights of the Child (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 61-63. These paragraphs further refer to Contracting State's obligations under

to Article 37 and defines the leading principles for the use of deprivation of liberty as that the detention 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; and (b) no child shall be deprived of his/her liberty unlawfully or arbitrarily*".[39] In the situation of children detained in an immigration context, the CRC and UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW) has considered that this cannot be justified as a measure of last resort as it conflicts with the principle of the best interests of the child and the right to development.[40] The clear overlap between the specific vulnerability of the child and his or her best interests is also evident from the UN CRC General Comment 14, which states that the determination of the best interests of the child must take into account the different kinds and degrees of vulnerability of each child and should have due regard to other human rights under international law, including the 1951 Geneva Convention.[41] This General Comment specifies that the best interests of the child are relevant in relation to Article 37 (c) CRC[42] confirming that "*in cases where the parents or other primary caregivers commit an offence, alternatives to detention should be made available and applied on a case-by-case basis, with full consideration of the likely impacts of different sentences on the best interests of the affected child or children.*"[43] The ICCPR has additionally set out a clear stance in its General Comment 35, and clarified that as well as a measure of last resort for the shortest appropriate period of time, a consideration of the deprivation of liberty of children should also take into account their best interests with regard to duration and conditions and the extreme vulnerability and need for care of unaccompanied minors.[44]

17. This Court has previously held that the ECHR does not exist in a vacuum and States remain bound by the obligations under the CRC when implementing the Convention.[45] The aforementioned *F.K.A.G. v. Australia* decision emphasised that the needs of children must be taken into account when detention is considered.[46] Furthermore, the Committee of the Rights of the Child has specifically considered communications relating to Article 37 of the Convention on the Rights of the Child.[47] In *E.H. et al v. Belgium* the Committee found a violation of Article 37 due to the State party's failure to consider alternatives to the detention of the children and thereby not taking their best interests into account as a primary consideration when deciding on their detention and extension of detention.[48] In a joint general comment of 2017, it re-affirmed that "*children should not be detained for reasons relating to their or their parents' migration status and States should expeditiously and completely cease or eradicate the immigration detention of children*".[49] In addition, *"any kind of child immigration detention should be forbidden by law and such prohibition should be fully implemented in practice.*"[50]

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international law and for detention to be used only in exceptional condition with children's best interests respected regarding the care and conditions of the detention, i.e. that they are separated from adults, and provided with basic necessities and free access to legal assistance and representation

[39] 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, para 79.

[40] UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW), 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, 16 November 2017, CMW/C/GC/4-CRC/C/GC/23, para 10.

[41] UN Committee on the Rights of the Child (CRC), 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, paras 75-76

[42] CRC, General Comment No. 14, (op. cit.) para 3.

[43] CRC, General Comment No. 14, (op. cit.) para 69.

[44] HRC, General Comment No. 35, (op. cit.) para 18.

[45] Pini and Ors v Romania App Nos. 78028/01 and 7803/01, (22 June 2004), para 138.

[46] F.K.A.G. et al v. Australia, UN Human Rights Committee, Communication No. 2094/2011, Views of 20 August 2013, para 5.5.

[47] United Nations, Convention on the Rights of the Child, General Assembly Resolution 44/25, 20 November 1989

[48] E.H. et al v. Belgium, UN Committee on the Rights of the Child, Communication No. 55/2018, Views of 24 March 2022, para 13.4

[49] 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 the general principles regarding the human rights of children in the context of international migration, para 5. This reasoning was similarly emphasised in CRC, Report of the 2012 Day of general discussion, The Rights of all children in the context of international migration, para 78.

[50] JCMW/C/GC/4-CRC/C/GC/23, para 5.

18. The findings and recommendations of the United Nations Global Study on Children Deprived of Liberty (UN Global Study)[51] can assist this Court in considering the issues raised under Article 5 (1) ECHR as interpreted in accordance with the UN CRC.[52] The Global Study reaffirms that "*children shall only be detained if all other non-custodial measures have failed or are expected to fail. The test of whether deprivation of liberty as an absolutely exceptional measure is permissible under Articles 3 and 37 (b) CRC must be applied on a case-by-case basis and might lead to different results with respect to the different situations of deprivation of liberty*".[53]
19. The UN Global Study, on the basis of a comprehensive analysis of decisions and opinions of various UN treaty bodies,[54] UN special procedures,[55] UN agencies, regional organisations and courts,[56] also observes the practice of an increasing number of States to stop and prohibit migration-related detention of children. This best practice seems to underline the opinion of international and regional human rights experts that "*there are always alternatives to detention that meet States' legitimate objectives in responsibly governing international migration, without depriving children of the right to personal liberty for reasons relating to their, or their parents' migration status. Both migrant families with children as well as unaccompanied or separated children can always be lodged in open family-type and community based settings*".[57]
20. In a joint General Comment, the CRC and the CMW held that "*the possibility of detaining children as a measure of last resort, which may apply in other contexts such as child criminal justice, is not applicable in immigration proceedings as it would conflict with the principle of the best interest of the child and the right to development*".[58] On the basis of this interpretation, the two UN treaty monitoring bodies concluded that "*child and family immigration detention should be prohibited by law and its abolishment ensured in policy and practice. Resources dedicated to detention should be diverted to non-custodial solutions carried out by competent child protection actors engaging with the child and, where applicable, his or her family*".[59]
21. The UN Global Study arrived at the same conclusion but on the basis of a different legal interpretation of Article 37 (b) UN CRC. While for the two treaty bodies this provision "*is not applicable in immigration proceedings*", the Global Study does apply Article 37 (b) to all forms of deprivation of liberty, including migration related detention. By explicitly applying this strict standard of "*measure of last resort*" to every form of deprivation of liberty, the Global Study concludes that purely migration related detention of children, as distinguished from other forms of detention, above all in the context of criminal justice, can never be justified as a measure of last resort. Since migrant and refugee children, whether unaccompanied, separated or travelling with their family, have not committed any crime and are not per se dangerous, there are always non-custodial alternative measures available, meaning that the detention would violate the standard of a measure of last resort.[60] While the two treaty bodies conclude that purely migration related detention of children violates the best interests of the child in Article 3 UN CRC and the child's right to development in Article 6 UN CRC, the Global Study

[51] Manfred Nowak (Independent Expert), The United Nations Global Study on Children Deprived of Liberty, Geneva 2019 (reprint 2020), https://omnibook.com/Global-Study-2019, in particular Chapter 11 on 'Children Deprived of Liberty for Migration Related Reasons'. See also the Executive Summary, Geneva 2020.

[52] In view of the practice of interpreting ECHR provisions in the light of other international texts and instruments, see: Tyrer v. the United Kingdom, App No. 5856/72 (25 April 1978), para 31; Marckx v. Belgium, App No. 6833/74 (13 June 1979), para 41; Christine Goodwin v. the United Kingdom [GC] App No. 28957/95 (11 July 2002), para 85; Demir and Baykara v. Turkey [GC], App no. 34503/97, (12 November 2008) paras 65-86; Hassan v. the United Kingdom [GC], App No. 29750/09, (16 September 2014), para 102.

[53] UN Global Study op. cit. p. 71.

[54] For instance, see: CRC, General Comment No. 6 (2005), CRC/GC/2005/6, para 61: "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"; 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, 16 November 2017, CMW/C/GC/4-CRC/C/GC/23, para 10.

[55] For instance, see UN Docs A/HRC/13/30, para 60 (2010) and A/HRC/20/24, para 41 (2012). See also Global Study op. cit., 448 f

[56] See UN Global Study op. cit. p. 448 ff with further references.

[57] UN Global Study op. cit., p. 451.

[58] See CMW/C/GC/4-CRC/C/GC/23, para 10.

[59] See CMW/C/GC/4-CRC/C/GC/23, para 12.

[60] UN Global Study op. cit., p. 451.

concludes that Article 37 (b) is the main provision of the UN CRC violated in case of purely migration-related detention of children. These rights and principles are mutually reinforcing rather than conflicting with each other.[61]

22. Moreover, under EU law the CFR enshrines the principle of best interests of the child. Article 24 CFR provides for the rights of the child and the explanations make clear that it is intended to mirror the UN CRC.[62] Article 24 sets out that the best interests of the child must be a primary consideration in all actions relating to children.[63]
23. This provision has to be understood in light of CJEU jurisprudence in cases regarding unaccompanied minors. The CJEU ruled that in cases affecting children Member States must carry out in-depth assessments of the situation of the minor concerned, taking into account the best interests of the child.[64] Furthermore, the CJEU reiterated that, "*Member States must in particular take due account of factors such as the minor's well-being and social development, taking into particular consideration the minor's background such as safety and security considerations*."[65]
24. In situations where the age of a minor is contested, such as a person in an age assessment procedure, the presumption of minority should be applied and the person concerned must be treated as a child and be able to enjoy the rights and protection that a child would receive.[66] This should be carried out in acknowledgement that '*age assessment is not absolutely precise*'[67], should a doubt remain, Member States shall '*treat the person as a child and grant the right to appeal age assessment decisions'*.[68] Most recently, in *Darboe and Camara v. Italy* concerning an applicant for international protection who despite claiming that he was a minor was kept in an adult reception centre for over four months before being transferred to accommodation for children once his minority was recognised, this Court held that "*the Italian authorities failed to apply the principle of presumption of minor age, which the Court deems to be an inherent element of the protection of the right to respect for private life of a foreign unaccompanied individual declaring to be a minor. While the national authorities' assessment of the age of an individual might be a necessary step in the event of doubt as to his or her minority, the principle of presumption implies that sufficient procedural guarantees must accompany the relevant procedure.*"[69]
25. The interveners draw this Court's attention to reports from the medical community and Ombudsmen in many EU Member States which criticise the use of medical examinations for age assessment, as these are unsuitable, inaccurate and unethical.[70] Hence, notwithstanding all the safeguards in place- which

[61] UN Global Study op. cit., p. 451.
[62] European Union, Explanations relating to the Charter of Fundamental Rights, 2007/ C 303/02, (14 December 2007).
[63] European Union, Charter of Fundamental Rights of the European Union, 26 October 2012, C 326/02.
[64] CJEU Judgment of 14 January 2021, TQ C-441/19, ECLI:EU:C:2021:9, paras 46, 60.
[65] CJEU Judgment of 12 November 2019, Zubair Haqbin C-233/18, ECLI:EU:C:2019:956, para 54.
[66] 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 the general principles regarding the human rights of children in the context of international migration, 16 November 2017, CMW/C/GC/3-CRC/C/GC/22; Council of Europe, A guide for policy makers: Age assessment for children in migration, December 2019.
[67] Cole (2015), pp. 387-388: 'The unpalatable truth is that physical maturation is problematic for assessing age. […] The use of developmental markers, be they skeletal, dental or other, for age assessment purposes, is imperfect and where they are used the quality of their evidence should be challenged.'. See also Roscam Abbing (2011), p. 20.
[68] Ibid.
[69] Darboe and Camara v. Italy, App No. 5797/17, (21 July 2022), paras 153-154.
[70] See, in particular, Commission Nationale Consultative des Droits de l'Homme (CNCDH) (2014) Avis sur la situation des mineurs isolés étrangers présents sur le territoire national. Etat des lieux un an après la circulaire du 31 mai 2013 relative aux modalités de prise en charge des jeunes isolés étrangers (dispositif national de mise à l'abri, d'évaluation et d'orientation), para. 12 : "[…] la CNCDH entend rappeler qu'il n'existe à ce jour aucune méthode médicale sûre de détermination de l'âge et recommande en conséquence qu'il soit mis fin à tout examen physique pour conclure à la minorité ou à la majorité d'un jeune isolé étranger. Dans ces conditions, elle regrette que l'article 25.5 de la directive 2013/32/UE du 26 juin 2013 relative aux procédures communes pour l'octroi et le retrait de la protection internationale reconnaisse la possibilité aux Etats « de procéder à des examens médicaux afin de déterminer l'âge d'un mineur non accompagné dans le cadre de l'examen d'une demande de protection internationale ». " and P. J. J. Sauer, A. Nicholson & D. Neubauer (on behalf of the Advocacy and Ethics Group of the European Academy of Paediatrics) (2016) Age determination in asylum seekers: physicians should not be implicated, European Journal of Pediatrics, 175:3, p. 302: 'The European Academy of Paediatrics strongly recommends all paediatricians in Europe not to participate in the process of age determinations in minor asylum seekers stating they are minors. It also recommends all paediatricians to convey this opinion to all other physicians. All physicians should let the representatives in their countries know that they oppose the asylum Procedures Directive (2005/85/EC) according to which the member states may use medical examinations to determine age in relation to the procedure of an asylum

constitute the minimum Member States are bound to respect[71] –more and more Member States are distancing themselves from medical examinations and are introducing less intrusive age assessment procedures.[72] Furthermore, the CRC has said that comprehensive assessments of age, which are carried out in a child-friendly and culturally appropriate manner are needed as opposed to medical assessments which may be inaccurate, have wide margins of error and can also be traumatic for applicants.[73] This has been reiterated in CRC jurisprudence alongside the recommendation that the benefit of the doubt to be given to the individual being assessed.[74]

26. **The interveners submit that best interests of the child are an overriding consideration and must therefore be assessed in all cases relating to children including when deprivation of liberty is at stake. Furthermore, where there is doubt as to age of the person concerned and their corresponding rights, the presumption of minority should be applied. The interveners emphasise this Court's findings that children's vulnerability can mean that their deprivation of liberty has been violated in situations where it may not have been for adults.**

IV. Lawfulness of detention and guarantees under Article 5 (4)

27. The safeguards against arbitrariness contained in Article 5 (1), and the associated prohibitions contained in Article 3 ECHR are rendered ineffective unless the detained individual is able in law and in practice to take proceedings to establish whether the deprivation of liberty and the conditions of detention are lawful. This is even more crucial when the detained individual asserts that he or she is a child.[75] The right to challenge the lawfulness of detention judicially under Article 5 (4) is a fundamental and non-derogable protection against arbitrary detention, as well as against torture or ill-treatment in detention. This is similarly the case with Article 9 (4) ICCPR of which the right to take proceedings against the lawfulness of detention has been clarified as non-derogable.[76] It is a *lex specialis* over and above the general requirements of Article 13 ECHR (discussed below in Section V). It requires that persons subject to any form of deprivation of liberty have effective access to an independent court or tribunal to establish the lawfulness of their detention while they are detained, and not just afterwards[77] and that they or their representative have the opportunity to be heard before the court.[78] Presence in court, either in person or through a representative, is an important safeguard against violations of Article 3. Article 5 (4) requires a specific remedy to the protect the liberty of the detained individual rather than an opportunity to complain generally about the proceedings leading to their detention.[79] The possibility to access such a procedure is an obligation and *cannot* be left to the discretion or '*good will'* of the detaining authority.[80] The remedy must also be "*sufficiently certain, not only in theory but also in practice, failing which it will lack the accessibility and effectiveness required for the purposes of that*

application."

[71] See the European Commission's Action Plan, p. 38.

[72] Ombudsman, Decision MDE-2016-052, 26 February 2016.

[73] Joint General Comment No. 4 of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 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 4.

[74] CRC, NBF v. Spain, Communication No. 11/2017, (18 February 2019), para 12.4; CRC, DD v. Spain, Communication No. 4/2016, (12 February 2019), para 14.3.

[75] Popov v. France, App Nos. 39472/07 and 39474/07, (19 January 2012).

[76] UN Human Rights Committee (HRC), General comment no. 35, Article 9 (Liberty and security of person), 16 December 2014, CCPR/C/GC/35, para 67.

[77] See G.B. and Others v. Turkey, App no. 4633/15, (17 October 2019) para 183; Mooren v. Germany [GC], App No. 11364/03, (9 July 2009) para 106; and Ilnseher v. Germany [GC], App Nos. 10211/12 and 27505/14, (4 December 2018) para 251.

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

[79] Rakevich v. Russia, App No. 58973/00, (28 October 2003) paras 44 and 45; G.B. and Others v. Turkey, App No. 4633/15, (17 October 2019), para 178.

[80] Rakevich v. Russia, no. 58973/00, (28 October 2003), para 44.

provision".[81] To be practical and effective, detained persons must also be informed in a language they understand of the reasons for detention[82] and should have access to legal advice and interpretation.[83]

28. The Grand Chamber of this Court has affirmed that Article 5 (4) requires the lawfulness of detention to be determined by a speedy judicial decision.[84] In order to determine whether authorities complied with the '*speediness*' requirement, the Court will consider the circumstances of each individual case which includes the complexity of the proceedings, the conduct of domestic authorities and detainees, and what was at stake for the detained individuals.[85] The Court should consider the duration of proceedings as a whole – this includes lengthy intervals between decisions, or the time taken to obtain evidence or further information.[86] This has been further illustrated in previous cases, such as *G.B. v. Switzerland* where the Court indicated that when considering the circumstances of the case, it would consider the reasons for detention, any requests for release, the lapse in time of detention, and the overall duration of proceedings.[87]
29. In *GB and others v Turkey*, this Court also stressed that the deprivation of liberty may impact the fundamental rights of persons to such an extent that all judicial review proceedings concerning lawfulness of detention must be conducted with particular speed. It further noted that such judicial review would be "particularly urgent" in cases concerning vulnerable individuals.[88] The interveners note that the Court has recognised the broad consensus under international law against the administrative detention of minors in the context of immigration controls and thus in cases where minors have been deprived of their liberty, *"particular expedition and diligence are required on the part of the domestic courts in reviewing the lawfulness of their detention*".[89]
30. **The interveners emphasise that 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 in the context of immigration control. Access to legal aid and advice is important in ensuring the accessibility and effectiveness of judicial review,[90] 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) and the adequacy of judicial review under Article 5 (4).[91]**
31. The interveners call attention to the relevant provisions of EU law, in particular rRCD[92]. According to the rRCD, applicants may only be detained for as short a period as possible and for as long as the detention grounds are relevant.[93] The rRCD also requires that detainees shall have access to a speedy judicial review of the lawfulness of detention. Where applicants' detention is found to be unlawful, they should be released immediately.[94]

V. Effective remedies and procedural guarantees against detention under Article 13 ECHR

[81] G.B. and Others v. Turkey, App No. 4633/15, (17 October 2019), para 163.
[82] M.S. v. Slovakia and Ukraine, App No. 17189/11, (11 June 2020), para 141.
[83] M.S. v. Slovakia and Ukraine, App No. 17189/11, (11 June 2020), para 143.
[84] Mooren v. Germany [GC], App No. 11364/03, (9 July 2009), para 106.
[85] Mooren v. Germany [GC], App No. 11364/03, (9 July 2009), para 106. See also G.B. v. Switzerland, App No. 27426/95, (30 November 2000), paras 33-39; Musiał v. Poland [GC], App No. 24557/94, (20 January 2009), para 43.
[86] Baranowski v. Poland, App No. 28358/95, (28 March 2000), para 73.
[87] G.B. v. Switzerland, op.cit., paras 34-35; Baranowski v. Poland, op. cit., paras 61, 63, 68.
[88] G.B. and Others v. Turkey, App No. 4633/15, (17 October 2019), para 166.
[89] G.B. and Others v. Turkey, op. cit., para 167.
[90] Louled Massoud v Malta, op. cit. para 61.
[91] 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.
[92] Directive 2013/33/EU of 26 June 2013 laying down standards for the reception of applicants for international protection (recast)
[93] rRCD Article 9 (1) and (2).
[94] rRCD Article 9 (3).

32. Article 13 ECHR guarantees the right to access a remedy at the national level to enforce the substance of Convention rights and freedoms.[95] A remedy must be effective both in practice and in law and not unjustifiably hindered by the acts or omissions of the relevant authorities.[96] The Court has noted that where arguable complaints[97] are raised regarding inhuman and degrading conditions of detention, an remedy to be effective should have the possibility to improve the material conditions of detention, or where there is a breach of Article 3 ECHR, to put an end to the ongoing violation and subjected to inhuman and degrading treatment.[98] Detained persons must have access to an effective remedy within the meaning of Article 13 during the course of detention. A domestic remedy procedure should have the capacity to offer effective redress and function effectively in practice.[99]
33. This Court has indicated that an effective domestic remedy in this context would examine the admissibility and merits of the complaints during the time of detention. During this time, the relevant examining authority or mechanism should have regard for the vulnerability of the individual as well as the known conditions of detention in the facility. In such cases, the relevant authority should show necessary diligence in reviewing the applicants' complaints and the mechanism should have the capacity to provide an urgent reaction.[100]
34. This Court has noted that the special importance attached to Article 3 ECHR means that States are required to establish over and above a compensatory remedy an effective mechanism to put an end to treatment prohibited by Article 3.[101]
35. Article 47 of the EU Charter of Fundamental Rights guarantees the right to an effective remedy and to a fair trial. This right provides that all persons are entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal.[102] The preamble of the recast Reception Conditions Directive further provides that applicants held in detention should have effective access to necessary procedural guarantees, including a judicial remedy before a national authority.[103]
36. In accordance with the International Covenant on Civil and Political Rights, States must ensure that persons whose rights have been violated must have access to an effective remedy. This right should be determined before a competent judicial, administrative or legislative authority or by any other competent authority designated by the State. States must ensure that access to effective remedies is enforced by the relevant authorities.[104]
37. **The interveners stress that all those who have been deprived of their liberty should have an effective access to a fair and effective remedy at national level, in accordance with EU and international law**.

[95] Neshkov and Others v. Bulgaria, App Nos. 36925/10 and 5 others, (27 January 2015), para 180.
[96] See for example, El-Masri v. the former Yugoslav Republic of Macedonia [GC], App No. 39630/09, (13 December 2012), para 255.
[97] G.B. and Others v. Turkey, op. cit., paras 125-126.
[98] G.B. and Others v. Turkey, op. cit. para 129; Neshkov and Others v. Bulgaria, App Nos. 36925/10 and 5 others, (27 January 2015), paras 185- and 186.
[99] G.B. and Others v. Turkey, op. cit., para 131.
[100] G.B. and Others v. Turkey, op. cit. para 134; See also: Popov v. France, op. cit., para 103; Muskhadzhiyeva and Others v. Belgium, App No. 41442/07, (19 January 2010), para 63.
[101] G.B. and Others v. Turkey, op. cit., para 136.
[102] EU Charter of Fundamental Rights, Article 47.
[103] rRCD preamble para 15
[104] ICCPR Article 2 (3)(a)-(c)