



INTERNATIONAL
COMMISSION
OF JURISTS

**ICJ Briefing Paper
in support of the negotiations on the recast of the
Dublin Regulation 343/2003**

Case-Law Note

Introduction

The International Commission of Jurists is pleased to present this case-law note to the members of the European Parliament's Civil Liberties, Justice and Home Affairs Committee (LIBE) and of the Working Groups of the Council of the European Union as a contribution to the on-going negotiations on the recast of Regulation 343/2003, the Dublin II Regulation.

In this submission, the ICJ highlights the essential jurisprudence of international and European human rights mechanisms on the following issues which are touched upon by the recast under discussion:

1. Right to information and personal interview;
2. Guarantees for children and unaccompanied children;
3. Detention;
4. Right to a Remedy;
5. Definition of family.

The ICJ recalls that any provision to be contained in the future Dublin Regulation must be devised and implemented in full compliance with international human rights law. The relevant framework in this respect consists of the *Treaty on the European Union* (TEU) and the *Treaty on the Functioning of the European Union* (TFEU), and in particular Member States' obligations under the *Charter of Fundamental Rights of the European Union* (EU Charter), as well as their obligations under the *European Convention for the Protection of Human Rights and Fundamental Freedoms* (ECHR) and other international law treaties. Furthermore, the ICJ emphasises that the need for human rights compliance of this regulation has also been stressed by the European Court of Human Rights in the case *M.S.S. v. Belgium and Greece* and by the Court of Justice of the European Union in the cases *N.S. and M.E. v. Secretary of State for the Home Department*. An additional imperative for compliance with the European Convention on Human Rights' case-law arises from the expected forthcoming accession of the European Union to this treaty.

All EU Member States are party to the *European Convention on Human Rights*, as they are to the *International Covenant on Civil and Political Rights*, the *UN Convention on the Rights of the Child* and the *Geneva Refugee Convention*. A regulation, directly applicable, which would contravene the jurisprudence of the protection mechanisms of these treaties would risk placing the Member States in situations of violation of their international law obligations.

The ICJ also recalls that, the Dublin transfer being equivalent to an expulsion,¹ the procedure of transfer may interfere with the enjoyment of any number of rights, including the right to enjoy family life, and may also undermine the prohibition of *non-refoulement*. The principle of *non-refoulement*, as it applies to the European convention covers not only torture and cruel, inhuman or degrading treatment or punishment, but also arbitrary detention and cases of flagrant denial of a fair trial.² In all cases where the respect of a human right may be at stake, the migrant or asylum seeker, regardless of his or her status, enjoys procedural guarantees under the right to a remedy, enshrined in Article 13 ECHR, Article 2.3 ICCPR and Article 47 EU Charter.

The present submission will summarise, on each topic, the principles of the international jurisprudence. It will then set out the relevant passages from the jurisprudence of international courts and other adjudicatory bodies. The submission highlights key international standards and jurisprudence, and does not provide a comprehensive digest of all relevant standards and case-law.³

1) Procedural rights: Right to information and to personal interview

The analysis of the international case law relevant to procedural rights in expulsion brings to light that States are under an obligation to **prevent** any transfer to a country where the person is at risk of being subject to torture or other cruel, inhuman or degrading treatment or punishment, or any other serious violation of human rights (the prohibition of *refoulement*). The right to information and personal interview are key elements of the procedures needed to satisfy this obligation, without which States are at high risk of breaches of the prohibition of *refoulement*.

International law provisions involved: Articles 3 and 13 ECHR; Articles 4, 19 and 47 EU Charter; Articles 2.3 and 7 ICCPR

Jurisprudence and international standards

Guidelines on human rights protection in the context of accelerated asylum procedures, Committee of Ministers, Council of Europe.⁴

II. Principles

2. *Asylum seekers have the right to an individual and fair examination of their applications by the competent authorities.*

3. *When procedures as defined in Guideline I are applied, the state concerned is required to ensure that the principle of non-refoulement is effectively respected.*

V. Procedural guarantees

1.c. *the right to be informed explicitly and without delay, in a language which he/she understands, of*

¹ See, same approach by the Court in *Diallo v. the Czech Republic*, ECtHR, Application no. 20493/07, 23 June 2011; and *M.S.S. v. Belgium and Greece*, ECtHR, Grand Chamber (GC), Application no. 30696/09, 21 January 2011.

² See, most recently, *Othman (Abu Qatada) v. United Kingdom*, ECtHR, Application no. 8139/09, 17 January 2012, paragraphs 231-235 and 258-267.

³ The case law is provided in English when the original text is available in that language. Otherwise the French version is provided. Emphasis throughout the submission are added by the ICJ and are not present in the original document.

⁴ Adopted by the Committee of Ministers on 1 July 2009 at the 1062nd meeting of the Ministers' Deputies.

the different stages of the procedure being applied to him/her, of his/her rights and duties as well as remedies available to him/her;

1.d. the right, as a rule, to an individual interview in a language which he/she understands where the merits of the claim are being considered and, in cases referred to in Guideline I.2, the right to be heard on the grounds of admissibility.

Twenty Guidelines on Forced Return, Committee of Minister, Council of Europe.

Guideline 4. Notification of the removal order

1. The removal order should be addressed in writing to the individual concerned either directly or through his/her authorised representative. If necessary, the addressee should be provided with an explanation of the order in a language he/she understands. The removal order shall indicate:

- the legal and factual grounds on which it is based;*
- the remedies available, whether or not they have a suspensive effect, and the deadlines within which such remedies can be exercised.*

Kanagaratnam et autres c. Belgique, European Court of Human Rights (ECtHR), Application no. 15297/09, 13 December 2011, paragraph 61.

*La Cour rappelle que, combinée avec l'article 3, l'obligation que l'article 1 de la Convention impose aux Hautes Parties contractantes de garantir à toute personne relevant de leur juridiction les droits et libertés consacrés par la Convention leur commande de **prendre des mesures propres à empêcher que lesdites personnes ne soient soumises à des tortures ou à des peines ou traitements inhumains ou dégradants.***

M.S.S. v. Belgium and Greece, ECtHR, Grand Chamber (GC), Application no. 30696/09, 21 January 2011 (systemic shortcomings leading to breach of non-refoulement).

*301. The Court notes, firstly, the shortcomings in access to the asylum procedure and in the examination of applications for asylum [...]: **insufficient information for asylum seekers about the procedures to be followed**, difficult access to the Attica police headquarters, no reliable system of communication between the authorities and the asylum seekers, **shortage of interpreters and lack of training of the staff responsible for conducting the individual interviews**, lack of legal aid effectively depriving the asylum seekers of legal counsel, and excessively lengthy delays in receiving a decision. These shortcomings affect asylum seekers arriving in Greece for the first time as well as those sent back there in application of the Dublin Regulation."*

*304. [...] In the Court's opinion, **the lack of access to information concerning the procedures to be followed is clearly a major obstacle in accessing those procedures.***

The importance of the procedural rights on the sending side of the Dublin Regulation is also highlighted in the case against Belgium.

*351. Furthermore, the Court notes that **the procedure followed by the Aliens Office in application of the Dublin Regulation left no possibility for the applicant to state the reasons militating against his transfer to Greece.** The form the Aliens Office filled in contains no section for such comments [...].*

352. In these conditions the Court considers that the general situation was known to the Belgian authorities and that the applicant should not be expected to bear the entire burden of proof. On the contrary, it considers it established that in spite of the few examples of application of the sovereignty clause produced by the Government, which, incidentally, do not concern Greece, the Aliens Office systematically applied the Dublin Regulation to transfer people to Greece without so much as considering the possibility of making an exception.

*366. [...] the Court [...] also wishes to emphasise that it cannot be held against the applicant that he did not inform the Belgian administrative authorities of the reasons why he did not wish to be transferred to Greece. **It has established that the procedure before the Aliens Office made no provision for such explanations and that the Belgian authorities applied the Dublin Regulation systematically [...].***

Auad v. Bulgaria, ECtHR, Application no. 46390/10, 11 October 2011, paragraph 102 (appropriate assessment was carried out to avoid the risk to breach the prohibition of *non-refoulement*)

[...] First, that Agency is a specialised body with particular expertise in this domain. Secondly, its officers were able to conduct a personal interview with the applicant. They had an opportunity to see, hear and assess his demeanour, and were thus in a position to test the credibility of his fears and the veracity of his account [...].

Rahimi c. Grèce, ECtHR, Application no. 8687/08, 5 April 2011, paragraph 79 (information in asylum proceedings and violation of the child's right to *habeas corpus* and an effective remedy (Articles 5.4 and 13 ECHR)).

[L]a brochure d'information qui lui a été fournie était rédigée en arabe. Selon les dires du requérant, sa langue maternelle était le farsi, ce qui n'est pas contesté par le Gouvernement. Par conséquent, la Cour ne peut pas considérer que la brochure d'information, faisant référence à des recours disponibles, était compréhensible au requérant. [...]

2) Guarantees for minors and unaccompanied children

The analysis of the international case law brings to light the following principles:

- a) The best interest of the child must be taken into consideration in all decisions regarding children, including in expulsion proceedings and Dublin transfers.
- b) When dealing with an unaccompanied minor (UAM), regardless of the procedure, the best interest of the child requires these first steps to be followed:
 - when dealing with UAM the first priority consists in tracking his or her family members;
 - once his or her family has been tracked, the UAM must be reunited with the family and it is acceptable that he or she will be subject to the asylum procedure in the country of presence of the family;
 - however, the pre-eminence of the principle of the best interest of the child and of the principle of *non-refoulement* mean that, if the UAM's transfer to the country where his or her family are present is not in his or her best interest or would result in a breach of his or her freedom from *refoulement*, the parents must be entitled to file an application in the country where the UAM is present.
- c) Appointment of a guardian to an UAM is the first measure to be taken and an obligation on the State.
- d) Free legal counsel must be provided to the UAM, in addition to the appointment of a guardian.
- e) In all steps of the procedure, measures must be taken to assure that the views of the child are taken into due consideration.
- f) Any measure leading to the transfer of a child outside the territory of the State cannot be carried out when the measure would contravene his or her best interests and must ensure that the child does not end up in a country where he or she is at risk of breach of the principle of *non-refoulement*.

International law provisions involved: Articles 3 and 8 ECHR; Articles 4, 19 and 24 EU Charter; Articles 7, 17 and 24 ICCPR; Articles 3, 9, 10, 22 CRC.

1. The Best Interest of the Child

General Comment no. 6: Treatment of Unaccompanied and Separated Children Outside Their Country of Origin, UN Committee on the Rights of the Child (CRC), UN Doc. CRC/GC/2005/6, 1 September 2005.

19. Article 3 (1) states that “[i]n all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration”. In the case of a displaced child, the **principle must be respected during all stages of the displacement cycle**. At any of these stages, a best interests determination must be documented in preparation of any decision fundamentally impacting on the unaccompanied or separated child’s life.

20. A determination of what is in the best interests of the child requires a clear and comprehensive assessment of the child’s identity, including her or his nationality, upbringing, ethnic, cultural and linguistic background, particular vulnerabilities and protection needs. Consequently, **allowing the child access to the territory is a prerequisite to this initial assessment process**. The assessment process should be carried out in a **friendly and safe atmosphere by qualified professionals who are trained in age and gender-sensitive interviewing techniques**.

Resolution 1810 (2011), Unaccompanied children in Europe: issues of arrival, stay and return, Parliamentary Assembly of the Council of Europe (PACE), paragraph 2. See also, paragraph 5.2.

*The Parliamentary Assembly recalls that by virtue of the United Nations Convention on the Rights of the Child, which all member states of the Council of Europe have ratified, there exists a **special duty of protection and assistance to all unaccompanied children, irrespective of their nationality, immigration status or statelessness**. The way in which immigration and asylum rules affect these children must be anchored in this obligation and perspective.*

UNHCR, Executive Committee Conclusion No. 47 (XXXVIII) – 1987 – Refugee Children, paragraph (d).

all action taken on behalf of refugee children must be guided by the principle of the best interests of the child as well as by the principle of family unity.

See also, **UNHCR, Executive Committee Conclusion No. 107 (LVIII) – 2007 – Children at Risk**, paragraph (b)(v).

2. General Principles

Mubilanzila Mayeka and Kaniki Mitunga v. Belgium, ECtHR, Application no. 13178/03, 12 October 2006 (obligations arising from the principle of non-refoulement)

53. [...]. **Steps should be taken to enable effective protection to be provided, particularly to children and other vulnerable members of society, and should include reasonable measures to prevent ill-treatment of which the authorities have or ought to have knowledge [...].**

55. *The [separated child]’s position was characterised by her very young age, the fact that she was an illegal immigrant in a foreign land and the fact that she was unaccompanied by her family from whom she had become separated so that she was effectively left to her own devices. She was thus in an extremely vulnerable situation. In view of the absolute nature of the protection afforded by Article 3 of the Convention, it is important to bear in mind that this is the decisive factor and it takes precedence over considerations relating to the second applicant’s status as an illegal immigrant. She therefore indisputably came within the class of highly vulnerable members of society to whom the Belgian State owed a duty to take adequate measures to provide care and protection as part of its positive obligations under Article 3 of the Convention.*

81. [...] Furthermore, the States' interest in foiling attempts to circumvent immigration rules must not deprive aliens of the protection afforded by these conventions or deprive foreign minors, especially if unaccompanied, of the protection their status warrants. The protection of fundamental rights and the constraints imposed by a State's immigration policy must therefore be reconciled.

The same principles have also been reiterated in:

- *Rahimi c. Greece*, ECtHR, Application no. 8687/08, paragraph 87;
- *Muskhadzhiyeva and Others v. Belgium*, ECtHR, Application no. 41442/07, 19 January 2010, paragraph 55;
- *Kanagaratnam and Others v. Belgium*, ECtHR, Application no. 15297/09, 13 December 2011, paragraphs 62 and 67;
- *Popov v. France*, ECtHR, Applications nos. 39472/07 and 39474/07, 19 January 2012, paragraphs 91, 139-140;
- **Resolution 1810 (2011): Unaccompanied children in Europe: issues of arrival, stay and return**, PACE, paragraph 5.15.

3. Entry, family tracing and family reunion

General Comment no. 6: Treatment of Unaccompanied and Separated Children Outside Their Country of Origin, CRC, UN Doc. CRC/GC/2005/6, 1 September 2005.

31. The best interests of the child must also be a guiding principle for determining the priority of protection needs and the chronology of measures to be applied in respect of unaccompanied and separated children. This necessary initial assessment process, in particular, entails the following:

- (i) **Prioritized identification of a child as separated or unaccompanied immediately upon arrival** at ports of entry or as soon as their presence in the country becomes known to the authorities (art. 8). [...];
- (ii) **Prompt registration by means of an initial interview** conducted in an age-appropriate and gender-sensitive manner, in a language the child understands, by professionally qualified persons to collect biodata and social history to ascertain the identity of the child, including, wherever possible, identity of both parents, other siblings, as well as the citizenship of the child, the siblings and the parents;
- (iii) In continuation of the registration process, the recording of further information in order to meet the specific needs of the child. This information should include:
 - Reasons for being separated or unaccompanied;
 - Assessment of particular vulnerabilities [...];
 - All available information to determine the potential existence of international protection needs [...];
- (iv) [...];
- (v) **Tracing of family members to be commenced as early as possible** (arts. 22 (2), 9 (3) and 10 (2))."

32. Any further actions relating to the residence and other status of the child in the territory of the State should be based on the findings of an initial protection assessment carried out in accordance with the above procedures. [...]

Mubilanzila Mayeka and Kaniki Mitunga v. Belgium, ECtHR, Application no. 13178/03, 12 October 2006.

(Applying Article 3 ECHR):

58. The Court considers that the measures taken by the Belgian authorities – informing the [mother] of the position, giving her a telephone number where she could reach her daughter, appointing a lawyer to assist the [daughter] and liaising with the Canadian authorities and the Belgian embassy in Kinshasa – were far from sufficient to fulfil the Belgian State's obligation to provide care for the [daughter]. The State had, moreover, had an array of means at its disposal [...].

(Applying Article 8 ECHR):

82. [...] The Court further notes that, far from assisting her reunification with her mother, the authorities' actions in fact hindered it. Having been informed at the outset that the [mother] was in Canada, the Belgian authorities should have made detailed enquiries of their Canadian counterparts in order to clarify the position and bring about the reunification of mother and daughter. The Court considers that that duty became more pressing from 16 October 2002 onwards, that being the date when the Belgian authorities received the fax from the UNHCR contradicting the information they had previously held.

85. Ultimately, **since the [daughter] was an unaccompanied foreign minor, the Belgian State was under an obligation to facilitate the family's reunification [...].**

90. The Court does not consider it necessary to recapitulate the circumstances in which the deportation took place, as these have already been described above [...]. It reiterates that the Belgian State had positive obligations in the instant case, including an obligation to take care of the second applicant and to facilitate the applicants' reunification [...]. By deporting the [daughter], the authorities did not assist their reunification [...]. [...]

Popov v. France, ECtHR, Applications nos. 39472/07 and 39474/07, 19 January 2012, paragraph 141. (Finding a violation of Article 8 ECHR)

Il découle par ailleurs des rapports internationaux [...] que la sauvegarde de l'intérêt supérieur de l'enfant implique d'une part de maintenir, autant que faire se peut, l'unité familiale, d'autre part, d'envisager des alternatives afin de ne recourir à la détention des mineurs qu'en dernier resort [...].

Twenty Guidelines on Forced Return, Committee of Minister, Council of Europe, Guideline 2.5.

Before deciding to issue a removal order in respect of a separated child, assistance – in particular legal assistance – should be granted with due consideration given to the best interest of the child. Before removing such a child from its territory, the authorities of the host state should be satisfied that he/she will be returned to a member of his/her family, a nominated guardian or adequate reception facilities in the state of return.

Resolution 1810 (2011): Unaccompanied children in Europe: issues of arrival, stay and return, PACE.

5.3. *no child should be denied access to the territory or be summarily turned back at the borders of a member state. Immediate referral to assistance and care should be arranged by specialised services with a view to identifying if the migrant is a minor, ascertaining his or her individual circumstances and protection needs and ultimately identifying a durable solution in the child's best interest;*

5.6. *legal, social and psychological assistance should be provided without delay to unaccompanied children. Children should be informed immediately upon arrival or interception, individually and in a language and form that they can understand, about their right to protection and assistance, including their right to seek asylum or other forms of international protection, and the necessary procedures and their implications;*

5.7. *all interviews with an unaccompanied child concerning his or her personal details and background should be conducted individually by specialised and well-trained staff and in the presence of the child's guardian;"*

5.14. *family reunification possibilities should be extended beyond the country of origin and approached from a humanitarian perspective exploring wider family links in the host country and third countries, guided by the principle of the child's best interest. The Dublin II Regulation should only be applied to unaccompanied children if transfer to a third country is in the child's best interests;*

Guidelines on International Protection No. 8: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees, UNHCR, UN Doc. HCR/GIP/09/08, 22 December 2009, paragraph 68.

For unaccompanied and separated child applicants, efforts need to be made as soon as possible to initiate tracing and family reunification with parents or other family members. There will be exceptions, however, to these priorities where information becomes available suggesting that tracing or reunification could put the parents or other family members in danger, that the child has been subjected to abuse or neglect, and/ or where parents or family members may be implicated or have been involved in their persecution.

UNHCR, Executive Committee Conclusion No. 107 (LVIII) – 2007 – Children at Risk, paragraph (h)(iii).

Facilitate children’s enjoyment of family unity through putting in place procedures to prevent separation, and in respect of unaccompanied and separated children, facilitate tracing and family reunification with their family members in accordance with the respective child’s best interests, with due respect for the national legislation of respective States;

4. Appointment of guardian

General Comment no. 6: Treatment of Unaccompanied and Separated Children Outside Their Country of Origin, CRC, UN Doc. CRC/GC/2005/6, 1 September 2005, paragraph 21.

Subsequent steps, such as the appointment of a competent guardian as expeditiously as possible, serves as a key procedural safeguard to ensure respect for the best interests of an unaccompanied or separated child. Therefore, such a child should only be referred to asylum or other procedures after the appointment of a guardian. In cases where separated or unaccompanied children are referred to asylum procedures or other administrative or judicial proceedings, they should also be provided with a legal representative in addition to a guardian.

The same obligation is reflected and detailed in the paragraphs 33-38 and 69 of this General Comment. Further expression of the principle can be found in:

- **Recommendation 1985 (2011): Undocumented migrant children in an irregular situation: a real cause for concern**, PACE, paragraph 7.
- **Recommendation 1703 (2005): Protection and assistance for separated children seeking asylum**, PACE, paragraph 5.
- **Resolution 1810 (2011): Unaccompanied children in Europe: issues of arrival, stay and return**, PACE, paragraph 5.5.
- **Guidelines on human rights protection in the context of accelerated asylum procedures**, adopted by the Committee of Ministers on 1 July 2009 at the 1062nd meeting of the Ministers’ Deputies,⁵ Article V.2.
- **Guidelines on International Protection No. 8: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees**, UNHCR, UN Doc. HCR/GIP/09/08, 22 December 2009, paragraph 69.

5. Legal representation

Resolution 1810 (2011): Unaccompanied children in Europe: issues of arrival, stay and return, PACE, paragraph 5.8.

All unaccompanied children in asylum proceedings must be represented by a lawyer in addition to a guardian, provided free of charge by the state [...].

The same principle is expressed in:

⁵ Available at <http://www.unhcr.org/refworld/pdfid/4a857e692.pdf>.

- paragraph 5.15;
- **Guidelines on International Protection No. 8: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees**, UNHCR, UN Doc. HCR/GIP/09/08, 22 December 2009, paragraph 69.

6. Views of the child

General Comment no. 6: Treatment of Unaccompanied and Separated Children Outside Their Country of Origin, CRC, UN Doc. CRC/GC/2005/6, 1 September 2005, paragraph 25.

Pursuant to article 12 of the Convention, in determining the measures to be adopted with regard to unaccompanied or separated children, the child's views and wishes should be elicited and taken into account (art. 12(1)). To allow for a well-informed expression of such views and wishes, it is imperative that such children are provided with all relevant information concerning, for example, their entitlements, services available including means of communication, the asylum process, family tracing and the situation in their country of origin (arts. 13, 17 and 22 (2)). In guardianship, care and accommodation arrangements, and legal representation, children's views should also be taken into account. Such information must be provided in a manner that is appropriate to the maturity and level of understanding of each child. As participation is dependent on reliable communication, where necessary, interpreters should be made available at all stages of the procedure.

General Comment no. 12: The Right of the Child to Be Heard, CRC, UN Doc. CRC/C/GC/12, 20 July 2009.

123. Children who come to a country following their parents in search of work or as refugees are in a particularly vulnerable situation. For this reason it is urgent to fully implement their right to express their views on all aspects of the immigration and asylum proceedings. In the case of migration, the child has to be heard on his or her educational expectations and health conditions in order to integrate him or her into school and health services. In the case of an asylum claim, the child must additionally have the opportunity to present her or his reasons leading to the asylum claim.

124. The Committee emphasizes that these children have to be provided with all relevant information, in their own language, on their entitlements, the services available, including means of communication, and the immigration and asylum process, in order to make their voice heard and to be given due weight in the proceedings. A guardian or adviser should be appointed, free of charge. Asylum-seeking children may also need effective family tracing and relevant information about the situation in their country of origin to determine their best interests. Particular assistance may be needed for children formerly involved in armed conflict to allow them to pronounce their needs. Furthermore, attention is needed to ensure that stateless children are included in decision-making processes within the territories where they reside.

The same principle is expressed in:

- **Resolution 1810 (2011): Unaccompanied children in Europe: issues of arrival, stay and return**, PACE, paragraph 5.11.
- **Guidelines on International Protection No. 8: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees**, UNHCR, UN Doc. HCR/GIP/09/08, 22 December 2009, paragraphs 8 and 70.

7. Consequences on non-refoulement for unaccompanied children

Recommendation 1703 (2005): Protection and assistance for separated children seeking asylum, PACE, paragraph 6.

As regards the asylum system, the Assembly regrets that separated children are often prevented from having access to effective protection against refoulement, due to the applicable legislation: at

procedural level, in most Council of Europe member states, children can be denied access to the territory on the grounds that they travelled via a safe country where they could have applied for asylum; their asylum application can be processed under an admissibility or accelerated asylum procedure; they may not benefit from the appointment of a legal representative [...].

Resolution 1810 (2011): Unaccompanied children in Europe: issues of arrival, stay and return, PACE, paragraph 5.15.

Returns to countries where the child's security, protection – including against refoulement – and welfare cannot be guaranteed, must not be envisaged.

4. Detention

The analysis of the international jurisprudence relevant to detention of asylum seekers or undocumented migrants brings to light the following principles:

- Detention must be justified, in accordance with law and not be arbitrary, in accordance with national law and procedures, which must be capable of effectively protecting the individual against arbitrariness;
- Detention is permissible to prevent unauthorized entry to the country or pending deportation or extradition, and will only be justified for as long as the deportation is actively being pursued with due diligence by the State;
- Information must be available and accessible to detained persons in a language they understand, regarding the nature of their detention, the reasons for it, and the process for reviewing or challenging the decision to detain;
- Detention should be seen as an exceptional measure and must last for the shortest possible period;
- The length of detention must not exceed that reasonably required for the legitimate purpose pursued;
- The general standards relating to the treatment of detainees also applies to the detention of migrants, including the prohibition of cruel, inhuman and degrading treatment
- Facilities where migrants are detained must provide conditions that are sufficiently clean, safe, and healthy to be compatible with freedom from torture or ill-treatment and the right to health;
- Detainees have a right to challenge the lawfulness of detention judicially;
- Judicial review of detention must be real and effective, must be clearly prescribed by law sufficiently certain in law and in practice. The review must be by a competent, independent and impartial judicial body; the body must have the power to issue legally binding judgments capable of leading to release where appropriate;

International law provisions involved: Article 5 ECHR, Articles 7, 9 and 10.1 ICCPR, UNHCR Revised Guidelines on the detention of asylum seekers (guidelines 1, 2, 3, 7, 9), Article 31 of the Geneva Refugee Convention, Article 2.1, 11 and 16.1 CAT, Article 12 IESCR, and the CPT standards.

Jurisprudence and international standards

1) Grounds of detention

Chahal v. the United Kingdom, ECtHR, GC, Application no. 22414/93, 15 November 1996, paragraphs 112, 113.

any deprivation of liberty under Article 5.1(f) will be justified only for as long as deportation proceedings are in progress. If such proceedings are not prosecuted with due diligence, the detention will cease to be permissible.

The same principle is reiterated in:

- *A. and Others v. the United Kingdom*, ECtHR, Grand Chamber (19 February 2009), paragraph 164.
- *Saadi v. the United Kingdom*, ECtHR, Grand Chamber (29 January 2008), paragraph 74.
- *Auad v. Bulgaria*, ECtHR, Application no. 46390/10, 11 October 2011, paragraph 128.
- *Mokallal v. Ukraine*, ECtHR, Application no. 19246/10, 10 November 2011, paragraph 35.
- *Yoh-Ekale Mwanje v. Belgium*, ECtHR, Application no. 10486/10, 20 December 2011, paragraphs 117-119.

M.S. v. Belgium, ECtHR, Application no. 50012/08, 31 January 2012, paragraph 155 (violation of right to liberty – Article 5.1 ECHR)

De l'avis de la Cour, à partir de ce moment-là, il apparaît clairement que le requérant fut maintenu en détention uniquement pour des raisons de sécurité, puisque les autorités ne pouvaient procéder à son éloignement vers l'Irak sans enfreindre leurs obligations au regard de la Convention. Il ressort des éléments de l'affaire que si les autorités belges avaient pu trouver un pays de destination où le requérant n'aurait pas couru un risque réel de subir un traitement contraire à l'article 3, elles auraient fait valoir la perspective réaliste d'expulser le requérant pour justifier de l'existence d'une procédure d'expulsion en cours. [...] La nécessité invoquée par Gouvernement de poursuivre la procédure d'asile ne saurait suffire en l'espèce, puisque l'issue de cette procédure était sans incidence sur la possibilité d'expulser le requérant.

A v. Australia, Human Rights Committee (CCPR), Communication No. 560/1993, Views of 30 April 1997, paragraph 9.3 (Right to liberty, Article 9 ICCPR)

*The State must provide more than general reasons to justify detention: in order to avoid arbitrariness, the State must advance reasons for detention particular to the individual case. It must also show that, in the light of the author's particular circumstances, there were **no less invasive means of achieving the same ends.***

The same principles are to be found in:

- *Saed Shams and others v. Australia*, CCPR, Communication No.1255/2004, 11 September 2007.
- *Samba Jalloh v. the Netherlands*, CCPR, Communication No. 794/1998, Views of 15 April 2002.

C. v. Australia, CCPR, Communication no. 900/1999, Views of 13 November 2002, paragraph 8.2 (Right to liberty, Article 9 ICCPR)

*[T]he State party has not demonstrated that, in the light of the author's particular circumstances, there were not less invasive means of achieving the same ends, that is to say, compliance with the State party's immigration policies, **by, for example, the imposition of reporting obligations, sureties or other conditions which would take account of the author's deteriorating condition.** In these circumstances, whatever the reasons for the original detention, continuance of immigration detention for over two years without individual justification and without any chance of substantive judicial review was, in the Committee's view, arbitrary and constituted a violation of article 9, paragraph 1.*

Concluding observations of the Committee against Torture: Germany, CAT/C/DEU/CO/5, 12 December 2011, paragraph 24

The Committee [...] is concerned at the information that several thousand asylum-seekers whose requests have been rejected and a vast majority of those who are the subject in so-called "Dublin cases" continue to be accommodated in Länder detention facilities immediately upon arrival, sometimes for protracted periods of time. This practice contravenes Directive 2008/115/EC of the European

Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third country nationals which regulates detention pending deportation as a means of last resort. The Committee is particularly concerned at the lack of procedure in a number of Länder for identification of vulnerable asylum-seekers, such as traumatized refugees or unaccompanied minors, given the absence of mandatory medical checks on arrival in detention, with the exception of checks on tuberculosis, and systematic checks for mental illnesses or traumatization. The Committee is further concerned by the lack of adequate accommodation for detained asylum-seekers separate from remand prisoners, especially for women awaiting deportation (arts. 11 and 16).

2) Principle of legality and arbitrariness of detention

Saadi v. the United Kingdom, ECtHR, GC, Application no. 13229/03, 29 January 2008

67. It is well established in the Court's case-law under the sub-paragraphs of Article 5 § 1 that any deprivation of liberty must [...] be "lawful". Where the "lawfulness" of detention is in issue, including the question whether "a procedure prescribed by law" has been followed, the Convention refers essentially to national law and lays down the obligation to conform to the substantive and procedural rules of national law. Compliance with national law is not, however, sufficient: Article 5 § 1 requires in addition that any deprivation of liberty should be in keeping with the purpose of protecting the individual from arbitrariness [...]. It is a fundamental principle that no detention which is arbitrary can be compatible with Article 5 § 1 and the notion of "arbitrariness" in Article 5 § 1 extends beyond lack of conformity with national law, so that a deprivation of liberty may be lawful in terms of domestic law but still arbitrary and thus contrary to the Convention.

74. To avoid being branded as arbitrary, therefore, such detention must be carried out in good faith; it must be closely connected to the purpose of preventing unauthorised entry of the person to the country; the place and conditions of detention should be appropriate, bearing in mind 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" [...]; and the length of the detention should not exceed that reasonably required for the purpose pursued.

These principles of legality and arbitrariness are also reiterated in:

- *Abdolkhani and Karimnia v. Turkey*, ECtHR, Application no. 30471/08, 22 September 2009, paragraph 133.
- *Chahal v. the United Kingdom*, ECtHR, GC, Application no. 22414/93, 15 November 1996, paragraphs 112, 113.
- *Conka v. Belgium*, ECtHR, Application no. 51564/99, 5 February 2002, paragraph 39.
- *A. and Others v. the United Kingdom*, ECtHR, GC, Application no. 3455/05, 19 February 2009, paragraph 164.
- *S.D. v. Greece*, ECtHR, Application No. 53541/07, Judgment of 11 June 2007, para 60.
- *Rahimi v. Greece*, ECtHR, Application no. 8687/08, 5 April 2011, paragraphs 104-106.
- *Lokpo and Touré v. Hungary*, ECtHR, Application no. 10816/10, 20 September 2011, paragraphs 23-25.
- *Mokallal v. Ukraine*, ECtHR, Application no. 19246/10, 10 November 2011, paragraph 36.
- *Longa Yonkeu v. Latvia*, ECtHR, Application no. 57229/09, 15 November 2011, paragraph 120 and 134.
- *Yoh-Ekale Mwanje v. Belgium*, ECtHR, Application no. 10486/10, 20 December 2011, paragraphs 117-119.

Rahimi v. Greece, ECtHR, Application no. 8687/08, 5 April 2011, paragraph 109, on arbitrary detention of unaccompanied minor:

[E]n ordonnant la mise en détention du requérant les autorités nationales ne se sont aucunement penchées sur la question de son intérêt supérieur en tant que mineur. De plus, elles n'ont pas recherché si le placement du requérant dans le centre de rétention de Pagani était une mesure

de dernier ressort et si elles pouvaient lui substituer une autre mesure moins radicale afin de garantir son expulsion. Ces éléments suscitent des doutes aux yeux de la Cour, quant à la bonne foi des autorités lors de la mise en œuvre de la mesure de détention.

3) Length of detention

Auad v. Bulgaria, ECtHR, Application no. 46390/10, 11 October 2011, paragraph 128.

[T]he length of the detention should not exceed that reasonably required for the purpose pursued [...]. Indeed, a similar point was recently made by the ECJ in relation to Article 15 of Directive 2008/115/EC [...]. It should, however, be pointed out that unlike that provision, Article 5 § 1 (f) of the Convention does not contain maximum time-limits; the question whether the length of deportation proceedings could affect the lawfulness of detention under this provision thus depends solely on the particular circumstances of each case [...].

4) Judicial review of detention

A. and Others v. the United Kingdom, ECtHR, GC, Application no. 3455/05, 19 February 2009, paragraph 202

Article 5 § 4 provides [...] entitles an arrested or detained person to institute proceedings bearing on the procedural and substantive conditions which are essential for the “lawfulness” of his or her deprivation of liberty. The notion of “lawfulness” under paragraph 4 of Article 5 has the same meaning as in paragraph 1, so that the arrested or detained person is entitled to a review of the “lawfulness” of his detention in the light not only of the requirements of domestic law but also of the Convention, the general principles embodied therein and the aim of the restrictions permitted by Article 5 § 1. [...] The review should, however, be wide enough to bear on those conditions which are essential for the “lawful” detention of a person according to Article 5 § 1 [...]. The reviewing “court” must not have merely advisory functions but must have the competence to “decide” the “lawfulness” of the detention and to order release if the detention is unlawful [...].

See also, *inter alia*, *Chahal v. the United Kingdom*, ECtHR, GC, Application no. 22414/93, 15 November 1996, paragraph 127.

Al-Nashif v. Bulgaria, ECtHR, Application no. 50963/99, 20 June 2002, paragraph 92

The Court reiterates that everyone who is deprived of his liberty is entitled to a review of the lawfulness of his detention by a court, regardless of the length of confinement. The Convention requirement that an act of deprivation of liberty be amenable to independent judicial scrutiny is of fundamental importance in the context of the underlying purpose of Article 5 of the Convention to provide safeguards against arbitrariness. What is at stake is both the protection of the physical liberty of individuals as well as their personal security.

Rahimi v. Greece, ECtHR, Application no. 8687/08, 5 April 2011, paragraphs 120-121

[...] La Cour observe notamment que le requérant ne pouvait en pratique contacter aucun avocat. De plus, il avait reçu une brochure d’information sur certains des recours disponibles, rédigée dans une langue qui lui était en principe incompréhensible. [...] De surcroît, le requérant avait été enregistré comme mineur accompagné, alors qu’il était sans tuteur qui aurait pu agir comme son représentant légal. Partant, à supposer même que les recours précités aient été efficaces, la Cour ne voit pas comment l’intéressé aurait pu les exercer.

Au vu de ce qui précède, la Cour conclut qu’il y a eu violation de l’article 5 § 4 de la Convention.

M. and Others v. Bulgaria, ECtHR, Application no. 41416/08, 26 July 2011, paragraph 83

The Court reiterates that the Convention requirement for an act of deprivation of liberty to be amenable to independent judicial scrutiny is of fundamental importance in the context of the underlying purpose of Article 5 of the Convention to provide safeguards against arbitrariness [...].

5) Facilities

Charahili v. Turkey, ECtHR, Application no. 46605/07, 13 April 2010, paragraph 77

[A]lthough immigration detainees may have to spend some time in ordinary police detention facilities, given that the conditions in such places may generally be inadequate for prolonged periods of detention, the period of time spent by immigration detainees in such establishments should be kept to the absolute minimum.

6) Conditions of detention

Orchowski v. Poland, ECtHR, Application no. 17885/04, 22 October 2009, paragraph 122

The extreme lack of space in a prison cell weighs heavily as an aspect to be taken into account for the purpose of establishing whether the impugned detention conditions were “degrading” from the point of view of Article 3 [...].

By contrast, in other cases where the overcrowding was not so severe as to raise in itself an issue under Article 3 of the Convention, the Court noted other aspects of physical conditions of detention as being relevant for its assessment of compliance with that provision. Such elements included, in particular, the availability of ventilation, access to natural light or air, adequacy of heating arrangements, compliance with basic sanitary requirements and the possibility of using the toilet in private. Thus, even in cases where a larger prison cell was at issue – measuring in the range of 3 to 4 m² per inmate – the Court found a violation of Article 3 since the space factor was coupled with the established lack of ventilation and lighting [...].

M.S.S. v. Belgium and Greece, ECtHR, GC, Application no. 30696/09, 21 January 2011

230. *The Court notes that, according to the findings made by organisations that visited the holding centre next to the airport, the sector for asylum seekers was rarely unlocked and the detainees had no access to the water fountain outside and were obliged to drink water from the toilets. In the sector for arrested persons, there were 145 detainees in a 110 sq. m space. In a number of cells there was only one bed for fourteen to seventeen people. There were not enough mattresses and a number of detainees were sleeping on the bare floor. There was insufficient room for all the detainees to lie down and sleep at the same time. Because of the overcrowding, there was a lack of sufficient ventilation and the cells were unbearably hot. Detainees’ access to the toilets was severely restricted and they complained that the police would not let them out into the corridors. The police admitted that the detainees had to urinate in plastic bottles which they emptied when they were allowed to use the toilets. It was observed in all sectors that there was no soap or toilet paper, that sanitary and other facilities were dirty, that the sanitary facilities had no doors and the detainees were deprived of outdoor exercise.*

233. *On the contrary, in the light of the available information on the conditions at the holding centre near Athens airport, the Court considers that the conditions of detention experienced by the applicant were unacceptable. It considers that, taken together, the feeling of arbitrariness and the feeling of inferiority and anxiety often associated with it, as well as the profound effect such conditions of detention indubitably have on a person’s dignity, constitute degrading treatment contrary to Article 3 of the Convention. In addition, the applicant’s distress was accentuated by the vulnerability inherent in his situation as an asylum seeker.*

Mouisel v. France, ECtHR, Application no. 67263/01, 14 November 2002, paragraph 40

Although Article 3 of the Convention cannot be construed as laying down a general obligation to release detainees on health grounds, it nonetheless imposes an obligation on the State to protect the physical well-being of persons deprived of their liberty, for example by providing them with the requisite medical assistance [...]. The Court has also emphasised the right of all prisoners to conditions of detention which are compatible with human dignity, so as to ensure that the manner and method of execution of the measures imposed do not subject them to distress or hardship of an

intensity exceeding the unavoidable level of suffering inherent in detention; in addition, besides the health of prisoners, their well-being also has to be adequately secured, given the practical demands of imprisonment [...].

Rodic v. Bosnia-Herzegovina, ECtHR, Application no. 22893/05, 27 May 2008, paragraph 73

*The Court concludes that the applicants' physical well-being was not adequately secured in the period from their arrival in Zenica Prison until they were provided with separate accommodation in the Zenica Prison hospital unit (a period which lasted between one and ten months depending on the applicant). Furthermore, the Court considers that the hardship the applicants endured, in particular the **constant mental anxiety caused by the threat of physical violence** and the anticipation of such [...], must have exceeded the unavoidable level inherent in detention and finds that the resulting suffering went beyond the threshold of severity under Article 3 of the Convention.*

Rahimi v. Greece, ECtHR, Application no. 8687/08, 5 April 2011, paragraph 86

*[...] En l'espèce, la Cour ne perd pas de vue que **le requérant, en raison de son âge et de sa situation personnelle, se trouvait en une situation d'extrême vulnérabilité**. Il ressort du dossier que les autorités compétentes ne se sont aucunement préoccupées lors de sa mise en détention de sa situation particulière. De plus, les conditions de détention au centre de Pagani, notamment en ce qui concerne l'hébergement, l'hygiène et l'infrastructure étaient si graves qu'elles portaient atteinte au sens même de la dignité humaine. Par conséquent, elles s'analysaient, en elles-mêmes et sans prendre en considération la durée de la détention, en un traitement dégradant contraire à l'article 3.*

Yoh-Ekale Mwanje v. Belgium, ECtHR, Application no. 10486/10, 20 December 2011, paragraph 91

*La Cour a rappelé sa jurisprudence relative à l'article 3 et à la privation de liberté des personnes gravement malades ainsi que les principes qui s'en dégagent dans l'arrêt *Aleksanian c. Russie* (n° 46468/06, §§ 133-140, 22 décembre 2008). Elle a notamment souligné que **trois éléments au moins devaient être pris en considération dans ce domaine : les pathologies dont est atteint l'intéressé, le caractère approprié de l'assistance et des soins médicaux fournis en détention et l'opportunité de maintenir la détention compte tenu de l'état de santé de l'intéressé** (*idem*, § 137).*

General Comment No. 14: The right to the highest attainable standard of health, UN Committee on Economic, Social and Cultural Rights, UN Doc. E/C.12/2000/4, 11 August 2000, paragraph 34.

States are under the obligation to respect the right to health by, inter alia, refraining from denying or limiting equal access for all persons, including prisoners or detainees, minorities, asylum seekers and illegal immigrants, to preventive, curative and palliative health services.

7) Release

Mokallal v. Ukraine, ECtHR, Application no. 19246/10, 10 November 2011, paragraph 44

*[...] The Court reiterates that some delay in implementing a decision to release a detainee is understandable, and often inevitable in view of practical considerations relating to the running of the courts and the observance of particular formalities. However, the national authorities must attempt to keep this to a minimum [...]. **Administrative formalities connected with release cannot justify a delay of more than a few hours** [...]. It is for the Contracting States to organise their legal system in such a way that their law-enforcement authorities can meet the obligation to avoid unjustified deprivation of liberty. In the present case it took the domestic authorities two days to arrange for the applicant's release after they had received notification that the applicant's extradition was no longer required. **Having regard to the prominent place which the right to liberty holds in a democratic society, the respondent State should have deployed all modern means of communication of information to keep to a minimum the delay in implementing the decision***

to release the applicant, as required by the relevant case-law [...].

8) Children and detention

General Comment no. 6: Treatment of Unaccompanied and Separated Children Outside Their Country of Origin, CRC, UN Doc. CRC/GC/2005/6, 1 September 2005.

61. In application of article 37 of the Convention and the principle of the best interests of the child, **unaccompanied or separated children should not, as a general rule, be detained**. Detention cannot be justified solely on the basis of the child being unaccompanied or separated, or on their migratory or residence status, or lack thereof. Where detention is exceptionally justified for other reasons, it shall be conducted in accordance with article 37 (b) of the Convention that requires **detention to conform to the law of the relevant country and only to be used as a measure of last resort and for the shortest appropriate period of time**. In consequence, **all efforts, including acceleration of relevant processes, should be made to allow for the immediate release** of unaccompanied or separated children from detention and their placement in other forms of appropriate accommodation.

63. In the exceptional case of detention, conditions of detention must be governed by the best interests of the child and pay full respect to article 37 (a) and (c) of the Convention and other international obligations. Special arrangements must be made for living quarters that are suitable for children and that separate them from adults, unless it is considered in the child's best interests not to do so. Indeed, the underlying approach to such a programme should be "care" and not "detention". Facilities should not be located in isolated areas where culturally appropriate community resources and access to legal aid are unavailable. Children should have the opportunity to make regular contact and receive visits from friends, relatives, religious, social and legal counsel and their guardian. They should also be provided with the opportunity to receive all basic necessities as well as appropriate medical treatment and psychological counselling where necessary. During their period in detention, children have the right to education which ought, ideally, to take place outside the detention premises in order to facilitate the continuance of their education upon release. They also have the right to recreation and play as provided for in article 31 of the Convention. In order to effectively secure the rights provided by article 37 (d) of the Convention, unaccompanied or separated children deprived of their liberty shall be provided with prompt and free access to legal and other appropriate assistance, including the assignment of a legal representative.

Rahimi v. Greece, ECtHR, Application no. 8687/08, 5 April 2011, paragraph 109, on arbitrary detention of unaccompanied minor:

[E]n ordonnant la mise en détention du requérant les autorités nationales ne se sont aucunement penchées sur la question de son intérêt supérieur en tant que mineur. De plus, elles n'ont pas recherché si le placement du requérant dans le centre de rétention de Pagani était une mesure de dernier ressort et si elles pouvaient lui substituer une autre mesure moins radicale afin de garantir son expulsion. Ces éléments suscitent des doutes aux yeux de la Cour, quant à la bonne foi des autorités lors de la mise en œuvre de la mesure de détention.

Kanagaratnam and others v. Belgium, ECtHR, Application no. 15297/09, 13 December 2011

67. [C]'est l'intérêt supérieur de l'enfant tel qu'il est consacré par l'article 3 de la Convention des Nations Unies relative aux droits de l'enfant qui doit prévaloir y compris dans le contexte d'une expulsion [...]. **Il faut donc partir de la présomption que les enfants étaient vulnérables tant en raison de leur qualité d'enfants que de leur histoire personnelle.** [...]

68. Eu égard à ce qui précède, la Cour estime qu'en plaçant les enfants requérants en centre fermé, les autorités belges les ont exposés à des sentiments d'angoisse et d'infériorité et ont pris, en pleine connaissance de cause, le risque de compromettre leur développement.

69. La situation ainsi vécue par les enfants requérants a atteint, selon la Cour, le seuil de gravité exigé par l'article 3 de la Convention pour constituer des **traitements inhumains et dégradants** et a emporté violation de cet article.

94. [L]a Cour est d'avis que, dans ces circonstances, le maintien de la [mère] dans un lieu manifestement inapproprié au séjour d'une famille, dans des conditions que la Cour analyse elle-même, en ce qui concerne les enfants, comme étant contraires à l'article 3 et pendant une période particulièrement longue relève de l'arbitraire.

95. Au vu de ce qui précède, la Cour conclut que le maintien en détention de la [mère] n'était pas « régulier » au sens de l'article 5 §1 f) de la Convention et qu'il y a eu violation de cette disposition.

Popov v. France, ECtHR, Applications nos. 39472/07 and 39474/07, 19 January 2012

147. [...] En effet, elle est d'avis que l'intérêt supérieur de l'enfant ne peut se limiter à maintenir l'unité familiale mais que **les autorités doivent mettre en œuvre tous les moyens nécessaires afin de limiter autant que faire se peut la détention de familles accompagnées d'enfants et préserver effectivement le droit à une vie familiale**. Aussi, en l'absence de tout élément permettant de soupçonner que la famille allait se soustraire aux autorités, la détention, pour une durée de quinze jours, dans un centre fermé, apparaît disproportionnée par rapport au but poursuivi.

148. Partant, la Cour considère que les requérants ont subi une ingérence disproportionnée dans le droit au respect de leur vie familiale et qu'il y a eu violation de l'article 8 de la Convention.

Recommendation 1985 (2011): Undocumented migrant children in an irregular situation: a real cause for concern, PACE

9.4.1. a child should, in principle, never be detained. Where there is any consideration to detain a child, the best interest of the child should always come first; [...]

9.4.3. if detained, the period must be for the shortest possible period of time and the facilities must be suited to the age of the child; relevant activities and educational support must also be available;

9.4.4. if detention does take place, it must be in separate facilities from those for adults, or in facilities meant to accommodate children with their parents or other family members, and the child should not be separated from a parent, except in exceptional circumstances;

9.4.5. unaccompanied children should, however, never be detained;

9.4.6. no child should be deprived of his or her liberty solely because of his or her migration status, and never as a punitive measure;

9.4.7. where a doubt exists as to the age of the child, the benefit of the doubt should be given to that child; [...].

The same principles are reflected in:

- **Resolution 1810 (2011): Unaccompanied children in Europe: issues of arrival, stay and return**, PACE, paragraph 5.9

UNHCR, Executive Committee Conclusion No. 107 (LVIII) – 2007 – Children at Risk, paragraph (b)(xi)

In recognition that detention can affect the physical and mental well-being of children and heighten their vulnerability, States should refrain from detaining children, and do so only as a measure of last resort and for the shortest appropriate period of time, while considering the best interests of the child.

4. Remedy

The analysis of international jurisprudence relevant to the right to an effective remedy of asylum seekers and undocumented migrants brings to light the following principles:

- the remedy must be prompt, accessible, effective in practice as well as in law, and must not be hindered by the acts of State authorities;
- the remedy should be provided by a judicial body, but if it is not, it must be provided by an independent and impartial body, and be capable to review and overturn the decision to expel;

- it must be enforceable and lead to cessation and reparation for the human rights violation concerned;
- in cases of *non-refoulement*, the decision to expel must be subject to close and rigorous scrutiny;
- a person threatened with expulsion must have access to relevant documents and accessible information on the legal procedures to be followed in his or her case; where necessary, translated material and interpretation; effective access to legal advice, if necessary by provision of legal aid; the right to participate in adversarial proceedings; reasons for the decision to expel and a fair and reasonable opportunity to dispute the factual basis for the expulsion;
- the right to an effective remedy requires the right to an appeal with a suspensive effect;

International law provisions involved: Article 32 and 33 Geneva Refugee Convention, Article 2.3 ICCPR, Article 13 ECHR, Article 8.2 CPED, Article 3 CAT; UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law.

Jurisprudence and international standards

1. General principles

M.S.S. v. Belgium and Greece, ECtHR, GC, Application no. 30696/09, 21 January 2011, paragraph 293. See also, paragraph 387

[I]n view of the importance which the Court attaches to Article 3 of the Convention and the irreversible nature of the damage which may result if the risk of torture or ill-treatment materialises, the effectiveness of a remedy within the meaning of Article 13 imperatively requires close scrutiny by a national authority, independent and rigorous scrutiny of any claim that there exist substantial grounds for fearing a real risk of treatment contrary to Article 3, as well as a particularly prompt response ; it also requires that the person concerned should have access to a remedy with automatic suspensive effect.

See also:

- *Shamayev and Others v. Georgia and Russia*, ECtHR, Application no. 36378/02, paragraph 448.
- *Bati and Others v. Turkey*, ECtHR, Applications nos. 33097/96 and 57834/00, paragraph 136.
- *Conka v. Belgium*, ECtHR, Application no. 51564/99, paragraphs 79, 81-83.
- *Gebremedhin [Gaberamadhien] v. France*, ECtHR, Application no. 25389/05, paragraph 66.
- *Jabari v. Turkey*, ECtHR, Application no. 40035/98, 11 July 2000, paragraphs 39 and 50.
- *Chahal v. the United Kingdom*, ECtHR, GC, Application no. 22414/93, 15 November 1996, paragraphs 79, 83 and 96.
- *Al-Nashif v. Bulgaria*, ECtHR, Application no. 50963/99, 20 June 2002, paragraph 132.
- *R.U. v. Greece*, ECtHR, GC, Application no. 2237/08, 7 June 2011, paragraphs 77-78.
- *Diallo v. Czech Republic*, ECtHR, Application no. 20493/07, 23 June 2011, paragraphs 74, 78, 80, 85.
- *Baysakov and Others v. Ukraine*, ECtHR, Application no. 54131/08, § 71, 18 February 2010.

Muminov v. Russia, ECtHR, Application no. 42502/06, 11 December 2008, paragraph 100

As to the merits of the complaint, the Court reiterates that the remedy required by Article 13 must be effective both in law and in practice, in particular in the sense that its exercise must not be unjustifiably hindered by the acts or omissions of the authorities of the respondent State. [...]

See also:

- *I.M. v. France*, ECtHR, Application no. 9152/09, 2 February 2012, paragraph 130.
- *M.S.S. v. Belgium and Greece*, ECtHR, GC, Application no. 30696/09, 21 January 2011, paragraph 290.

Alzery v. Sweden, CCPR, Communication No. 1416/2005, Views of 10 November 2006, paragraph 11.8

As to the claim concerning the absence of independent review of the Cabinet's decision to expel, given the presence of an arguable risk of torture, the Committee notes that article 2 of the Covenant, read in conjunction with article 7, requires an effective remedy for violations of the latter provision. By the nature of refoulement, effective review of a decision to expel to an arguable risk of torture must have an opportunity to take place prior to expulsion, in order to avoid irreparable harm to the individual and rendering the review otiose and devoid of meaning. The absence of any opportunity for effective, independent review of the decision to expel in the author's case accordingly amounted to a breach of article 7, read in conjunction with article 2 of the Covenant.

Nirmal Singh v Canada, Committee against Torture (CAT), Communication No. 319/2007, 8 July 2011, CAT/C/46/D/319/2007, paragraph 8.9

[...] [T]he State party should provide for judicial review of the merits, rather than merely of the reasonableness, of decisions to expel an individual where there are substantial grounds for believing that the person faces a risk of torture. [...]

Concluding observations of the Committee against Torture: Germany, CAT/C/DEU/CO/5, 12 December 2011, paragraph 22.

While noting that asylum applications falling under the Dublin II Regulation are subject to appeal, the Committee is concerned that [...] lodging of an appeal does not have suspension effect on the impugned decisions (art. 3). The Committee also recommends that the State party abolish the legal provisions of the Asylum Procedures Act excluding suspensive effects of the appeals against decision to transfer an asylum-seeker to another State participating in the Dublin system.

UNHCR, Executive Committee Conclusion No. 85 (XLIX) International Protection, 49th Session, 1998, para. (aa)

Stresses that, as regards the return to a third country of an asylum-seeker whose claim has yet to be determined from the territory of the country where the claim has been submitted, including pursuant to bilateral or multilateral readmission agreements, it should be established that the third country will treat the asylum-seeker (asylum-seekers) in accordance with accepted international standards, will ensure effective protection against refoulement, and will provide the asylum-seeker (asylum-seekers) with the possibility to seek and enjoy asylum;

Twenty Guidelines on Forced Return, Committee of Minister, Council of Europe, Guideline 5.1 Remedy against the removal order

In the removal order, or in the process leading to the removal order, the subject of the removal order shall be afforded an effective remedy before a competent authority or body composed of members who are impartial and who enjoy safeguards of independence. The competent authority or body shall have the power to review the removal order, including the possibility of temporarily suspending its execution.

2. Accessibility

M.S.S. v. Belgium and Greece, ECtHR, GC, Application no. 30696/09, 21 January 2011, paragraph 318

[T]he Court reiterates that the accessibility of a remedy in practice is decisive when assessing its effectiveness. The Court has already noted that the Greek authorities have taken no steps to ensure communication between the competent authorities and the applicant. That fact, combined with the malfunctions in the notification procedure in respect of "persons of no known address" reported by the Council of Europe Commissioner for Human Rights and the UNHCR [...], makes it very

uncertain whether the applicant will be able to learn the outcome of his asylum application in time to react within the prescribed time-limit.

3. Systemic obstacles to an effective remedy

M.S.S. v. Belgium and Greece, ECtHR, GC, Application no. 30696/09, 21 January 2011

300. *The Court observes, however, that for a number of years the UNHCR and the Council of Europe Commissioner for Human Rights as well as many international non-governmental organisations have revealed repeatedly and consistently that Greece's legislation is not being applied in practice and that the asylum procedure is marked by such major structural deficiencies that asylum seekers have very little chance of having their applications and their complaints under the Convention seriously examined by the Greek authorities, and that in the absence of an effective remedy, at the end of the day they are not protected against arbitrary removal back to their countries of origin [...].*

301. *The Court notes, firstly, the shortcomings in access to the asylum procedure and in the examination of applications for asylum [...]: insufficient information for asylum seekers about the procedures to be followed, difficult access to the Attica police headquarters, no reliable system of communication between the authorities and the asylum seekers, shortage of interpreters and lack of training of the staff responsible for conducting the individual interviews, lack of legal aid effectively depriving the asylum seekers of legal counsel, and excessively lengthy delays in receiving a decision. These shortcomings affect asylum seekers arriving in Greece for the first time as well as those sent back there in application of the Dublin Regulation.*

302. *The Court is also concerned about the findings of the different surveys carried out by the UNHCR, which show that almost all first-instance decisions are negative and drafted in a stereotyped manner without any details of the reasons for the decisions being given [...]. In addition, the watchdog role played by the refugee advisory committees at second instance has been removed and the UNHCR no longer plays a part in the asylum procedure [...].*

See also, *R.U. v. Greece*, ECtHR, Grand Chamber, Application no. 2237/08, 7 June 2011, paragraphs 82-83

4. National Security

Al-Nashif v. Bulgaria, ECtHR, Application no. 50963/99, 20 June 2002, paragraph 137

[...] While procedural restrictions may be necessary to ensure that no leakage detrimental to national security would occur and while any independent authority dealing with an appeal against a deportation decision may need to afford a wide margin of appreciation to the executive in matters of national security, that can by no means justify doing away with remedies altogether whenever the executive has chosen to invoke the term "national security" [...]. Even where an allegation of a threat to national security is made, the guarantee of an effective remedy requires as a minimum that the competent independent appeals authority must be informed of the reasons grounding the deportation decision, even if such reasons are not publicly available. The authority must be competent to reject the executive's assertion that there is a threat to national security where it finds it arbitrary or unreasonable. There must be some form of adversarial proceedings, if need be through a special representative after a security clearance. Furthermore, the question whether the impugned measure would interfere with the individual's right to respect for family life and, if so, whether a fair balance is struck between the public interest involved and the individual's rights must be examined.

5. Accelerated procedures and the right to a remedy

I.M. v. France, ECtHR, Application no. 9152/09, 2 February 2012

132. Par ailleurs, l'effectivité implique des exigences de qualité, de rapidité et de suspensivité, compte tenu en particulier de l'importance que la Cour attache à l'article 3 et de la nature irréversible du dommage susceptible d'être causé en cas de réalisation du risque de torture ou de mauvais traitements.

147. [...] Si la Cour reconnaît l'importance de la rapidité des recours, elle considère que celle-ci ne devrait pas être privilégiée aux dépens de l'effectivité de garanties procédurales essentielles visant à protéger le requérant contre un refoulement arbitraire vers le Soudan.

148. [...] la Cour estime au contraire que le classement de la demande d'asile du requérant en procédure prioritaire a abouti à un traitement extrêmement rapide, voire sommaire de cette demande par l'OFPRA. Pour la Cour, l'ensemble des contraintes imposées au requérant tout au long de cette procédure, alors qu'il était privé de liberté et qu'il s'agissait d'une première demande d'asile, ont affecté en pratique la capacité du requérant à faire valoir le bien-fondé de ses griefs tirés de l'article 3 de la Convention.

154. [...] la Cour constate que si les recours exercés par le requérant étaient théoriquement disponibles, leur accessibilité en pratique a été limitée par plusieurs facteurs, liés pour l'essentiel au classement automatique de sa demande en procédure prioritaire, à la brièveté des délais de recours à sa disposition et aux difficultés matérielles et procédurales d'apporter des preuves alors que le requérant se trouvait en détention ou en rétention.

5) Family Definition

An analysis of the international case law relevant to the definition of family in the context of the right to family life and family reunification brings to light the following:

- a definition of family members appropriate to the tenets of international human rights law should be based on the existence of family ties *de facto* and not only *de iure*, regardless of sexual orientation and gender identity, thus including parents, children, direct ascendants, and other siblings, from families also *de facto* and also from same-sex families.
- the concept of family members who may be a sponsor of a child or may reunite with unaccompanied child should be driven by the paramount principle of the best interests of the child, and not be limited by a strict classification of eligible family members.

International law provisions involved: Article 8 ECHR; Articles 7 and 24 EU Charter; Articles 17 and 24 ICCPR; Articles 3, 9 and 10 CRC.

Jurisprudence and international standards

1) Family *de facto* and *de iure*

Onur v. United Kingdom, ECtHR, Application No. 27319/07, Judgment of 27 February 2009.

43. It is clear from the Court's case-law that children born either to a married couple or to a co-habiting couple are *ipso jure* part of that family from the moment of birth and that family life exists between the children and their parents [...].

44. The Court has [...] indicated that in the absence of co-habitation, other factors may serve to demonstrate that a relationship has sufficient constancy to create *de facto* family ties [...]. Such factors include the nature and duration of the parents' relationship, and in particular whether they had planned to have a child; whether the father subsequently recognised the child as his; contributions made to the child's care and upbringing; and the quality and regularity of contact [...].

Ciliz v. the Netherlands, ECtHR, Application No. 29192/95, Judgment of 11 July 2000.

59. Having regard to its previous case-law the Court observes that there can be no doubt that a bond amounting to family life within the meaning of Article 8 § 1 of the Convention exists between the parents and the child born from their marriage-based relationship, as was the case in the present

application. Such natural family relationship is not terminated by reason of the fact that the parents separate or divorce as a result of which the child ceases to live with one of its parents [...].

These principles are also reflected in:

- *Schalk and Kopf v. Austria*, ECtHR, Application No. 30141/04, 24 June 2010, paragraph 91;
- *A.W. Khan v. United Kingdom*, ECtHR, Application No. 47486/06, 12 January 2010, paragraph 34;
- *Elsholz v. Germany*, ECtHR, GC, Application No. 25735/94, 13 July 2000, paragraph 43;
- *Hoffmann v. Germany*, ECtHR, Application No. 34045/96, 11 October 2001, paragraph 34;
- *Marckx v. Belgium*, ECtHR, Plenary, Application No. 6833/74, 13 June 1979, paragraph 31;
- *Keegan v. Ireland*, ECtHR, Application No. 16969/90, 26 May 1994, paragraphs 44-45;
- *Kroon and Others v. the Netherlands*, ECtHR, Application No. 18535/91, 27 October 1994, paragraph 40.

Genovese v. Malta, ECtHR, Application no. 53124/09, 11 October 2011, paragraph 29.

The Court [...] reiterates that the notion of “family life” in Article 8 is not confined solely to marriage-based relationships and may encompass other de facto “family” ties. The application of this principle has been found to extend equally to the relationship between natural fathers and their children born out of wedlock. Further, the Court considers that Article 8 cannot be interpreted as only protecting “family life” which has already been established but, where the circumstances warrant it, must extend to the potential relationship which may develop between a natural father and a child born out of wedlock. Relevant factors in this regard include the nature of the relationship between the natural parents and the demonstrable interest in and commitment by the natural father to the child both before and after the birth [...].

Recommendation 1327 (1997) on the protection and reinforcement of the human rights of refugees and asylum-seekers in Europe, PACE⁶.

PACE urges “member states to interpret the concept of asylum seekers’ families as including de facto family members (natural family), for example an asylum seeker’s partner or natural children as well as elderly, infirm or otherwise dependent relations.”

See also, **Recommendation 1686 (2004) of the Parliamentary Assembly of the Council of Europe on Human mobility and the right to family reunion**, adopted by the Standing Committee, acting on behalf of the Assembly, on 23 November 2004, Article 8.

Ngambi and Nébol v. France, CCPR, Communication No. 1179/2003, Views of 16 July 2004, paragraph 6.4.

the term ‘family’, for purposes of the Covenant, must be understood broadly to include all those comprising a family as understood in the society concerned. The protection of such family is not obviated by the absence of formal marriage bonds, especially where there is a local practice of customary or common-law marriage. Nor is the right to protection of family life necessarily displaced by geographical separation, infidelity, or the absence of conjugal relations. However, there must first be a family bond to protect.

2. Adult dependants

Osman v. Denmark, ECtHR, Application no. 38058/09, 14 June 2011, paragraph 55.

The Court has accepted in a number of cases concerning young adults who had not yet founded a family of their own that their relationship with their parents and other close family members also constituted “family life”.

⁶ adopted by the Assembly on 24 April 1997 (14th Sitting)

3. Same sex couples and family life

Schalk and Kopf v. Austria, ECtHR, Application No. 30141/04, 24 June 2010.

93. *The Court notes that since 2001, when the decision in Mata Estevez was given, a rapid evolution of social attitudes towards same-sex couples has taken place in many member States. Since then a considerable number of member States have afforded legal recognition to same-sex couples (see above, paragraphs 27-30). Certain provisions of EU law also reflect a growing tendency to include same-sex couples in the notion of “family” (see paragraph 26 above).*

94. *In view of this evolution the Court considers it artificial to maintain the view that, in contrast to a different-sex couple, a same-sex couple cannot enjoy “family life” for the purposes of Article 8. Consequently the relationship of the applicants, a cohabiting same-sex couple living in a stable de facto partnership, falls within the notion of “family life”, just as the relationship of a different-sex couple in the same situation would.*

The same principle is reflected in ***P.B. and J.S. v. Austria***, ECtHR, Application No. 18984/02, 22 July 2010, paragraphs 29-30.

Recommendation 1686 (2004) of the Parliamentary Assembly of the Council of Europe on Human mobility and the right to family reunion, adopted by the Standing Committee, acting on behalf of the Assembly, on 23 November 2004, Article 12.iii.a

PACE urged states “to apply, where possible and appropriate, a broad interpretation of the concept of family and include in particular in that definition members of the natural family, non-married partners, including same-sex partners, children born out of wedlock, children in joint custody, dependent adult children and dependent parents.”

See also, ***Recommendation 1470 (2000) of the Parliamentary Assembly of the Council of Europe on the Situation of gays and lesbians and their partners in respect of asylum and immigration in the member states of the Council of Europe***, adopted by the Parliamentary Assembly on 30 June 2000 (24th Sitting), Article 6.