BEFORE THE FORTH SECTION

EUROPEAN COURT ON HUMAN RIGHTS

Bilalova v Poland

Application no. 23685/14

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

INTERVENERS

pursuant to the Deputy Grand Chamber Registrar's notification dated 13 February 2015 that the President of the Court had granted permission under Rule 44 § 3 of the Rules of the European Court of Human Rights

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6 March 2015

Summary

1. In accordance with the prohibition of arbitrary detention and the principle that detention measures must be carried out in good faith, the interveners submit that deprivation of liberty pursuant to immigration control must not be imposed without an examination of the particular situation of the individuals concerned, including a detailed assessment of their potential vulnerabilities. An individualised assessment of all the relevant circumstances of each case must be carried out prior to the imposition of detention measures, which must always be a measure of last resort, to be imposed only when no alternative is available.
2. Furthermore, in light of children's inherent vulnerability, the principle of the best interests of the child militates strongly against any resort to detention, whatever the context, let alone when the detaining measures are being contemplated pursuant to immigration control. This applies even when children are to be detained with members of their family.
3. In light of the specific vulnerabilities of, *inter alia,* families and victims of domestic or gender-based violence, the individual examination requires an assessment of whether immigration detention will adversely affect the health or well-being of the individual concerned.
4. The interveners recall that, in accordance with this Court's jurisprudence, where Contracting Parties are also EU Member States, there is an obligation to act in accordance with EU law.

The right to liberty and security under Article 5 ECHR

5. For detention to be lawful under Article 5, an individual must not be unlawfully or arbitrarily detained.[1] Whilst Article 5(1)(f) allows the detention of an asylum seeker or other immigrant "to prevent his effecting an unauthorised entry into the country or … with a view to deportation or extradition", such detention must be compatible with the overall purpose of Article 5, namely to safeguard the right to liberty and security and to ensure that "no-one should be dispossessed of his or her liberty in an arbitrary fashion".[2]
6. This Court has established specific requirements that detention under Article 5(1)(f) must satisfy in order to comply with the purpose, the spirit and the letter of the ECHR.[3] In particular, detention measures must be carried out in good faith; they must be closely connected to the ground of detention relied on to impose them in the case in question; the place, regime and

[1] *McKay v the United Kingdom* [GC], (No. 543/03) para 30; *Amuur v France* (No. 19776/920), para 50; *Chahal v the United Kingdom* (No. 22414/93), para 118; *Saadi v the United Kingdom* [GC], (No. 13229/03), para 66; *Al Husin v Bosnia and Herzegovina* (No. 3727/08), para 65; *Abdi v the United Kingdom* (No. 27770/08), para 68; *Azimov v Russia* (No. 67474/11); *Suso Musa v Malta* (No. 42337/12), para 93; and *Akram Karimov v Russia* (No. 62892/12), para 144.

[2] *Saadi v the United Kingdom* [GC], (No. 13229/03), paras 64-66. Indeed, this Court has held that arbitrary detention renders those subjected to it vulnerable, for instance, to inhuman or degrading treatment or punishment (Article 3). In *Muskhadzhiyeva and Others v Belgium (No. 41442/07)*, this Court found that the conditions in which children were held in detention amounted to inhuman or degrading treatment, one of the factors that led to the Court determining that the detention was unlawful under the Convention.

[3] *Amuur v France* (No. 19776/92), para 50; *Chahal v the United Kingdom* (No. 22414/93), para 118; *Saadi v the United Kingdom* [GC], (No. 13229/03), para 74; *Al Husin v Bosnia and Herzegovina* (No. 3727/08), para 65; *Abdi v the United Kingdom* (No. 27770/08), para 68; *Azimov v Russia* (No. 67474/11), para 161; *Suso Musa v Malta* (No. 42337/12), para 89; *Akram Karimov v Russia* (62892/12), para 143.

detention conditions should be appropriate; and the length of the detention should not exceed that reasonably required for the purpose pursued.[4]

7. This Court has held that, whilst detention under Art 5(1)(f) must not be arbitrary, it need not be necessary for a specific purpose other than immigration control, and "that the principle of proportionality applies to detention under Article 5(1)(f) only to the extent that the detention should not continue for an unreasonable length of time" as opposed to proportionate to all the circumstances of the individual case.[5] However, particular considerations apply in regard to vulnerable individuals deprived of their liberty under Article 5(1)(f), as will be explored below.

The right to liberty and security and immigration detention in EU law

8. EU law, and in particular the EU asylum *acquis,* is relevant to the present case in two ways.[6] First, the principle of the rule of law runs like a golden thread through the Convention.[7] As a result, the Convention requires that all measures carried out by the Contracting Parties that affect an individual's protected rights must be "in accordance with the law". In some circumstances the law will be EU law.

9. In this context, in determining whether the Contracting Parties' obligations under the Convention are engaged in any particular case — and, if so, the scope and content of these obligations — this Court has had regard to the EU asylum *acquis* materially relevant to those questions when the Respondent States are themselves legally bound by that *corpus* of law.[8]

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[4] In *Saadi v the United Kingdom* [GC], (No. 13229/03), para 74, this Court found that "[t]o 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" (see Amuur, cited above, para 43); and the length of the detention should not exceed that reasonably required for the purpose pursued". See also *Aden Ahmed v Malta* (No. 55352/12), para 141; *A v UK* (No.3455/05, GC), para 164; *Louled Massoud v Malta* (No.24340/08), para 70.

[5] *Saadi v UK* (No.13229/03, GC), para 72; *A v UK* (No. 3455/05, GC), para 164; *Louled Massoud v Malta* (No.24340/08), para 60; *Aden Ahmed v Malta*, (No 55352/12), para 141.

[6] The EU asylum *acquis* is the *corpus* of law comprising all EU law adopted in the field of international protection claims. The EU asylum *acquis* is "a body of intergovernmental agreements, regulations and directives that governs almost all asylum-related matters in the EU". '"Under EU law, Article 78 of the TFEU [Treaty on the Functioning of the EU] stipulates that the EU must provide a policy for asylum, subsidiary protection and temporary protection, "ensuring compliance with the principle of *non-refoulement*. This policy must be in accordance with [the 1951 Geneva Convention and its Protocol] and other relevant treaties", such as the ECHR, the UN Convention on the Rights of the Child (UNCRC), the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT), ICCPR, ICESCR. The EU asylum *acquis* measures have been adopted under this policy, including the Dublin Regulation (Regulation (EU) No. 604/2013), the Qualification Directive (2011/95/EU), the Asylum Procedures Directive (2013/32/EU) and the Reception Conditions Directive (2013/33/EU). All these instruments have been amended."' See, Fundamental Rights Agency, Handbook on European law relating to asylum, borders and immigration, Edition 2014, pp. 64-65.

[7] The Convention's preamble recalls the rule of law.

[8] See *M.S.S. v Belgium and Greece,* where the Grand Chamber analysed the scope and content of the Contracting Parties' obligations under Article 3 of the Convention in the light of relevant provisions of EU law by which the Greek authorities were bound (see *M.S.S. v Belgium and Greece*, (No. 30696/09, GC) *inter alia,* paras 57-86 and para 250). See also *Sufi and Elmi v the United Kingdom*, (Nos. 8319/07 and 11449/070), where the Fourth Section of 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 2004 Qualification Directive"), as well as to a preliminary ruling by the European Court of Justice, as the CJEU was then known, following a reference lodged by the Dutch Administrative Jurisdiction Division of the Council of State (Afdeling Bestuursrechtspraak van de Raad van State) 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 *Sufi and Elmi v the United Kingdom*, (Nos. 8319/07 and 11449/07), *inter alia*, paras 30-32 and paras 219-226).

10. It is for this Court therefore to consider any EU Respondent Government's obligations under the applicable provisions of the EU *acquis* when assessing whether a Contracting Party's proposed actions will be "in accordance with the law" under the Convention.[9] This is a distinct but related issue from the one that arises under Article 53 of the Convention. Pursuant to Article 53, the provisions of the ECHR cannot be applied in a manner that would limit the scope of the protection of human rights and fundamental freedoms ensured under the EU asylum *acquis*. The law applicable in all the Member States of the EU[10] to detention pending the removal is Directive 2008/115/EC ("the Returns Directive") (**Annex 1**).

11. In this context, the Directive insists in Recital (16), *"that the use of detention for the purpose of removal should be limited and subject to the principle of proportionality with regard to the means used and objectives pursued. Detention is justified only to prepare the return or carry out the removal process and if the application of less coercive measures would not be sufficient".* Article 15(1) of the Directive further stipulates that detention must only be used if other sufficient but less coercive measures cannot be applied effectively. That is therefore the test of legality for detaining those who are subject to the regime of the Directive, "in accordance with the law", including for the purposes of Article 5(1)(f) ECHR.

12. The Court will recall that it considered a similar issue in the case of *Jusic v Switzerland*[11] where the applicable Swiss law required that detention could only be imposed on someone who presented a risk of absconding. The Court was not satisfied that such an intention had been demonstrated. This finding arose from a failure to comply with Swiss law, notwithstanding the fact that adherence to Article 5(1)(f) did not require evidence of a risk of absconding to render detention lawful in Convention terms.

13. As a matter of EU law, States are required to transpose Directives in their entirety into national law by the appointed deadline.[12] Once the transposition deadline expires, if the Directive has not been transposed – or has been transposed incorrectly or incompletely – it will have direct effect where its provisions are unconditional, sufficiently clear and precise.[13]

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[9] *Aristimuño Mendizabal v France*, (No. 51431/99), para 69 and paras 74-79. See also *Suso Musa v Malta,* (No. 42337/12), where the Fourth Section of the Court observed "where a State which has gone beyond its obligations in creating further rights or a more favourable position – a possibility open to it under Article 53 of the Convention – enacts legislation (of its own motion or pursuant to European Union law) explicitly authorising the entry or stay of immigrants pending an asylum application (see for example, *Kanagaratnam*, cited above, para 35 *in fine*, in relation to Belgian law), an ensuing detention for the purpose of preventing an unauthorised entry may raise an issue as to the lawfulness of detention under Article 5 § 1 (f). Indeed, in such circumstances it would be hard to consider the measure as being closely connected to the purpose of the detention and to regard the situation as being in accordance with domestic law. In fact, it would be arbitrary and thus run counter to the purpose of Article 5 § 1 (f) of the Convention to interpret clear and precise domestic law provisions in a manner contrary to their meaning (see *Longa Yonkeu v. Latvia*, (No. 57229/09), para 125, 15 November 2011).", *Suso Musa v Malta*, No. 42337/12, para 97.

[10] Except the UK and Ireland.

[11] *Jusic v Switzerland*, (No. 4691/06), 2 December 2010

[12] In the case of the Returns Directive: 24 December 2010.

[13] The principal was made clear by the Court of Justice in *Case 149/79 Ratti* and also *Joined Cases C-465/00, C-138/00, C-139/01 Rechnungshof v Osterreigh Rundfunk and others*.

14. **In light of this, the interveners submit that national legislation purporting to transpose the Return Directive must therefore clearly reflect the provision of Art 15(1) of the same to the effect that detention can only be used if other sufficient but less coercive measures cannot be applied effectively**. [14]

Vulnerable individuals detained pursuant to immigration control

Assessment of vulnerability and detention of vulnerable individuals under Article 5(1)(f) ECHR

15. The detection of special reception needs following a positive assessment of vulnerability and the availability (or lack thereof) of appropriate facilities to meet those needs is critical to deciding whether to detain or to continue the detention, as well as to determining whether, in the circumstances, the deprivation of liberty would ultimately be lawful. The lack of services within the detention estate capable of satisfying special reception needs requires the implementation of alternatives to detention. Indeed, the vulnerability and special reception needs of an individual may foreclose the possibility of detention altogether, as depriving the individuals concerned of their liberty in such circumstances may be unlawful. This is the case, *a fortiori*, in circumstances where detention would constitute or lead to inhuman or degrading treatment.[15]
16. In the context of immigration detention, under both ECHR and EU law Contracting Parties must exercise due diligence when detaining individuals with a view to their removal. This requires detailed consideration of any potential vulnerability and a specific assessment of the eventuality that detention may have a detrimental effect on their health and well-being, particularly so when dealing with vulnerable individuals.[16]
17. In *M.S.S. v. Belgium and Greece*, the Grand Chamber, applying Article 3 of the Convention, found that even short periods of detention of four days and one week could not be regarded as insignificant because the "applicant, being an asylum seeker, was particularly vulnerable because of everything he had been through during his migration and the traumatic experiences he was likely to have endured previously".[17] While in that case the Court's analysis of the applicant's vulnerability was critical to its ultimate finding that his detention conditions violated

[14] In Poland, the Act on Foreigners of 2013 (attached **Annex 2**) was adopted two years after the transposition deadline for the Returns Directive. It purports to be the legislation transposing the Directive. However, in addition to being enacted after the transposition deadline had expired, it contains no reference to the "less coercive measures" provisions of Article 15(1) of the Returns Directive.

[15] *Khubodin v Russia*, (No 59696/00), 26 October 2006, para 93

[16] *Chahal v. the United Kingdom [GC], (No. 22414/93)*, 15 November 1996, para 113; *A. and Others v. the United Kingdom* [GC], (No. 3455/05), 19 February 2009, para. 164. Article 15 (1) of the Returns Directive; The Council of Europe Commissioner for Human Rights has expressed concern where "persons in a situation of particular vulnerability" can be detained for immigration purposes, citing detention of single parents with minor children as well as persons who have been subjected to forms of serious psychological, physical or sexual violence. This is also mirrored by the UNHCR in their Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention, 2012 (Guideline 9) (**Annex 3**) contending that vulnerable persons include unaccompanied elderly persons, and survivors of torture or other serious physical, psychological or sexual violence. *Khudobin v Russia, (*No.59696/00*)*, 26 October 2006, para 93; *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium* (No 13178/03), 12 October 2006, para 103; *Muskhadzhiyeva and others v Belgium* (No. 41442/07), 19 January 2010, para 73.

[17] *M.S.S. v. Belgium and Greece,* [GC], (No. 30696/09), 21 January 2011, para 232.

Article 3, the interveners submit that, *mutatis mutandis*, it should equally apply to the assessment of whether detention may be arbitrary under Article 5(1)(f).[18]

18. This Court has frequently pointed to the fact that deprivation of liberty inevitably generates suffering and humiliation.[19] Furthermore, it has held that, in the application of Article 5(1)(f), particular consideration must be given to alternatives to detention for "vulnerable" persons or groups, for the detention to be in good faith and free from arbitrariness. In a series of cases, detention has been found not to have been imposed in good faith, as, despite the individual's vulnerability, the authorities had not considered less coercive measures as alternatives to detention.[20] The Court has held this in cases of persons affected by serious illness,[21] children and families,[22] and unaccompanied children.[23]

19. The UNHCR Guidelines (**Annex 3**) recommend that especially active consideration should be given to alternatives to detention, for persons for whom detention is likely to have a particularly serious effect on their psychological well-being. The Guidelines require initial and periodic assessments of detainees' physical and mental state, carried out by qualified medical practitioners.[24]

20. These standards reinforce the general principle, set out in the UNHCR Guidelines on Detention (Guideline 4.3)(**Annex 3**), the Council of Europe Twenty Guidelines on Forced Return (Guideline 6)(**Annex 4**) and in PACE Resolution 1707 (2010) on Detention of Asylum Seekers and Irregular Migrants (**Annex 5**), that alternative measures should be given priority over detention of asylum seekers.[25]

21. This approach is also reflected in the jurisprudence of the UN Human Rights Committee, which in *C v Australia*[26] (**Annex 6**), found a violation of the right to liberty of an asylum seeker, detained despite his deteriorating mental health, where the respondent State "has not demonstrated

[18] *Mubilanzila Mayeka and Kaniki Mitunga v Belgium*, (No. 13178/03), 12 October 2006.
[19] *De Los Santos and De La Cruz v. Greece*, (No 2134/12 and 2161/12), 26 June 2015, para. 42.
[20] *Yoh-Ekale Mwanje v Belgium*, (No 10486/10), para 124
[21] *Yoh-Ekale Mwanje v Belgium,* (No 10486/10)
[22] *Mubilanzila Mayeka and Kaniki Mitunga v Belgium*, (No. 13178/03), 12 October 2006.
[23] *Rahimi v Geece*, (No.8687/080), 5 July 2011.
[24] See the UNHCR, Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention, 2012 (Guideline 9). See further PACE Resolution 1707 (2010), paras 9.1 and 9.1.9, which states that "vulnerable people should not, as a rule, be placed in detention".
[25] Guideline 6 of the Twenty Guidelines on Forced Return has been held by the CJEU to be an authoritative instrument of interpretation of EU asylum law, alongside the ECHR and the European Court of Human Rights jurisprudence. In the *El Dridi case, Case C-61/11 PPU*, 28 April 2011, para 43, it stated that "Directive 2008/115 is thus intended to take account both of the case-law of the European Court of Human Rights, according to which the principle of proportionality requires that the detention of a person against whom a deportation or extradition procedure is under way should not continue for an unreasonable length of time, that is, its length should not exceed that required for the purpose pursued … and of the eighth of the 'Twenty guidelines on forced return' … referred to in recital 3 in the preamble to the directive." According to that guideline, any detention pending removal is to be for as short a period as possible. See also PACE Resolution 1707 (2010) para 9.1.1.
[26] *C. v. Australia, CCPR/C/76/D/900/1999*, UN Human Rights Committee (HRC), 13 November 2002, para 8.3.

that, in the light of the author's particular circumstances, there were not less invasive means of achieving the same ends".[27]

22. In its recent General Comment no. 35 on Article 9 of the Covenant[28] (**Annex 7**), the right to liberty and security of person, while stressing the need of assessing the necessity and proportionality of the measure of immigration detention and the availability of alternatives to detention, the Human Rights Committee stated that " [d]ecisions regarding the detention of migrants must also take into account the effect of the detention on their physical or mental health."[29]

Assessment of vulnerability and detention of vulnerable individuals under EU law in the context of immigration control

23. Under EU law, assessing the lawfulness of the detention of individuals pursuant to immigration control requires an individual examination of the necessity and proportionality of the proposed detention of the people concerned, including in light of their vulnerability.[30] Detention can only be resorted to if less coercive measures - alternative to detention - cannot be applied effectively in the specific case.[31]

24. Specifically under the Returns Directive, "vulnerable persons" are defined as including "minors, unaccompanied minors, disabled people, elderly people, pregnant women, single parents with minor children and persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence."[32]

25. In order to effectively guarantee that the treatment of vulnerable asylum seekers is in accordance with Article 17 of the Reception Conditions Directive (RCD) (**Annex 8**), Member States are required to carry out an individual evaluation of the person's situation.[33] In this context, any system which relies exclusively on the individual concerned self-identifying as vulnerable, including in domestic violence cases, is inherently ineffective.[34]

[27] 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", para 8.2.

[28] UN ICCPR General comment No. 35 Article 9 (Liberty and security of person), CCPR/C/GC/35, 16 December 2014.

[29] See paragraph 18.

[30] Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (Recast Reception Conditions Directive), Recital 15 and Article 18 para 2 (**Annex 9**)

[31] Note on administrative practice on the identification of vulnerability (**Annex 10**)

[32] Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, Article 3

[33] Furthermore, the recast Reception Conditions Directive, due to be transposed by the EU Member States by July 2015, requires the assessment mechanism to be initiated by the state officials within a reasonable time, and that needs are addressed if they become apparent at a later stage in the asylum procedure.

[34] UNHCR Response to vulnerability in Asylum; Article 68 and 69 of the Polish Law on Protection (**Annex 12**).

Detention of non-national families with children

26. In *Tarakhel*, *Mubilanzila Mayeka* and *Kaniki Mitunga v. Belgium* and *Popov v. France*[35], this Court has confirmed children's specific needs, their double vulnerability, stemming first from their status as asylum seekers and secondly as children, and that the child's extreme vulnerability is the decisive factor and takes precedence over considerations relating to immigration control.
27. The requirement that a separate best-interest and vulnerability assessment must be carried out for children prior to the decision to detain has been clarified by this Court in several cases where it has held that the effects of detention and the conditions of detention on children can amount to a breach of Article 3 even where this would not be so for an adult.[36]
28. This jurisprudence is echoed in the Charter of Fundamental Rights of the European Union (**Annex 12**), the UN Convention on the Rights of the Child (CRC) (**Annex 13**), and in the UN Human Rights Committee's authoritative interpretation of the International Covenant on Civil and Political Rights.
29. In accordance with Article 3 of the CRC, the best interests of the child shall be the primary consideration in any action taken by States parties. Article 37 CRC requires state parties to ensure that children are detained in conformity with the law, as a measure of last resort, for the shortest possible period of time and are guaranteed the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty.
30. The interveners draw the attention of the Court to the recent General Comment of the Committee on the Rights of the Child[37] (**Annex 14**) stating that in all decisions relating to children their best interests must not only be the primary consideration but that the decisions taken must clearly reflect the fact that this approach has been followed. This is specifically mentioned in relation to administrative decisions concerning asylum and immigration.[38]
31. Moreover, when parents are detained solely for the purposes of immigration control, detaining their non-national children with them on the sole premise of maintaining family unity, without any considerations of achieving the same result by resorting to less coercive measures, violates a number of CRC principles, including the principle of the child's best interests. Indeed, in the

[35] *Mubilanzila Mayeka* (No 13178/03), 12 October 2006, para 55; Popov v. France 39472/07 and 39474/07, 19 April 2012, para 91; *Mubilanzila Mayeka* (No 13178/03), 12 October 2006, para 55; Popov v. France 39472/07 and 39474/07, 19 April 2012, para 91; *Tarakhel v. Switzerland*, Application no. 29217/12, para 99.

[36] *Muskhadzhieyava and others v. Belgium*, (No 41442/07), 19 January 2010; *Mubilanzila Mayeka*, (No 13178/03), 12 October 2006 at [81] and [83]; see *Popov v. France,* (Nos 39472/07 and 39474/07), 19 April 2012; *Kanagaratnam and others v Belgium,* (No 15297/09), 13 December 2011; *Neulinger and Shruk v. Switzerland*, (No 41615/07), [GC], 6 July 2010.

[37] UN CRC, General Comment No. 14 (2013), The right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1) of 2 May 2013

[38] Paragraph 14 (b) UN CRC, General Comment No. 14 (2013), The right of the child to have his or her best interests taken as a primary consideration, Article 3, para 1, 2 May 2013; UN CRC, General Comment No 6(2005), Treatment of unaccompanied and separated children outside their country of origin, para 62 – 63 (**Annex 15**).

context of child detention, the best interests principle should prevail over the mere interest of immigration control and should be used as the key evaluation tool in all decisions affecting asylum-seeking children.

32. The interveners draw the attention of the Court to a recent advisory opinion of the Inter-American Court of Human Rights (**Annex 16**), in which it ruled that, "deprivation of liberty of a child in this context [i.e. immigration detention] can never be understood as a measure that responds to the child's best interest."[39]

33. **The interveners submit that, in accordance with the principle of the best interests of the child, detention of a child under Article 5(1)(f) ECHR should not be imposed without rigorous examination of the individual circumstances of the case. The interveners further submit that, if this examination is duly carried out, it is virtually impossible to conceive of a situation in which the detention of non-national children, even when detained with family, would comply with their best interests. In this context, the interveners note the recently adopted Resolution 2020 (2014) (Annex 17) in which the Parliamentary Assembly of the Council of Europe called on States to introduce and enforce laws banning the detention of children for immigration purposes.[40]**

Immigration detention of victims of domestic and gender-based violence

34. Victims of domestic and/or gender-based violence, represent a particularly vulnerable group of asylum-seekers. The special vulnerability of refugee and asylum-seeking women, is acknowledged in General Recommendation no. 32 of CEDAW[41] (**Annex 18**). It stipulates that a gender-sensitive approach should be adopted at all stages of the asylum procedures, which means the establishment of an "asylum system that is informed by a thorough understanding of discrimination or persecution and human rights abuses that women experience on grounds of gender or sex."[42]

35. At a Council of Europe level, this is also recognized by the Convention on preventing and combating violence against women and domestic violence *(*the "Istanbul Convention"*)* (**Annex 19**), which places a number of protection obligations on State Parties, including the obligation of introducing gender-sensitive procedures, guidelines and support services in the asylum process.

[39] The Court further concluded that "States may not resort to the deprivation of liberty of children who are with their parents, or those who are unaccompanied or separated from their parents, as a precautionary measure in immigration proceedings; nor may States base this measure on failure to comply with the requirements to enter and to remain in a country, on the fact that the child is alone or separated from her or his family, or on the objective of ensuring family unity, because States can and should have other less harmful alternatives and, at the same time, protect the rights of the child integrally and as a priority", IACtHR, Rights and guarantees of children in the context of migration and/or in need of international protection, Advisory Opinion no. OC-21/14 of 19 August 2014, para. 154-160. IACtHR, Rights and guarantees of children in the context of migration and/or in need of international protection, Advisory Opinion no. OC-21/14 of 19 August 2014, para 154.

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

[41] CEDAW GR no. 32 on gender-related dimensions of refugee status, asylum, nationality and statelessness of women.

[42] CEDAW GR 32, para 25.

36. The identification of vulnerability cannot rely solely on the applicant's self-identification, particularly in cases involving domestic violence given that "the problem may not always surface since it often takes place within personal relationships or closed circuits."[43] Self-identification in domestic violence cases may be further hindered where children or even partners may be present during the assessment.[44]

37. This Court has ruled in *Opuz v. Turkey* that a victim of domestic violence "may be considered to fall within the group of "vulnerable individuals" entitled to State protection"[45] and that States are to adopt and enforce laws that are capable of protecting victims of violence.[46] Contracting States can be in violation of Article 8 of the ECHR when they leave a domestic violence victim *'for a prolonged period in a position in which they* [state authorities] *fail [ ] to satisfy their positive obligations to ensure her respect for her private life'.*[47]

38. The interveners draw the Court's attention to the fact that victims of gender-based violence, including domestic violence, are recognized as a vulnerable group in EU law.[48]

39. **The interveners submit that, in the case of particularly vulnerable adults, such as those who have been subjected to serious psychological, physical or sexual violence, including gender-based and/or domestic violence, detention in good faith under Article 5(1)(f) should not be imposed without an examination of the individual circumstances of the case, and only as a last resort. In the immigration context, no decision to detain should be made without an informed assessment that detention will not adversely affect the health or well-being of the people concerned.**

[43] *Opuz v. Turkey*, (No. 33401/02), 9 June 2009, para 132.
[44] The UK was recently heavily criticised by the Joint Committee on Human Rights where information given to assess vulnerability was often disclosed in public areas or where the applicant's children were present. Joint Committee on Human Rights, Violence against Women and Girls, Sixth Report of Session 2014-2015 p.59 (**Annex 20**).
[45] *Opus v. Turkey,* (No. 33401/02), para. 160.
[46] *Mudric v the Republic of Moldova, (No. 74839/10),* 16 July 2013, para 47
[47] *A v Croatia*, *(No. 55164/08)*, 14 January 2011, para 79. Differential treatment on the basis of immigration status in respect of fundamental rights can violate Article 14 ECHR as discrimination on the ground of 'other status', see *Hode and Abdi v United Kingdom*, (No. 22341/09), 6 November 2012, para 55
[48] Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers