

EUROPEAN COURT OF HUMAN RIGHTS

Application Nos. 40002/22

BETWEEN:

V.M. and Others

Applicant

v.

Poland

Respondent

WRITTEN SUBMISSIONS ON BEHALF OF THE INTERVENORS

The AIRE Centre (Advice on Individual Rights in Europe) and ECRE (the European Council on Refugees and Exiles), and the ICJ (International Commission of Jurists).

pursuant to the Registrar's notification dated 26th May 2023 on the Court's permission to intervene under Rule 44 § 3 of the Rules of the European Court of Human Rights

19th June 2023

I. The engaged obligations of Contracting Parties under Article 3

1. The obligation of the State Parties under Article 3 of the European Convention of Human Rights (ECHR) requires States to ensure that no individuals within their jurisdiction are subjected to prohibited ill-treatment.¹
2. To fall within the scope of Article 3, ill-treatment “*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*”.² This Court will also consider factors, such as the context of the ill-treatment and whether the individuals are in a particularly vulnerable situation.³
3. Article 3 includes the obligation to identify and pay special attention to the needs of those in vulnerable situations, irrespective of whether authorisation to enter the territory has been granted or if the person has irregular migration status.⁴ This Court recognises that asylum seekers are members of a “*particularly underprivileged and vulnerable population*”.⁵ They often have few resources and can only rely on the State for assistance.
4. As regards child asylum seekers, the Court recognises their enhanced vulnerability, as children and as asylum seekers, which must be a primary consideration, taking precedence over other’s arising from their irregular migration status.⁶ The Court has recognised the right of children to have their best interests assessed and taken as a primary, and in some contexts, paramount consideration.⁷ In *Rahimi v. Greece*,⁸ the Court confirmed that in all actions relating to children, conformity with Article 53 ECHR (see below) requires a best interests assessment be undertaken separately and prior to any decision that will affect that child’s life.⁹
5. In the context of the **administrative detention of children**, the Court has found a violation of Article 3 on the basis of a combination of three factors: the child’s young age, the length of detention and the unsuitability of the premises taking into account the specific needs of children.¹⁰ The Court has emphasised **that the passage of time is of primary significance**, holding that irrespective of whether the conditions of detention alone fall below severity of ill-treatment threshold under article 3, the repeated and accumulated effects of deprivation of liberty may taken together meet the threshold. As a result, children may experience psychological and emotional harm due to prolonged detention which may bring the detention within the Article 3 threshold.¹¹

¹ *Hirsi Jamaa and Others v. Italy*, no. 27765/09, § 70 and § 114, 23 February 2012.

² *M.S.S v. Belgium and Greece* [GC] no. 30696/09, § 219, 21 January 2011; *Sufi and Elmi v. United Kingdom*, nos. 8319/07 and 11449/07, § 213, 28 June 2011.

³ *Khlaifia and Others v. Italy* [GC], no. 16483/12, § 160, 15 December 2016.

⁴ *Saadi v. the United Kingdom* [GC], No. 13229/03, § 66, 29 January 2008; *Mohamad v. Greece*, No. 70586/11, § 44, 11 December 2014.

⁵ *M.S.S v. Belgium and Greece* [GC], no. 30696/09, § 251, 21 January 2011.

⁶ *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, no. 13178/03, § 55, 12 October 2006.

⁷ *Neulinger and Shuruk v. Switzerland*, no. 41615/07, § 135, 6 July 2010; *Yousef v. Netherlands*, no. 33711/96, § 73, 5 February 2003; *Wagner and J.M.W.L. v. Luxembourg*, no.76240/01, § 133, 28 September 2007.

⁸ *Rahimi v. Greece*, no. 8687/08, § 108, 5 April 2011.

⁹ See EASO, ‘Practical Guide on the Best Interests of the Child in Asylum Procedures’, 2019, p.17, p.25.

¹⁰ *A.M. and others v. France*, No. 7534/20, 4 May 2023, § 9.

¹¹ *A.M. and others v. France*, No. 7534/20, 4 May 2023, § 14. See also: *A.B. and Others v. France*, no. 11593/12, § 109 and 114, 12 July 2016.

6. The fact that a child may be accompanied by a parent does not relieve national authorities of the obligation to protect children from treatment in breach of Article 3.¹² In cases where the Court has found the detention of children fell within the scope of Article 3, similar finding might apply to the mother in light of the inseparable bonds and emotions shared between a mother and child.¹³ The Court found an Article 3 violation in such a context in *M.D. and A.D. v. France*. After concluding that the detention of a 4-month-old baby amounted to proscribed ill-treatment, the Court also found a breach of Article 3 with regard to the mother due to, *inter alia*, the inseparable bond between the mother and her baby.¹⁴ The Court highlighted that “*the particularly vulnerable situation of the minor child is decisive and takes precedence over the parent’s status as an illegal resident alien.*”¹⁵
7. The Court has previously taken into account the vulnerability of pregnant women and their children. In *R.R. and Others v. Hungary*, the Court considered *inter alia*, the children’s young age and the mother’s pregnancy and found that the conditions of detention were inadequate in view of these particular vulnerabilities.¹⁶ In that case, the Court also took into consideration, *inter alia*, whether there had been opportunities for the applicants to access medical attention.¹⁷ Similarly, in *Shioshvili and Others v. Russia*, the Court found a violation of Article 3 where the applicant, who was eight months pregnant, had not been afforded adequate access to healthcare.¹⁸ In reaching this conclusion, the Court noted the very special circumstances of the case, namely that the applicant was in a ‘*very vulnerable position*’ and indifference towards her ‘*extremely difficult situation*’ was shown by the state authorities.¹⁹ In *H.M. and Others v. Hungary*, although the authorities had provided essential medical attention to a pregnant woman, the Court found that “*the constraints inherent during confinement, to which she was subjected through her advanced stage of pregnancy, must have caused her anxiety and psychological suffering*” contrary to Article 3.²⁰
8. In the context of detention, this Court also ruled that article 3 would be engaged in a situation where there is “*detriment to ... physical or mental condition, or avoidable suffering of a certain intensity, or an immediate risk of such detriment or suffering*”.²¹ In a case concerning an applicant with medical problems stemming from past domestic abuse, the Court noted that the authorities should have been aware of the consequences that detention, which lasted for almost seven months, would have on the applicant’s mental health.²²
9. In the context of persons deprived of their liberty in prisons, the Court has maintained that the deterioration of the applicant’s health in detention does not in itself amount to a violation of Article 3 if the State has “*in timely fashion resorted to all reasonably possible*

¹² *A.M. and others v. France*, No. 7534/20, 4 May 2023, § 8.

¹³ *A.M. and others v. France*, No. 7534/20, 4 May 2023, § 16.

¹⁴ *M.D. and A.D. v. France*, no. 57035/18, § 71, 22 October 2021.

¹⁵ *M.D. and A.D. v. France*, no. 57035/18, § 65, 22 October 2021.

¹⁶ *R.R. and Others v. Hungary*, no. 36037/17, § 52, 2 March 2021.

¹⁷ *R.R. and Others v. Hungary*, no. 36037/17, § 62, 2 March 2021.

¹⁸ *Shioshvili and Others v. Russia*, no. 19356/07, § 85, 20 December 2016.

¹⁹ *Shioshvili and Others v. Russia*, no. 19356/07, § 86, 20 December 2016.

²⁰ *H.M. and Others v. Hungary*, no. 38967/17, § 18, 2 June 2022.

²¹ *Moxamed Ismaaciil and Abdirahman Warsame v. Malta*, nos. 52160/13 and 52165/13, § 83, 84, 96, 12 January 2016.

²² *W.O. and Others v. Hungary*, no. 36896/18, § 5 and 12, 25 August 2022.

medical measures in a conscientious effort to hinder development of the disease".²³ On the contrary, States have an obligation under Article 3 to ensure in a timely fashion all reasonably possible medical measures and that a comprehensive record is kept of the detained individual's state of health and treatment provided; and that supervision is regular and systematic.²⁴

10. **The intervenors submit that when assessing the threshold of severity to establish a violation under Article 3 ECHR, the Court must take into consideration the vulnerability of the applicants and the cumulative effects of the conditions and treatment to which the applicants were subjected. This includes consideration of the applicant's age, sex and state of health on entry to the detention facility, the development or deterioration of their health condition, and whether lack of medical assistance led to avoidable suffering or risk of such suffering.**

II. The engaged obligations of Contracting Parties under Article 5 (1) (f)

11. Under Article 5, individuals must not be unlawfully or arbitrarily detained.²⁵ For detention not to be arbitrary, it must be carried out in good faith and be closely connected to the purpose of preventing unauthorised entry or deportation. The place and conditions of detention should be appropriate,²⁶ and there must be a relationship between the ground of deprivation of liberty and the place and conditions of detention.²⁷ It should be taken into account that "*the measure is applicable not to those who have committed criminal offences but to aliens who, often fearing for their lives, have fled from their own country*".²⁸ The length of detention must not exceed the time necessary to achieve the aim pursued under Art 5(1)(f) by the deprivation of liberty.²⁹
12. Detention measures must be **implemented in good faith and not automatically**: national authorities must consider whether there are suitable alternatives and individually assess the need for detention, particularly where an individual is vulnerable.³⁰ A decision to place an individual in detention without an individual assessment of the particular needs of the person would therefore amount to a violation of Article 5 (1)(f) ECHR.³¹

a. Immigration detention of children

13. The Court's well-established case-law shows that, as a general principle, the detention of young children should presumptively be avoided and where children are detained in

²³ *Goginashvili v. Georgia*, no. 47729/08, §71, 8 March 2012.

²⁴ See *Blokhin v. Russia* [GC], no. 47152/06, § 136-137, 23 March 2016.

²⁵ *McKay v the United Kingdom* [GC], no. 543/03, §30, 3 October 2006; *Amuur v France*, no. 19776/920, §50, 25 June 1996; *Chahal v the United Kingdom*, no. 22414/93, §118, 15 November 1996; *Saadi v the United Kingdom* [GC], no. 13229/03, §66, 29 January 2008; *Al Husin v Bosnia and Herzegovina*, no. 3727/08, §65, 25 September 2019; *Abdi v the United Kingdom*, no. 27770/08, §68, 9 July 2013; *Azimov v Russia*, no. 67474/11, 18 April 2013; *Suso Musa v Malta*, no. 42337/12, §93, 23 July 2013; and *Akram Karimov v Russia*, no. 62892/12, §144, 28 May 2014.

²⁶ *Saadi v the United Kingdom* [GC], no. 13229/03, §74, 29 January 2008; *Gebremedhin v. France*, no. 25389/05, § 74, 26 July 2007.

²⁷ *Aerts v. Belgium*, no. 61/1997/845/1051, § 46, 30 July 1998.

²⁸ *Amuur v France*, no. 19776/920, §43, 25 June 1996

²⁹ *Saadi v. the United Kingdom* [GC], No. 13229/03, §74, 29 January 2008

³⁰ *Thimothawes v. Belgium*, no. 39061/11, § 72, 4 April 2017

³¹ *Thimothawes v. Belgium*, no. 39061/11, § 72 and 73, 4 April 2017

unsuitable conditions, this may **in itself** be sufficient to find a violation of Article 5 (1), whether accompanied by an adult or not.³² Placing children in detention centres must generally be avoided and their deprivation of liberty is only compatible with the Convention if it is for a short period of time and if the conditions are suitable.³³ The Court has consistently held that placing children with their parents in a detention centre will only be compatible with Article 5 (1) (f) ECHR where national authorities have assessed that the use of detention had been a measure of last resort for which no alternative involving a lesser restriction of their freedom of movement was available.³⁴ Any exceptional decision to detain children in the context of immigration decisions, will always be conditioned up on national authorities adhering to these principles and exhausting alternative possibilities. For example, the Court considered that the authorities had failed to assess whether alternatives to detention were available when they prolonged the child's detention, despite the fact that the refugee status determination proceedings had been pending for more than six months and had been extended for two consecutive months.³⁵ The Court has made it clear that if children are detained authorities must act with greater speed and diligence.³⁶

14. The intervenors note that this Court takes into account the increasing consensus among international bodies, including supervisory bodies of UN human rights treaties³⁷ and the Council of Europe,³⁸ which calls on States to eradicate immigration detention of children.³⁹ It is due to the specific and double vulnerability of child asylum seekers that the Court has maintained that any deprivation of liberty of children must be necessary to achieve the aim a State is purporting to pursue, namely to ensure the family's removal.⁴⁰ In this connection, this Court has also established that placing unaccompanied⁴¹ or accompanied⁴² children in detention in the same conditions as adults constitutes an arbitrary deprivation of liberty since the conditions of detention are not adapted to their situation of vulnerability.
15. This Court has also taken into consideration the ways in which the well-being of children may be protected in the context of detention decisions. A decision to detain children will not necessarily be in the child's best interest simply because that decision keeps the family (accompanying parent) together.⁴³ In *Nikoghosyan and Others v. Poland*, the

³² *Nikoghosyan and Others v. Poland*, no. 14743/17, § 64 and 86, 3 March 2022

³³ *Bilalova and Others v. Poland*, no. 23685/14, § 79, 26 July 2020; *Nikoghosyan and Others v. Poland*, no. 14743/17, § 86, 3 June 2022.

³⁴ *Popov v. France*, no. 39472/07 and 39474/07, §119, 19 April 2012; *A.B. and Others v France*, no. 11593/12, § 74, 12 July 2016. *Nikoghosyan and Others v. Poland*, no. 14743/17, § 86, 3 June 2022.

³⁵ *Bilalova and Others v. Poland*, no. 23685/14, § 79, 26 July 2020.

³⁶ *Nikoghosyan and Others v. Poland*, no. 14743/17, § 86 and 88, 3 June 2022.

³⁷ This includes reference to the relevant General Comments and Recommendations of UN Treaty Bodies. These are addressed in section III of this submission under the relevant standards and provisions of the international law.

³⁸ Council of Europe PACE, Resolution 2020 (2014), Assembly debate on 3 October 2014 (36th Sitting) (see Doc. 13597, report of the Committee on Migration, Refugees and Displaced Persons, rapporteur: Ms Tinatin Bokuchava). Text adopted by the Assembly on 3 October 2014 (36th Sitting).

³⁹ *G.B. and Others v. Turkey*, no. 4633/15, § 151 and 168, 17 October 2019. *Nikoghosyan and Others v. Poland*, no. 14743/17, § 65, 3 June 2022.

⁴⁰ *A.B. and Others v France*, no. 11593/12, 12 July 2016.

⁴¹ *Mubilanzila Mayeka*, no. 13178/03, §103, 12 October 2006.

⁴² *Muskhadzhiyeva and others v. Belgium*, no. 41442/07, § 74, 19 April; *Karagaratnam and others v Belgium*, no. 15297/09, §87, 13 March 2012.

⁴³ *Nikoghosyan and Others v. Poland*, no. 14743/17, § 84, 3 June 2022.

Court found a violation of Art 5 (1) (f) ECHR with regard to the adult and child applicants on account of their detention for a period of six months without a prior thorough and individualised assessment of whether detention was a measure of last resort in light of their needs.⁴⁴ The intervenors submit that States must take all possible steps to avoid the detention of families accompanied by children. Even when claiming this measure as a last resort, states must have considered and exhausted all suitable alternatives.⁴⁵

16. **The intervenors submit that detention of children both accompanied and unaccompanied will be arbitrary under Article 5(1)(f) ECHR where, among other grounds, no adequate consideration has been given to a child's individual circumstances or where detention will not meet the particular needs of the child.⁴⁶ The detention of families will be incompatible with Article 5(1)(f) ECHR, both as regards the parents and accompanying children, if the authorities have not taken all the necessary steps to limit the detention, temporally, as far as possible, and in any event detention may never be prolonged.**

b. Immigration detention of adults in vulnerable situations

17. In the application of Article 5(1)(f) ECHR, particular consideration must be given to alternatives to detention for persons or groups in vulnerable situations, for the detention to be in good faith and free from arbitrariness. The detection of special needs linked to an individual's vulnerability and the availability (or lack thereof) of appropriate facilities to meet those needs is critical to deciding whether to detain or to continue the detention, as well as to determining whether, in the circumstances, the deprivation of liberty would ultimately be lawful. The lack of services within the detention estate capable of addressing the needs related to specific vulnerabilities satisfying requires the implementation of alternatives to detention. Indeed, the vulnerability and associated needs of an individual may exclude the possibility of detention altogether, as depriving the individuals concerned of their liberty in such circumstances may be unlawful.⁴⁷
18. Moreover, States must make a specific assessment of the eventuality that detention may have a detrimental effect on health and well-being, particularly when dealing with individuals in a vulnerable condition.⁴⁸ **The intervenors submit that in the immigration context, no decision to detain should be made without an informed assessment as to whether that detention will adversely affect the health or well-being of the person concerned.⁴⁹**
19. Furthermore, this Court has clarified, in other contexts, that the identification of vulnerability cannot rely solely on the applicant's self-identification, particularly in cases involving domestic violence given that "*the problem may not always surface since it often takes place within personal relationships or closed circuits*".⁵⁰

⁴⁴ *Nikoghosyan and Others v. Poland*, no. 14743/17, § 88, 3 June 2022.

⁴⁵ *Nikoghosyan and Others v. Poland*, no. 14743/17, § 88, 3 June 2022.

⁴⁶ *O.M. v. Hungary*, no. 9912/15, § 53, 5 July 2016.

⁴⁷ *Khubodin v Russia*, no. 59696/00, § 93, 26 October 2006.

⁴⁸ *Chahal v the United Kingdom*, no. 22414/93, §113, 15 November 1996; *A v UK [GC]*, no. 3455/05, §164, 19 February 2009.

⁴⁹ *Thimothawes v. Belgium*, no. 39061/11, §§ 79-80, 18 September 2017.

⁵⁰ *Opuz v. Turkey*, no. 33401/02, §132, 9 June 2009.

20. **The intervenors submit that, in the case of particularly vulnerable adults, such as those who have been subjected to serious psychological or sexual violence, including gender-based and/or domestic violence, detention will be arbitrary under Article 5(1) ECHR where they are detained despite availability of other less coercive measures and whether the State knew or ought to have known that detention will detrimentally affect their state of health. This Court shall take into account the vulnerability of pregnant women, as recognised in the context of detention under Article 3, in the assessment of deprivation of liberty under Article 5(1) ECHR.**

III. Article 53 and relevant provisions of international and EU law

21. Article 53 ECHR prohibits a construction of Convention rights which would limit the human rights and fundamental freedoms ensured under any other agreement to which the respondent State is a party.

a. Relevant provisions of EU Law

22. The Court is thus invited to consider the relevant provisions of the Charter on Fundamental Rights of the European Union (CFR).⁵¹ **Article 6** provides for the right to liberty and security of person. **Article 24 CFR** provides that children have the right to protection and care as necessary for their well-being and that the best interests of the child must be a primary consideration in all actions concerning children.⁵² The CFR also provides that everyone has the right to health care and to benefit from medical treatment per **Article 35**. The intervenors also draw the attention of the Court to **Article 8** of the recast Reception Conditions Directive (rRCD). Assessing the lawfulness of the detention of individuals requires an individual examination of the necessity and proportionality of the proposed detention of the people concerned, including in light of their vulnerability. Detention can only be resorted to if less coercive measures cannot be applied effectively in the specific case.⁵³ This has been confirmed by the EU Court of Justice (CJEU)⁵⁴ stating 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.⁵⁵ The rRCD also provides in **Article 11(1)** that the health, including the mental health, of individuals in vulnerable conditions in detention shall be a primary concern and that States shall monitor and provide adequate support in light of each individual's specific situation,

⁵¹ Charter on fundamental rights of the European Union (CFR) Articles 2 and 3.

⁵² CFR, Article 24 (1) and (2).

⁵³ Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (Recast Reception Conditions Directive), Recital 15 and Article 8 para 2.

⁵⁴ CJEU, Judgment of 25 June 2020, Ministerio Fiscal (Authority likely to receive an application for international protection), C-36/20 PPU, EU:C:2020:495, paragraph 102

⁵⁵ CJEU, Judgment of 14 September 2017, K. v Staatssecretaris van Veiligheid en Justitie, C-18/16, ECLI:EU:C:2017:680, paragraphs 42 - 47

including their health. **Article 23 rRCD** provides specific guarantees for minors. The best interests of the child shall be a primary consideration and States shall ensure a standard of living adequate for the physical, mental, spiritual, moral and social development of the child. Per **Article 25(2) rRCD**, States must ensure that victims of torture, rape or other serious acts of violence receive the necessary treatment, in particularly medical and psychological care. The intervenors further observe that the provisions of the rRCD should be interpreted in accordance with the relevant provisions of the CFR.⁵⁶

23. This Court noted, in accordance with the rRCD,⁵⁷ “*the authorities were in principle required to ensure that material reception conditions are provided to asylum seekers*”⁵⁸ whilst also taking into account the specific situation of, vulnerable persons.⁵⁹ Under **Article 21 rRCD**, “vulnerable persons” include pregnant women, single parents with minor children and persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence. **The intervenors draw the Court’s attention to the fact that victims of gender-based violence, including domestic violence, are recognised as a vulnerable group in EU law.**

b. Relevant standards and provisions of international law

24. The intervenors also urge the Court to take into consideration UNHCR *Guidelines on Detention*, which stipulate that especially active consideration should be given to alternatives to detention for persons for whom detention is likely to have a particularly serious effect on their psychological well-being. Initial and periodic assessments of detainees’ physical and mental state, by qualified medical practitioners, shall be carried out.⁶⁰ Victims of torture and other physical, psychological or sexual violence, as well as pregnant women, should not be detained.⁶¹
25. These standards reinforce the general principle, set out in the UNHCR *Guidelines on Detention* (Guideline 4.3), the Council of Europe Twenty Guidelines on Forced Return (Guideline 6) and in PACE Resolution 1707 (2010) on Detention of Asylum Seekers and Irregular Migrants, that alternative measures should be given priority over detention of asylum seekers. PACE Resolution 1637 (2008) also recalls that vulnerable persons, including pregnant women, families with minors, persons with medical needs or victims of torture and sexual violence, shall not be detained.⁶²
26. This approach is reflected in the views of the UN Human Rights Committee, which in *C v Australia*,⁶³ found a violation of the right to liberty of an asylum seeker, detained despite his deteriorating mental health, where the respondent State “*ha[d] not*

⁵⁶ CFR, Preamble § 9 and 35.

⁵⁷ Directive 2013/33/EU (recast) laying down standards for the reception of applicants for international protection (rRCD) (29.6.2013),

⁵⁸ *R.R and Others v. Hungary*, no. 36037/17, § 54 and 58, 2 March 2021.

⁵⁹ *R.R and Others v. Hungary*, no. 36037/17, § 58, 2 March 2021. See also recast rRCD, Article 21.

⁶⁰ UNHCR, *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, Guideline 9, 2012.

⁶¹ *Ibid.*

⁶² Council of Europe PACE, Resolution 1637 (2008) on Europe’s boat people: mixed migration flows by sea into south Europe, § 9.6.

⁶³ UN Human Rights Committee (HRC), *C. v. Australia*, CCPR/C/76/D/900/1999, 13 November 2002, §8.3.

demonstrated that, in the light of the author's particular circumstances, there were not less invasive means of achieving the same ends”.

27. In its GC no. 35 on the right to liberty and security of person,⁶⁴ the Human Rights Committee stated that “[d]ecisions regarding the detention of migrants must also take into account the effect of the detention on their physical or mental health.”⁶⁵
28. The UN Committee on the Rights of the Child has urged Poland to ensure that children asylum seekers and families with children are not placed in guarded centres.⁶⁶ Furthermore, the intervenors note the UN Committee against Torture has expressed concern about the detention of families with children, the failure to identify individuals who are survivors of torture and the inadequate protection for survivors of sexual and gender-based violence.⁶⁷
29. The special vulnerability of refugee and asylum-seeking women is acknowledged in GR no. 32 of Committee on the Elimination of all forms of Discrimination Against Women.⁶⁸ The CEDAW Committee affirms that the Convention serves to prohibit sex and gender-based discrimination during the entire asylum process, throughout which women are entitled to be treated with respect and dignity at all times.⁶⁹ The Committee has recommended that gender sensitivity should be reflected in reception arrangements for particularly vulnerable groups of women, including refugee women.⁷⁰ UNHCR Guidelines state that women in detention who have been victims of sexual abuse shall receive adequate physical and mental health care.⁷¹
30. The CEDAW Committee has also made clear that alternatives to detention shall be made available in order to prevent violence against women. As regards pregnant women and nursing mothers, who both have special needs, the Committee has clarified that, as a general rule, they should not be detained.⁷² Furthermore, UNHCR Guidelines establish that detaining single migrant women with accompanying children may also deteriorate the well-being of the children who might be left without support or care.⁷³
31. The CEDAW Convention also recognises the right to equal access to health care: States shall ensure equal access to health care services and appropriate services in connection with pregnancy and the post-natal period.⁷⁴ In GR No. 24, the Committee affirms that special attention should be paid to the health needs of women from

⁶⁴ HRC General comment No. 35 Article 9 (Liberty and security of person), CCPR/C/GC/35, 16 December 2014.

⁶⁵ See § 18.

⁶⁶ UN CRC, Concluding observations on the combined fifth and sixth periodic reports of Poland, CRC/C/POL/CO/5-6, §41b, 6 December 2021.

⁶⁷ UN CAT Concluding observations on the seventh periodic report of Poland, CAT/C/POL/CO/7, 29 August 2019, §25.

⁶⁸ The Contracting Party became a signatory to CEDAW on 29 May 1980 and ratified it on 30 July 1980.⁶⁸ CEDAW seeks to promote women’s rights and is aimed at ending all forms of discrimination against women, including discrimination based not only on gender, but grounds of age, nationality, immigration status, and religion etc

⁶⁹ UN CEDAW, General recommendation No. 32 on the gender-related dimensions of refugee status, asylum, nationality and statelessness of women, CEDAW/C/GC/32, § 10, 11 and 14, 5 November 2014.

⁷⁰ See § 48.

⁷¹ UNHCR, Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention, Guidelines 4.3, 9.1 and 9.3, 2012.

⁷² UN CEDAW General recommendation No. 32 on the gender-related dimensions of refugee status, asylum, nationality and statelessness of women, CEDAW/C/GC/32, §34, 5 November 2014.

⁷³ UNHCR, Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention, Guideline 9, 2012.

⁷⁴ CEDAW, Article 12.

vulnerable and disadvantaged groups including migrant women and refugees and internally displaced women.⁷⁵ States have an obligation to take appropriate measures and to the maximum extent of available resources to ensure that women are guaranteed access to health care.⁷⁶ The Committee has called on States to take measures to ensure appropriate services in connection with pregnancy and maternal health to guarantee to all women, including those in vulnerable groups, the right to safe motherhood.⁷⁷ In GR No. 35, the Committee clarifies that violations of women's sexual and reproductive health, including denial or delay of post-abortion care, is a form of gender-based violence and may amount to torture or inhuman or degrading treatment.⁷⁸

32. At a Council of Europe level, the special vulnerability of asylum-seeking women has also been recognised by the Convention on preventing and combating violence against women and domestic violence (the "Istanbul Convention"), which provides for a number of protection obligations on State Parties, including the obligation to introduce gender-sensitive procedures, guidelines and support services in the asylum process.⁷⁹ The Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO) noted with concern that women victims of gender-based violence were being detained in Poland, often with accompanying children.⁸⁰
33. When parents are detained solely for the purposes of immigration control, detaining their non-national children with them on the sole premise of maintaining family unity, without any considerations of achieving the same result by resorting to less coercive measures, violates a number of obligations under the UN Convention on the Rights of the Child, including the of the best interests of the child principle. Indeed, in the context of child detention, the best interests of the child principle should prevail over the mere interest of immigration control and should be used as the key evaluation tool in all decisions affecting asylum-seeking children. The UN Committee on the Rights of the Child and the Committee on Migrant Workers have jointly determined that the detention of children in the immigration context is incompatible with the convention on the rights of the child and the convention on the rights of migrant workers.⁸¹ The Joint GC notes that detention of children may have a negative impact on the mental health and development of the child, even for short periods and even where accompanied by a parent. As a general principle, a child may be deprived of liberty only as a last resort and for the shortest appropriate period of time.⁸²

⁷⁵ UN CEDAW General recommendation No. 24 on Article 12 of the Convention (Women and Health) (1999), A/54/38/Rev.1, § 6.

⁷⁶ See § 17.

⁷⁷ See § 26 and 27.

⁷⁸ CEDAW General recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19, CEDAW/C/GC/35, §18, 26 July 2017.

⁷⁹ Council of Europe Convention on preventing and combating violence against women and domestic violence (CETS No. 210), 1 August 2014, available at: <https://bit.ly/4438VFm>. The Contracting Party became a signatory to Istanbul Convention on 8 December 2012 and ratified it on 27 April 2015. Available at: <https://www.coe.int/en/web/istanbul-convention/poland1>

⁸⁰ Council of Europe GREVIO, Poland – Round Baseline Evaluation Round, GREVIO/Inf(2021)5, §335 and 338.

⁸¹ UN CMW and CRC, General Comment No.4 of the CMW and No. 23 of the CRC, State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return, CMW/C/GC/4-CRC/C/GC/23, §12, 16 November 2017.

⁸² UN CMW and CRC, General Comment No.4 of the CMW and No. 23 of the CRC, State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return, CMW/C/GC/4-CRC/C/GC/23, § 9 and 10, 16 November 2017.

34. **Article 6 CRC**⁸³ provides that States must recognise the child’s inherent right to life, which includes the need to ensure, to the maximum extent possible, the development of the child. **Article 27 CRC** provides that States must recognise that children have a right to a standard of living adequate for the physical, mental, spiritual, moral and social development of the child. This includes, per **Article 31 CRC**, the right of the child to rest and leisure, to play, and to engage in recreational activities. These provisions should be interpreted in light of the particular vulnerability of children seeking asylum, which is explicitly recognised by **Article 22 CRC** and elaborated in CRC GC 14 on the right of the child to have their best interests taken as a primary consideration.⁸⁴ Following **Article 24 CRC**, States must recognise the right of children to the enjoyment of the highest attainable standard of health. As clearly stated in GC no. 15, since a child’s development is closely related to the mother’s health, States shall ensure pre-natal and post-natal health for mothers.⁸⁵
35. In accordance with **Article 3** of the CRC, the best interests of the child shall be the primary consideration in any action taken by States parties. **Article 37 CRC** requires States parties to ensure that children are detained in conformity with the law, as a measure of last resort, for the shortest possible period of time and are guaranteed prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty.
36. The intervenors also draw the attention of the Court to an advisory opinion of the Inter-American Court of Human Rights, in which it ruled that “*deprivation of liberty of a child in this context [i.e. immigration detention] can never be understood as a measure that responds to the child’s best interest*”.⁸⁶
37. **The intervenors submit that when considering arguments under Article 3 and Article 5 of the Convention, the Court should take account for the other relevant international and regional agreements, particular those giving rise to binding legal obligations, to which a State is a party.**

⁸³ The Contracting Party became a signatory to CRC on 26 January 1990 and ratified it on 7 June 1991. See United Nations Treaty Body Database – ratification status for Poland, available at: https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=68&Lang=EN.

⁸⁴ 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 (Article 3, para .1), CRC/C/GC/14, § 75-76, 29 May 2013; Article 22 CRC.

⁸⁵ UN CRC General Comment No. 15 on the right of the child to the enjoyment of the highest attainable standard of health (art. 24), CRC/C/GC/15

⁸⁶ The Court further concluded that “States may not resort to the deprivation of liberty of children who are with their parents, or those who are unaccompanied or separated from their parents, as a precautionary measure in immigration proceedings; nor may States base 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”, IACtHR, Rights and guarantees of children in the context of migration and/or in need of international protection, Advisory Opinion no. OC-21/14 of 19 August 2014, para. 154- 160. IACtHR, Rights and guarantees of children in the context of migration and/or in need of international protection, Advisory Opinion no. OC-21/14 of 19 August 2014, para 154.