EUROPEAN COURT OF HUMAN RIGHTS

Application no. 17764/22

BETWEEN:

C.O.C.G. and others

Applicant

v.

Lithuania

Respondent

WRITTEN SUBMISSIONS ON BEHALF OF THE INTERVENORS

The AIRE Centre (Advice on Individual Rights in Europe), ECRE (the European Council on Refugees and Exiles), the Dutch Council for Refugees, the International Commission of Jurists (ICJ), and the International Refugee Assistance Project (IRAP)

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pursuant to the Registrar's notification dated 13th September 2024 on the Court's permission to intervene under Rule 44 § 3 of the Rules of the European Court of Human Rights

30 September 2024

Contracting Parties' Non-Refoulement Obligations Under Article 3 ECHR

1. Contracting Parties are required under Article 1 ECHR to secure Convention rights to everyone within their jurisdiction, including those guaranteed by the *non-refoulement* principle, and to ensure individuals can effectively exercise their rights with dignity, regardless of their legal status.[1]
2. As this Court's case law firmly establishes,[2] the *non-refoulement* principle is enshrined under several Convention rights, including Article 3, is crucial to safeguarding "the fundamental values of democratic societies",[3] and is "a value of civilisation closely bound up with respect for human dignity, part of the very essence of the Convention."[4]
3. Contracting Parties violate Article 3 by removing an individual "where substantial grounds have been shown for believing that the person concerned faces a real risk of being subjected to torture or inhuman or degrading treatment or punishment in the receiving country".[5] Article 3 *non-refoulement* obligations apply both to removals to the State where the person will be at such risk (direct refoulement), and to transfers to States where there is a risk of onward removal to a third country where the person will similarly be at risk (indirect refoulement).[6] They also protect individuals against harm by both State agents and non-State actors[7] and against removal to endure living conditions amounting to serious ill-treatment contrary to the Convention.[8] **The *non-refoulement* principle is absolute, permitting no derogation either in law or in practice, irrespective of the conduct of the person concerned, including where such conduct may give rise to "a public emergency threatening the life of the nation".[9]**
4. Under this Court's jurisprudence, diligent compliance with the *non-refoulement* principle requires the domestic authorities to examine the conditions in the envisaged country of removal in the light of Article 3.[10] Such assessment must be "a rigorous one".[11] The removing State is under a duty of enquiry to verify, before removal, that the person concerned will not face a real risk of prohibited treatment in the country of destination and/or in any third country through which they may transit.[12]
5. This Court has found that the exact content of the removing State's duties under the Convention may differ depending on whether it envisages to remove individuals to their

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[1] M.S.S. v. Belgium and Greece, no. 30696/09 (21 January 2011), §§ 299-320.

[2] Soering v. the United Kingdom, no. 14038/88 (7 July 1989), Series A no. 161, pp. 35-36, §§88-91.

[3] Chahal v. the United Kingdom, no. 22414/93, [GC] (15 November 1996), para. 96; Vilvarajah and Others v. the United Kingdom, nos. 13163/87, 13164/87, 13165/87, 13447/87 and 13448/87, (30 October 1991), §108.

[4] M.K and others v Poland, no. 40503/17, 23 July 2020 § 166- 167; M.S.S. v. Belgium and Greece op.cit., § 286; M.A. v. Cyprus, no. 41872/10, 23 July 2013, § 133.

[5] Soering v. the United Kingdom, op.cit. 1989, § 90-91, Series A no. 161; Vilvarajah and Others v. the United Kingdom, op.cit., § 103, Series A no. 125; H.L.R. v. France, no. 24573/94, 29 April 1997, § 34, Reports 1997-III; Jabari v Turkey, no. 40035/98, 11 July 2000, § 38; Salah Sheekh v. the Netherlands, no. 1948/04, 11 January 2007, § 135; and Saadi v Italy, no. 37201/06, 28 February 2008, § 152.

[6] Salah Sheekh v. the Netherlands, op.cit., § 141; M.S.S. v. Belgium and Greece [GC], op.cit., § 342.

[7] J.K and others v. Sweden [GC], no. 59166/12, 23 August 2016

[8] M.S.S. v. Belgium and Greece, op.cit., §§ 362-368.

[9] Saadi v Italy op.cit., § 127; UN General Assembly, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984; Adel Trebourski v. France, UNCAT, CAT/C/38/D/300/2006, 11 May 2007, § 8.2 – 8.3; UN Human Rights Committee, General comment no. 31 [80]; The nature of the general legal obligation imposed on States Parties to the Covenant, 26 May 2004, CCPR/C/21/Rev.1/Add.13, § 12. This is unlike in refugee law, where the principle is not absolute.

[10] Mamatkulov and Askarov v. Turkey [GC], no. 46827/99 and 46951/99, 04 February 2005, § 67; F.G. v. Sweden [GC], no. 43611/11, 23 March 2016, § 112

[11] Sufi and Elmi v. the United Kingdom, no. 8319/07 and 11449/07, 28 June 2011, § 214; Chahal v. the United Kingdom op.cit., § 96; Saadi v. Italy, op.cit., § 128.

[12] Mamatkulov and Askarov v. Turkey [GC], op. cit. §, 69.

country of origin or to a third country.[13] Where applicants can arguably claim that a removal may lead to an Article 3 violation, the respondent State is obliged to allow the applicants to remain within its jurisdiction and cannot deny access to its territory to persons presenting themselves at a border checkpoint.[14] Removal to a third country must be preceded by a thorough examination of the "general situation" in that country[15] and whether the intermediate country's asylum procedure affords sufficient guarantees to prevent an asylum seeker being removed, directly or indirectly, to the country of origin without a proper evaluation from the standpoint of Article 3.[16] In such cases, authorities are precluded from removing individuals merely on the basis of generalized assumptions regarding a certain country's asylum system but must conduct a *proprio motu* assessment of its "accessibility and functioning […] and the safeguards it affords in practice" based on up-to-date information available at the time of the assessment,[17] including authoritative findings made by UNHCR, Council of Europe and reputable nongovernmental organisations.

6. States must identify and address the needs of individuals in "vulnerable situations," such as asylum seekers,[18] ensuring their access to legal procedures[19] with adequate safeguards,[20] including legal assistance and information. To comply with Article 3's procedural safeguards, individuals must be told, in simple, non-technical language they understand, the reasons for their removal, and the process available for reviewing or challenging the removal decision.[21] Further, individuals at an arguable risk of prohibited treatment under the Convention have the right to an effective remedy, one intended to guarantee not theoretical or illusory rights, but rights that are practical and effective, and which allows for the review and, if appropriate, for the reversal of the removal decision.[22] This Court's jurisprudence has found a remedy ineffective, *inter alia*, when removal takes place before the individual is able to access that remedy.[23]
7. **The interveners submit that the *non-refoulement* principle requires States to examine, *proprio motu*, the situation the applicants will encounter in the envisaged removal country, irrespective of whether they had an opportunity to raise concerns and whether the destination is a third country or a country of origin. Where the person is returned or sent to a third country, the authorities are precluded from operating on the basis of generalized assumptions, and must, instead, examine the quality and functioning of the asylum and reception system in practice, including reception conditions, quality of procedures, and guarantees against ill-treatment upon return to such country and against onward refoulement. Domestic legislation and/or practice precluding the authorities of the removing State from carrying out such an examination and preventing asylum seekers from making applications for international protection will violate Article 3. Migratory pressure, potential national security concerns, the behaviour of third States, or the Contracting Party's capacity**

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[13] Ibid, Ilias and Ahmed, § 128
[14] M.K. and Others v Poland 2020, paras 178-179
[15] J.K. and others v. Sweden op.cit., § 98.
[16] Ibid, § 137.
[17] Ibid, § 141.
[18] M.S.S. v. Belgium and Greece, op.cit., §§ 251.
[19] Hirsi Jamaa and Others v. Italy, no. 27765/09, 23 February 2012.
[20] Kebe and Others v. Ukraine, no. 12552/12, 12 January 2017, § 104.
[21] Hirsi Jamaa and Others v. Italy, op. cit., 204; Čonka v. Belgium, App. No. 51564/99, 5 February 2002, §. 44.
[22] Shamayev and Others v. Georgia and Russia, App. No. 36378/02, 12 April 2005, §.460; M.S.S. v. Belgium and Greece, op. cit.; Čonka v. Belgium, op. cit., §s. 77-85.
[23] Shamayev and Others v. Georgia and Russia, op. cit., § 460; Labsi v. Slovakia, App. No. 33809/08, 15 May 2012, §. 139, Gebremedhin v France, App No. 25389/05, 26 July 2007, §54, § 66-67; Baysakov and others v. Ukraine, App. No. 54131/08, 18 February 2010, §.74; M.S.S. v. Belgium and Greece, op.cit., §. 301- 313, §319; Hirsi Jamaa and Others v. Italy, op. cit., §202, § 204.

constraints, cannot justify migration management allowing for derogation from non-derogable rights under the Convention.[24]

Individualized assessment of protection needs under Article 4 of Protocol 4 ECHR

8. Collective expulsion of non-nationals is prohibited under international law. This prohibition is present in all major human rights treaties[25] and is a rule of customary international law making it binding on all States.[26] Moreover, the Human Rights Committee has clarified that, where non-derogable rights and absolute prohibitions are concerned, any procedural safeguards that aim to guarantee such rights and obligations must be observed on equally absolute terms.[27]Therefore, insofar as a measure of collective expulsion is linked to the non-derogable prohibiton of *refoulement*, States are not able to derogate from the obligation to ensure procedures that allow individuals to submit reasons against their removal.
9. The Court's interpretation of the term 'expulsion' has been informed by the *travaux préparatoires* of Article 4, Protocol 4 (A4P4).[28] The Court has considered that the term "in the generic meaning in current use" – "to drive away from a place" – refers to any forcible removal of a non-national from a State's territory or jurisdiction, irrespective of the lawfulness of the person's presence, the length of time they have spent in the territory, the location in which they were apprehended, and their status[29] and regardless of their conduct when crossing the border[30] and of whether they were "merely passing through."[31] The notion of expulsion encompasses any measures constituting a formal act or conduct attributable to a State by which a non-national is compelled to leave the territory or jurisdiction of that State if their personal circumstances have not been adequately examined, including instances in which persons who arrived at the respondent State's border were stopped and returned,[32] and even when the measure concerned is not classified as "expulsion" in domestic law.[33]
10. This Court has stressed that measures not complying with the Convention do not become compliant simply because they may be aimed at preventing unauthorised border crossings at a time when a Contracting Party faces challenges in respect of increased arrivals of migrants.[34] Under the Convention, "migration challenges" cannot justify violations of the rights and freedoms guaranteed by the Convention, which the Contracting Parties have

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[24] Hirsi Jamaa and Others, op. cit., § 179

[25] Treaty prohibitions on collective expulsions are contained in Article 4 of Protocol 4 to the ECHR, Article 12.5 of the African Charter, Article 22.9 ACHR, Article 26.2 of the Arab Charter on Human Rights, and Article 22.1 ICRMW. Although no express ICCPR provision prohibits collective expulsions, the Human Rights Committee has been clear that "laws or decisions providing for collective or mass expulsions" would entail a violation of Article 13 ICCPR: UN Human Rights Committee (HRC), *CCPR General Comment No. 15: The Position of Aliens Under the Covenant*, 11 April 1986. See also, Council of Europe: Committee of Ministers, *Twenty Guidelines on Forced Return*, 4 May 2005**.** Guideline 3. Prohibition of collective expulsion. A removal order shall only be issued on the basis of a reasonable and objective examination of the particular case of each individual person concerned, and it shall take into account the circumstances specific to each case. The collective expulsion of aliens is prohibited.

[26] The ILC Special Rapporteur on the expulsion of aliens held that the prohibition of collective expulsion assumed the status of a general principle of international law "recognised by civilised nations", UN GA, *Third report on the expulsion of aliens / by Maurice Kamto, Special Rapporteur,* 19 April 2007, A/CN.4/581, § 115.

[27] UN Human Rights Committee (HRC), *CCPR General Comment No. 29: Article 4: Derogations during a State of Emergency*, 31 August 2001, CCPR/C/21/Rev.1/Add.11, § 15.

[28] Hirsi Jamaa and Others, op.cit, §.174.

[29] Khlaifia and Others v. Italy, App no. 16483/12 (15 December 2016), §243.

[30] M.D. and Others v Hungary No 60778/19, 19 September 2024, §35.

[31] Georgia v. Russia (I), Application no. 13255/07, 3 July 2014, §168.

[32] N.D. and N.T v. Spain., cited above, §§ 187 and 197, D. A. and others v Poland, §. 79.

[33] Shahzad v Hungary, §. 48.

[34] Hirsi Jamaa and Others, op.cit, § 179.

undertaken to secure to everyone within their jurisdiction,[35] including where such challenges are caused or exacerbated by conduct attributable to a third State. Potential exceptional or emergency situations cannot be invoked to suspend the application of Convention rights without a legitimate derogation under Article 15, which prohibits derogations from absolute rights under the Convention, including Article 3, and derogations inconsistent with the State's other obligations under international law.

11. A4P4 prohibits States from returning non-nationals without adequately examining their individual personal circumstances and therefore without enabling them to put forward arguments against the removal measures envisaged by the authorities.[36] In order to determine whether there has been a sufficiently individualised examination, it is necessary to consider the circumstances of each such case and to verify whether a decision to return non-nationals took into consideration the specific situation of each individual concerned.[37]
12. In this context, this Court will first consider whether the State has provided **genuine and effective access to means of legal entry**, in particular border procedures that allow for applications to be submitted and processed in a manner consistent with international standards.[38] When assessing the procedures' accessibility, due regard must also be given to independent reports evidencing, *inter alia,* a wider State policy of refusing entry to non-nationals seeking international protection.[39]
13. When considering whether a State has provided genuine and effective means of legal entry, this Court has had regard to whether a person without identification documents, could have sought entry on humanitarian grounds and whether such grounds as defined by the national legislation could have applied to the applicant concerned. In respect of asylum seekers, the expression of their intention to seek international protection at the border crossing ought to trigger an examination of personal circumstances. To demonstrate that this obligation has been effectively fulfilled, thereby providing a genuine and effective access to means of legal entry, the State concerned has to provide detailed information in this regard as to the location of border crossing points, the procedures for submitting applications, the availability of interpreters and legal assistance to inform asylum-seekers of their rights and information showing that applications had actually been made at those border points.[40]
14. This Court has affirmed that, while the Convention does not prevent States from requiring applications for international protection to be submitted at the existing border crossing points, such entry points, wherever they exist, should secure the right to seek protection under the Convention, and particularly under Article 3, in a genuine and effective manner.[41] When examining whether such procedures in the transit zones at the Hungarian border with Serbia fulfilled these criteria, the Court found that the limited access to the transit zones and the lack of any formal procedure accompanied by appropriate safeguards

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[35] N.D. and N.T., op.cit., § 110, Shahzad v Hungary, § 51.

[36] Sharifi and Others, op.cit. § 210, and Hirsi Jamaa and Others, op.cit., § 177.

[37] Hirsi Jamaa and Others, op.cit., § 183. In *D.A. v. Poland*, § 82, the Court determined that despite the applicants receiving individual decisions denying them entry and being interviewed by border officials, their asylum claims were disregarded, leading to decisions that lacked a sufficiently individualized examination. Similar findings were made in *M.K. v. Poland.* The Court concluded that these cases reflected a broader state policy of refusing to accept international protection applications at the Polish-Belarusian border and returning individuals to Belarus, in violation of domestic and international law. M.K. and others v Poland, op.cit., §§ 219 – 220. Moreover, in *J.A. and Others v. Italy*, the Court found a violation of Article 4 of Protocol No. 4 as the applicants were not interviewed before signing the refusal-of-entry orders and either received no copies or standardized orders that failed to consider their personal situations. J.A. and Others v. Italy, no. 21329/18, 30 March 2023, §§106-116.

[38] N.D. and N.T. v. Spain [GC], op.cit., § 209.

[39] M.K. and Others v Poland, nos. 40503/17, 42902/17, 43643/17, 23 July 2020, §. 208.

[40] N.D. and N.T. v. Spain [GC], 2020, §§ 212-217; A.A. and Others v. North Macedonia, 2022, §§ 116-122.

[41] Shahzad v Hungary, § 62; N.D. and N.T. v Spain, §§ 209 – 210.

governing the admission of individual migrants in such circumstances, could not be considered an effective means of legal entry.[42]

15. **The interveners submit that, a third country's use of force and threats of treatment contrary to Article 3 ECHR against asylum seekers deliberately and often decisively disincentivize those seeking international protection through the available procedures from accessing means of legal entry to the Contracting Party, resulting in their inability to do so. In such circumstances, the interveners urge the Court to find that no real effective procedure to seek international protection existed in the Contracting Party.**
16. Second, this Court's case law requires consideration of whether, based on objective facts for which the State was responsible, the applicant had **cogent reasons not to make use of the genuine and effective access to means of legal entry**.[43] Should the Court find that the use of force or threats of prohibited ill-treatment resulted in the applicant's inability to access means of legal entry, then the Court, consistent with its case law, should regard such use of force or threats of ill-treatment, at a minimum, as 'cogent reasons' for the applicant's failure to use the means of legal entry.
17. If the State had in fact provided genuine and effective means of legal entry, and there were no cogent reasons to not make use of them, this Court has established that **in highly exceptional situations** a Contracting Party's responsibility under A4P4 may not be engaged when the lack of individual procedure can be attributed to the applicant's own culpable conduct.[44] This was found to be the case in *N.D. and N.T. v. Spain*, where the applicants were considered to have sought to deliberately evade available procedures by crossing a border irregularly in large numbers through the use of force, creating a clearly disruptive situation endangering public safety, while the State provided genuine and effective means of legal entry.[45] It is clear that such exceptions must be construed narrowly and do not apply to a situation where there is not a mass arrival of migrants accompanied by a major use of force attributable to the culpable conduct of applicants. Moreover, in line with the non-penalisation clause of the 1951 Refugee Convention,[46] a refugee's mere irregular entry into a country, be it with the aim of seeking international protection or with the aim of passing through, cannot be regarded as culpable conduct aimed at preventing identification. The Court has previously emphasized that the Convention protection cannot be dependent on formal considerations such as whether persons entitled to it were admitted to the territory of a Contracting Party in conformity with a particular provision of national or European law applicable to the situation in question.[47] A4P4 is further explicitly applicable to people entering and passing through a country of their own initiative.[48] Where deliberate actions by bordering States may create clearly disruptive and unsafe situations, such as through channeling large groups of people to irregular border crossing points, this cannot be regarded as the applicant's own culpable conduct. The *N.D. and N.T.* exception requires the applicant's **deliberate and culpable** causation of clearly disruptive and unsafe situations.
18. **Where individuals have not arrived in large numbers of their own free will and do not have the intention to take advantage of their large numbers and of the use of force, thus creating a clearly disruptive situation difficult to control and**

[42] S.S. and Others v. Hungary, Applications nos. 56417/19 and 44245/20, 12 October 2023, §§ 45-52.
[43] N.D. and N.T. v. Spain [GC], 2020, §§ 201 and 209-211
[44] N.D. and N.T. op. cit. para. 201
[45] N.D. and N.T. op. cit. para. 201
[46] UN General Assembly, Convention Relating to the Status of Refugees, United Nations, Treaty Series, vol. 189, p. 137, 28 July 1951, https://www.refworld.org/legal/agreements/unga/1951/en/3982].
[47] S.S. and Others v Hungary op. cit. § 50
[48] Georgia v Russia (I), op. cit; § 168

endangering public safety, the respondent State may not rely on any exception to their A4P4 obligations.

19. The interveners submit that the A4P4 prohibition of collective expulsion mandates a rigorous, individualized assessment of each person's circumstances within the group whose removal may be envisaged. This obligation requires Contracting Parties to ensure proper identification, registration, and access to protection procedures and remedies for each individual. Moreover, the State must assess all evidence central to a *non-refoulement* claim, obtain such evidence *proprio motu* when necessary, and avoid imposing an unrealistic burden of proof on applicants. This Court has held that the notion of an effective remedy requires that it be capable of preventing the execution of measures that are contrary to the Convention and whose effects are potentially irreversible.[49] Where applicants allege that there is a real risk of a violation of the rights guaranteed by Articles 2 or 3 in the destination country, a remedy needs to have a suspensive effect to be considered effective under Article 13 of the Convention.[50]

EU legal standards in relation to Article 3 and A4P4 ECHR

20. The interveners note that under Article 53 ECHR, where Contracting Parties are also bound by EU law, the Court must ensure that the Convention rights are interpreted and applied in a manner that does not diminish the protection of rights guaranteed under the applicable EU law.[51] EU law aligns with Article 15 ECHR, which permits derogations only in exceptional circumstances "[...] in a limited and supervised manner" and mandates safeguards, and ensures that absolute rights like *non-refoulement* under Article 3 ECHR remain non-derogable, as well as rights under Article 2, 4(1) and 7. In determining whether the Contracting Parties' obligations under the Convention are engaged in a particular case - and, if so, the scope and content of these obligations - this Court has considered the EU asylum *acquis* materially relevant when the Respondent States are legally bound by that *corpus* of law.[52]
21. The EU Charter of Fundamental Rights (CFR)[53] enshrines guarantees fundamental to the issues under consideration, such as the right to asylum (Article 18), the protection of human dignity (Article 1), the prohibition of torture and inhuman and degrading treatment (Article 4), protection in the event of removal, expulsion or extradition (Article 19)[54] and the right to an effective remedy and to a fair trial (Article 47). It applies to all situations governed by EU law.
22. The EU asylum *acquis* comprises a number of legal instruments and their interpretation

[49] M.K. and Others op. cit. § 144; Čonka, § 79, and Hirsi Jamaa and Others, op. cit. § 199.
[50] Khlaifia and Others v Italy op. cit. § 281.
[51] As regards EU Member States, the ECHR must not be applied in such a way as to diminish human rights protection, "which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a party." The Court will recall that in MSS the Grand Chamber took into account Greece's obligations under the Reception Conditions Directive, 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.
[52] M.S.S. v. Belgium and Greece, op. cit., §s 57-86 and 250. Sufi and Elmi v. the United Kingdom, no.s 8319/07 and 11449/070, 28 November 2011, § 30-32 and 219-226, where the Court had regard to Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted ("the Qualification Directive"), as well as to a preliminary ruling by the European Court of Justice in the case of M. and N. Elgafaji v. Staatssecretaris van Justitie asking, inter alia, whether Article 15(c) of the Qualification Directive offered supplementary or other protection to Article 3 of the Convention. See also M.A. and Others v. Lithuania, op. cit., §. 113, N.D. and N.T. v. Spain, op. cit., § 180.
[53] European Union, Charter of Fundamental Rights of the European Union, 26 October 2012, 2012/C 326/02.
[54] Paragraph 1 of Article 19 is a prohibition on collective expulsion and has the same meaning and scope as A4P4 according to the Explanations relating to the Charter of Fundamental Rights, OJ C 303, 14.12.2007, p. 17–35.

by the European Court of Justice (CJEU). The Asylum Procedures Directive (APD)[55] provides for effective access to the asylum procedure for all applicants, without exception.[56] Border procedures shall ensure in particular that persons wishing to apply for international protection: "(a) have the right to remain at the border or transit zones of the Member State; (b) are immediately informed of their rights and obligations; (c) have access to interpretation; (d) are interviewed [...] by persons with appropriate knowledge of the relevant standards applicable in the field of asylum and refugee law; (e) can consult a legal adviser or counsellor".[57]

23. Moreover, Article 6(1) of the APD requires EU Member States to facilitate asylum application registration, including recording applicants' information, ensuring authorities are trained to perform their tasks effectively, and obliging authorities to refer asylum applicants to competent bodies as soon as they express a wish to apply for asylum.[58] The Directive does not impose formal requirements on applicants for submitting asylum applications and does not allow for the suspensions of procedures based on national security, migratory pressure, or other grounds, nor does it permit derogations from its provisions regardless of national emergency measures.
24. The CJEU has affirmed that one of the objectives pursued by the APD is to ensure the most effective access to the procedure for granting international protection.[59] In order to guarantee such access, Member States have an obligation under Article 6 APD to ensure that persons who have applied for international protection have the "concrete possibility to lodge an application as soon as possible". An applicant should have sufficient procedural guarantees to pursue their application at all stages of the procedure.[60]
25. The EU asylum *acquis* requires Member States to provide information, detailing the possibility of making an application for international protection, to all non-nationals including those apprehended during the surveillance operations or present at border crossings, such as transit zones, and at external borders.[61] Construed in light of the obligations under the EU Charter, and particularly Articles 18 and 19, such information must be provided to all those apprehended at or near the border in order to make *non-refoulment* protection and access to the right to asylum under the Charter available in practice. Moreover, in order to be effective and useful, such information must be provided in a language the non-nationals concerned understand.[62]
26. A series of EU legal instruments (the new EU Pact on Migration and Asylum) entered into force on 11 June 2024, transforming some existing instruments and creating new ones, most of which will apply from 12 June 2026. The newly established Regulation addressing situations of crisis and *force majeure* in migration and asylum (Crisis Regulation) creates three special legal regimes to manage the asylum system in cases of "mass influx," "instrumentalization" and "*force majeure.*"[63] In situations of "instrumentalization", the Crisis Regulation only allows for a limited number of

[55] Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast) [2013] OJ L 180/60 ('recast Asylum Procedures Directive'). In force on 20 July 2015 and had to be transposed by 20 July 2015) apart from Articles 31(3), (4) and (5) which must be transposed by 20 July 2018.
[56] Recast Asylum Procedures Directive, Recital 25.
[57] Recast Asylum Procedures Directive, Articles 2(p), 6, 8, 10-12, 15 and 19.
[58] CJEU, Judgment of 25 June 2020, VL v. Ministerio Fiscal, C-36/20 PPU, ECLI:EU:C:2020:495, § 58 – 60.
[59] Ibid, § 63
[60] Ibid, § 63 - 64. See also Advocate General Szpunar opinion on the same case, 30 April 2020, § 61.
[61] Recital 26 Recast Asylum Procedures Directive, as well as Article 6.1 § 3 and Article 8 of the same Directive.
[62] Recast Asylum Procedures Directive, Article 8(1) interpreted in light of the principle of effectiveness. Case C-13/01 Safalero Srl v. Prefetto di Genova [2003] ECR I-8679, § 49.
[63] Regulation (EU) 2024/1359 of the European Parliament and of the Council of 14 May 2024 addressing situations of crisis and force majeure in the field of migration and asylum and amending Regulation (EU) 2021/1147, PE/19/2024/REV/1, OJ L, 2024/1359.

temporary derogations[64] from the new Asylum Procedures Regulation.[65] It contains a very limited set of timebound measures that cannot be equated to a general exception to disapply asylum law. Both instruments recognise the absolute nature of the *non-refoulement* principle[66] and ensure that the right to asylum and to protection from torture continues to apply during derogations.[67]

27. **The interveners emphasize that the EU asylum *acquis* and fundamental rights ensure effective access to asylum procedures for all who may wish to apply for international protection, as specified in the APD. The Directive guarantees the right to an effective remedy against any asylum decision, including at borders and transit zones. This requires individual identification and a meaningful chance to raise objections, necessitating prior access to information and legal assistance. Emergency measures adopted at the domestic level that hinder access to international protection procedures are in breach of the Charter and secondary EU law, as no derogation from the right to apply for asylum exists under the latter.**

ECHR obligations regarding the asylum seekers' deprivation of liberty

28. Detention may only be considered lawful and meet the requirements of legality if it is "in accordance with a provision prescribed by law", and if the grounds for the deprivation of liberty are foreseeable in their application.[68] To be in accordance with the law, detention must both have a clear legal basis in national law and follow a procedure prescribed by law.[69] Detention must also conform with any applicable international law and standards,[70] including EU law under Article 53 ECHR, as noted above.
29. This Court has found[71] that resort to any form of detention must be carried out in good faith; be closely connected to a permitted ground; the place and conditions of detention must be appropriate; and the length of detention must not exceed what is reasonably required for the legitimate purpose pursued.[72] The interveners draw the Court's attention to the fact that EU law, which for the purpose of applying Article 5 ECHR is national law, stipulates that the detention of an international protection applicant in border procedures must never exceed four weeks from the date on which the application for international protection is lodged, even in emergency situations.[73] The CJEU underlined in *C, B and X* that where the conditions for lawful detention are not met or cease to be met, the individual must be released immediately.[74]
30. In the context of measures taken with the stated aim of migration control, it is clear that those not considered as "detained" under national law, who are placed in facilities

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[64] E.g., delay in registration, prolongation of the border procedure and expanded scope of the border procedure.
[65] Regulation (EU) 2024/1348 of the European Parliament and of the Council of 14 May 2024 establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU, PE/16/2024/REV/1, OJ L, 2024/1348, Article 59 (1)(c).
[66] Article 11 (10) of the Crisis Regulation; Recital 58, Asylum Procedures Regulation.
[67] Article 11 (10) of the Crisis Regulation.
[68] Enhorn v. Sweden, no. 56529/00, (25 January 2005), § 36.
[69] Louled Massoud v. Malta, op. cit., para 61, Khlaifia and others v. Italy [GC], op. cit. § 91.
[70] Medvedyev v France [GC], App. No.3394/03, (29 March 2010), §§ 79 – 80.
[71] Saadi v. the United Kingdom op.cit. para 66; Khudoyorov v. Russia App No. 6847/02, (8 November 2005), para 137; Rahimi v. Greece, App No. 8687/08 (5 July 2011), § 102.
[72] Saadi v UK, op. cit, § 74; Yoh-Ekale Mwanje v Belgium, App No. 10486/10, 20 December 2011, §§ 117-119.
[73] Article 8(3)(c) recast Reception Conditions Directive and with Article 43(2) Asylum Procedures Directive; CJEU, Judgment of 17 December 2020, Commission v Hungary, C-808/18, ECLI:EU:C:2020:1029, § 181.
[74] CJEU, Judgment of 8 November 2022, C, B and X, Joined Cases C 704/20 and C 39/21, ECLI:EU:C:2022:858, §§ 79, 80. See also: CJEU, Judgment of 25 June 2020, VL v. Ministerio Fiscal, C-36/20 PPU, ECLI:EU:C:2020:495, §§ 101-102. CJEU, Judgment of 14 September 2017, K v. Staatssecretaris van Veiligheid en Justitie, C-18/16, ECLI:EU:C:2017:680, § 48. 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, § 258.

classified as "reception", "holding", "accommodation" or "foreigners' registration" centres, may be still considered to be deprived of their liberty under Article 5 ECHR as a consequence of the nature of the restrictions on their freedom of movement as well as "the type, duration, effects and manner of implementation" of such placement.[75] In *M.A. v. Valstybės sienos apsaugos tarnyba*,[76] the CJEU examined the compatibility of Lithuanian domestic legislation with the recast Reception Conditions Directive[77] (rRCD) and the APD. The CJEU reiterated its definition of detention as a coercive measure that "deprives the applicant of freedom of movement" and concluded that detention due to national security or public interest is only justified "if the applicant's individual conduct represents a genuine, present and sufficiently serious threat affecting a fundamental interest of society or the internal or external security of the Member State concerned."[78]

31. This Court has reiterated that detention is a measure so consequential for the enjoyment of ECHR rights 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 will generally be arbitrary.[79] The UN Human Rights Committee has highlighted the importance of alternatives to detention and found a violation where the State "had not demonstrated that, in the light of the author's particular circumstances, there were not less invasive means of achieving the same ends."[80]
32. Moreover, this Court has found a violation of Article 5(1) on the basis that the reasoning of the authorities "was not sufficiently individualised to justify" detention.[81] Similarly, interpreting the rRCD, the CJEU emphasized that Member States are obliged to undertake an individualised assessment[82] and detention must be a last resort and proportionate to the objectives pursued.[83] In the *M.A.* case, the CJEU found that the Lithuanian Government's measures derogating from EU law in the event of "an emergency due to a mass influx of aliens", and enforcing the detention of those irregularly staying on the territory, were not compatible with the requirements under the rRCD or capable of justifying the application of Article 72 of the Treaty on Functioning of the European Union.
33. The right to challenge the lawfulness of detention judicially under Article 5(4) is a fundamental protection against arbitrary detention, as well as against torture or other ill-treatment in detention and enforced disappearance.[84] It entitles persons subject to any form of deprivation of liberty to take proceedings to have an independent court or tribunal establish the lawfulness of their detention while they are detained[85] and entitles the detainee to be heard before the court either in person or through a legal representative.[86]

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[75] Abdolkhani and Karimnia v. Turkey, App No. 30471/08, (22 September 2009), para 125-127; Amuur v France, App No. 19776/92, (25 June 1996), § 43.

[76] CJEU, Judgment of 30 June 2022, M.A. v. Valstybės sienos apsaugos tarnyba, C-72/22 PPU, ECLI:EU:C:2022:505, § 39.

[77] 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.

[78] CJEU, M.A. v. Valstybės sienos apsaugos tarnyba, op. cit., §§ 89-90.

[79] Rusu v. Austria, App No. 34082/02, (2 October 2008), § 58.

[80] C. v. Australia, CCPR/C/76/D/900/1999, UN Human Rights Committee (HRC), 13 November 2002, 8.2.

[81] Dshijri v. Hungary, App No. 21325/16, (23 February 2023).

[82] CJEU, Judgment of 25 June 2020, VL v. Ministerio Fiscal, C-36/20 PPU, ECLI:EU:C:2020:495, §§ 101-102.

[83] CJEU, Judgment of 14 September 2017, K v. Staatssecretaris van Veiligheid en Justitie, C-18/16, ECLI:EU:C:2017:680, § 48. CJEU, Judgment of 14 May 2020, FMS and others, C-924/19 PPU & C-925/19 PPU, ECLI:EU:C:2020:367, § 258.

[84] The CCPR has held that the corresponding Article 9(4) ICCPR is a non-derogable right, see, ICCPR, General comment No. 35 on Article 9, Liberty and security of person, CCPR/C/GC/35, § 67.

[85] See G.B. and Others v. Turkey, App no. 4633/15, (17 October 2019) § 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) § 251.

[86] 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) § 73.

For the remedy to be practical and effective, under Article 5(2) the authorities are required to inform the detained persons promptly in a language they understand of the reasons for detention[87] and to provide them with access to legal advice and, if needed, to interpretation.[88] Detained persons must be informed of the legal basis and legal and factual reasons for their deprivation of liberty, in such a way as to give them an opportunity to challenge its legality.[89] The information must be presented in a manner the individual understands, for which legal advice may be required.[90]

34. To protect the liberty of the detained individual, Article 5(4) requires the lawfulness of detention to be determined by a speedy judicial decision[91] and the specific remedy of release whenever the detention is unlawful.[92] The proceedings must be adversarial and ensure 'equality of arms' between the parties, including through effective assistance by a lawyer.[93]
35. Other Council of Europe bodies too have emphasised the necessity of legal safeguards for applicants in immigration detention. Although the European Committee for the Prevention of Torture does not make legal findings, its report on a visit to Lithuanian "registration centres" in 2021 noted that "the restrictions imposed on "accommodated" foreign nationals were such that they could amount to a form of deprivation of their liberty", inter alia due to the prison-like conditions of the facilities.[94]
36. **The interveners submit that under Article 5 ECHR detention must be lawful, free from arbitrariness and comply with a provision prescribed by law both substantively and in procedure. Detention, as a last resort, is permissible only after an individualized assessment determines that no less severe measures are available and must not be based solely on the fact that an individual has made an application for asylum. Effective exercise of the right to challenge detention requires prompt and adequate information about the reasons, access to legal aid and competent representation.[95] The lack of legal assistance, whether in law or practice, should be considered in assessing compliance with Article 5(4) regarding judicial review.[96]**

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[87] M.S. v. Slovakia and Ukraine, App No. 17189/11, (11 June 2020), §141.
[88] Ibid., § 143.
[89] R.M. and others v. Poland, App No. 11247/18, (9 February 2023), § 29.
[90] Louled Massoud v Malta (No.24340/08), §§ 43 -47, 71
[91] Mooren v. Germany [GC], App No. 11364/03, (9 July 2009), § 106.
[92] Rakevich v. Russia, App No. 58973/00, (28 October 2003) §§ 44 and 45; G.B. and Others v. Turkey, App No. 4633/15, (17 October 2019), § 178.
[93] Reinprecht v. Austria, 2005, § 31; A. and Others v. the United Kingdom [GC], 2009, § 204); Cernák v. Slovakia, 2013, § 78; Demirtaş and Yüksekdağ Şenoğlu v. Türkiye, 2023, §§ 104-106; Demirtaş and Yüksekdağ Şenoğlu v. Türkiye, 2023, §§ 104-106; Atilla Taş v. Turkey, 2021, §§ 151-154, with further references.
[94] European Committee for the Prevention of Torture and Inhuman or Degrading Treatment (CPT), Report to the Lithuanian Government on the periodic visit to Lithuania from 10 to 20 December 2021, 23 February 2023.
[95] Louled Massoud v Malta, op. cit. § 61.
[96] 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.