Richmond Yaw and others v. Italy

Applications nos. 3342/11 – 3391/11 – 3408/11 – 3447/11

WRITTEN SUBMISSIONS ON BEHALF OF THE INTERNATIONAL COMMISSION OF JURISTS (ICJ)

INTERVENER

pursuant to the Section Registrar's notification dated 5 June 2015 that the Vice-President of the Section had granted permission under Rule 44 § 3 of the Rules of the European Court of Human Rights

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26 June 2015

I. Introduction

These written comments are submitted on behalf of the International Commission of Jurists (ICJ) pursuant to leave granted by the President of the Fourth Section by letter of 5 June 2015, in accordance with Rule 44.3 of the Rules of Court. This intervention addresses the law and practice of Italy on detention of migrants and asylum seekers under Article 5.1.f, in light of international refugee law, international human rights law, and the law of the European Union. Part II of the intervention summarizes the ICJ's assessment of the Italian law governing detention of migrants, and the situation of detained migrants in Italy at least up until October 2014. It addresses the findings of the ICJ mission relevant to this particular case, concerning: the competencies and administration of the Justice of the Peace; the practical functioning of the expulsion decree and practice of detention of migrants under Italian law; and the procedural aspects of the decision as well as the rights to effective remedy and reparation. Part III analyses the requirements under article 5.1.f, 5.4 and 5.5.

II. Detention of Migrants in Italy: ICJ report

This section of the submission provides a summary of an ICJ mission undertaken in June 2014 to assess the effectiveness of the respect and protection of the right to *habeas corpus* and of the right to an effective remedy by the Justices of the Peace in relation to situations of detention of migrants, which is central to the case at hand. The mission report, entitled *"Undocumented" Justice for Migrants in Italy* and annexed to this submission, is based on findings of an ICJ fact-finding mission undertaken in June 2014, during which the ICJ visited Rome and Milan, holding meetings with lawyers, NGOs, Justices of the Peace, scholars, and Government officers, and visiting the Centre for Identification and Expulsion of Ponte Galeria (Rome). The report sets out conclusions and recommendations on the compatibility of the Italian legal system on detention of migrants with Italy's international human obligations, including under the European Convention on Human Rights (ECHR). It addresses in particular the communication of court decisions, access to remedies and reparation for unlawful detention. The analysis, conclusions and recommendations of the report that are of special relevance to this case are summarized in this section. In both the report and in this intervention, reference to legislation and practice refers to that in force at the time of the visit, in June 2014. The ICJ is aware that there have been changes to the legal framework since this time, including a decrease in the maximum length of detention to 90 days, but this is not relevant to the law in force at the time of the facts at stake in this case.

1. Grounds for detention of migrants under Italian law

According to Italian law, orders for detention of undocumented migrants are to be issued by the Questore[1] for as long as is "strictly necessary" to prepare the migrant's expulsion[2] Detention may be ordered when expulsions cannot be executed immediately, due to a temporary situation that obstructs the preparation of the repatriation or the execution of the removal.[3] The ICJ mission report documented that, in practice, at least three indicators are taken into account in the decision on whether to detain: a) whether the migrant had been arrested on suspicion of having committed a criminal offence; b) whether the migrant had a previous criminal conviction; and/or c) whether the migrant was alleged to have used different aliases in the past. According to police officials, the lack of possession of identity documents was considered, in practice, to be an essential element for the detention decision. Legislative Decree no. 286/1998 (the 'Immigration Law') provides that the detention decision should be translated into a language understandable by the detainee. When this is not possible, it must be translated into

[1] The Questore is the provincial head of public security and exercises activities of security and administrative police. The competences exercised are various and, *inter alia*, they amount to: criminal offences prevention and repression, safeguard of democratic order, counterterrorism, protection of minors, passports, permit of sojourn, push-back of irregular migrants.

[2] Article 14.1, Legislative Decree no. 286/1998 as modified (hereinafter 'Immigration Law').

[3] Article 14.1, *ibid.* Such situations may include: the existence of a situation of risk of absconding and/or the need to give emergency assistance to a migrant, to undergo verification of identity/nationality, to obtain documents for the trip or to check availability of adequate means of transport.

French, English or Spanish. The ICJ was told that it was frequently not possible to find a translator for a migrant's own language, and that English, French or Spanish were therefore substituted.[4] The law provides that the decision must be in writing and reasoned, and it must contain an indication of the competent authority to which an appeal is available, and must mention the right to be assisted by a lawyer.[5] Following the order for detention, the Justice of the Peace is charged with the validation of the detention order within 48 hours following the notification of the decision. The Immigration Law provides that the migrant must be promptly informed of the place and date of the hearing and, at the appropriate time, accompanied to the hearing.[6]

2. Length of detention and judicial review

At the time of the ICJ visit, the initial period of detention was thirty days. The Justice of the Peace could prolong the initial period by thirty additional days, upon the proposal of the Questore, in case of serious difficulties in the identification of the migrant and/or the acquisition of the travel documents. Sixty additional detention days could be requested if the same difficulties persisted, followed by another sixty days, if the same difficulties still persisted, bringing the maximum period of detention to 180 days. However, the Justice of the Peace, at the request of the Questore, could prolong the detention again for further periods of sixty days up to a total of eighteen months if, despite having employed any reasonable efforts, it had not been possible to execute the removal, because of lack of cooperation by the migrant or of the delay in obtaining the documentation from third countries.[7]

The law on its face does not require the Justice of the Peace to hold a hearing to decide on extensions of the period of detention. However, the Court of Cassation has ruled that the proceedings of extension of the detention must be subject to the same guarantees than the validation of the detention, including the mandatory presence of a lawyer and the hearing of the detainee. It also stressed that the detainee should be heard.[8] Hearings for the authorization or extension of detention are held *in camera*, with the mandatory presence of a lawyer, and, if needed, of an interpreter.[9] The Constitutional Court has ruled that the judge must ensure a "full judicial control, and not only a formal one" upon all deprivations of liberty.[10] However, the ICJ report raised concerns that, although a full assessment of the case *proprio motu* would be possible from a legal point of view, in practice only formal issues were typically adjudicated. The ICJ report concluded that the present legal position did not ensure a full assessment, including of the necessity and proportionality of the detention measure, sufficient to satisfy Italy's obligations under article 5.4 ECHR, as well as article 9.4 ICCPR and articles 6 and 47 of the EU Charter, or the EU Return Directive.[11]

3. Independence and effectiveness of the Justice of the Peace

In its report, the ICJ expressed concern at the often poor and paltry reasoning, or even lack of any reasoning, in detention validation or extension decisions. Stereotyped formulas are reportedly often used for decisions of the Justice of the Peace, and their work was often conducted in a superficial manner. This is of particular concern in light of reliable research by the Justice of the Peace Jurisprudence Clinic of University of Roma Tre, which found that, in the period between October and November 2013 in Rome, 60 of the 61 decisions on extension of detention were approved.[12] The ICJ report concluded that lack of

[4] ICJ Report, *"Undocumented" Justice for Migrants in Italy*, October 2014, p.54.
[5] Article 20, Decree of the President of the Republic no. 394/99. See also, articles 2.6 and 14.2, Immigration Law, with reference to the notification of the decision of validation of detention of the justice of the peace.
[6] Article 14, Immigration law. See also, ICJ Report, *op. cit.*, p.49.
[7] Article 14.5, Immigration Law. The maximum length of detention has been currently reduced to ninety days.
[8] Decision no. 4544 of 24 February 2010 and Judgment no. 13767/10 of 8 June 2012.
[9] Decrees issued in camera must be reasoned and the judge has the power to gather information; articles 737-742bis, Civil Procedure Code.
[10] Italian Constitutional Court, Judgment no. 105/2001 of 10 April 2001.
[11] ICJ Report, *op. cit.*, p. 52.
[12] Enrica Rigo and Lucia Gennari, *Rapporto preliminare sullo stato della ricerca*, April 2014, Osservatorio sulla giurisprudenza del Giudice di Pace in materia di immigrazione, Clinica del Diritto dell'Immigrazione e della Cittadinanza, Dipartimento di Giurisprudenza, UniRoma3, p. 12.

adequate reasons for decisions gives rise to a risk of violations of the right to judicial review of detention, under article 5.4 ECHR as well as articles 9.4 ICCPR.[13]

The ICJ report identified several practices conflicting with the requirements of article 5.4 ECHR, such as the lack of common understanding among Justices of the Peace as to their powers under the applicable procedural law (the Code of Civil Procedure), a disorganized system of filing making the tracing of a migrant's history and case difficult, and the effective impossibility of attaining the services of an interpreter during hearings because of the extremely short (48 hours) time limit for a hearing for judicial review. This short time limit affects the capacity of lawyers to adequately represent their clients. The ICJ report made a series of recommendations designed to ensure effective access to legal advice in compliance with article 5.4 ECHR, including access to interpreters for lawyer client-communications, and modifications to the legal aid system.[14]

The ICJ report raised significant concerns regarding the security of tenure of Justices of the Peace, who are responsible for judicial supervision of expulsion and detention of migrants. At the time of the visit, Justices of the Peace were appointed for periods of four years, renewable for a second period of four years and a third period of two years. Justices of the Peace were paid according to the number and type of cases they decided, rather than by a fixed salary. These conditions of tenure do not accord with principles of independence of the judiciary. The report concluded that "the current system, with its precarious tenure, unsatisfactory remuneration and … inherent flaws regarding substantive and procedural safeguards, cannot ensure sufficient independence, impartiality and effectiveness in the supervision of expulsion and detention proceedings."[15] It found that the system was "incapable of ensuring an effective remedy to migrants in situations of expulsion or detention" and was "seriously lacking in respect of the guarantees linked to the right to an effective remedy and the right to habeas corpus and judicial review of detention" risking repetitive violations of articles 5 and 13 ECHR, articles 2.3 and 9 ICCPR and articles 6 and 47 of the EU Charter.[16]

4. Appeal to the Court of Cassation

In regard of the review of detention, a right to appeal (*ricorso*) to the Court of Cassation is foreseen by article 14.6 of the Immigration Law, allowing migrants to challenge the decrees of validation as well as the decrees of extension of detention. The filing of appeal does not suspend the detention measure. The Court of Cassation only reviews cases on matters of law. Additionally, the ICJ report pointed out several factors rendering the appeal to the Cassation Court difficult for migrants: the prohibition on representing one's self in the absence of a lawyer;[17] the requirement that the appeal may only be brought by one of the relatively few lawyers authorized to plead before the Court of Cassation; the high rate of dismissal of the Court of Cassation; and a low and declining rate of appeals against a validation order accepted by the Court of Cassation.[18] Italian law does not foresee any other form of review or appeal for decisions on detention of migrants.

7. Effective Remedy and reparation for unlawful detention

The ICJ found an apparent legal vacuum in the Italian legislation when it comes to reparation, particularly compensation for unlawful detention of a migrant in a Centre for Identification and Expulsion. While there is a procedure for compensation for unlawful detention in criminal procedural law (articles 314 and 315 of the Criminal Procedure Code[19]), this concerns only persons unjustly detained or imprisoned for a criminal offence,

[13] ICJ Report, *op. cit.,* p. 53.
[14] ICJ Report, *op. cit.,* p. 56.
[15] ICJ Report, *op. cit.*, pp. 13-15.
[16] ICJ Report, *op. cit.*, p. 62.
[17] While representation *pro se* is possible in criminal procedure, it is not under the civil procedure, ICJ Report, *op. cit.*, p. 59.
[18] ICJ Report, *op. cit.*, pp. 59-60. The ICJ stressed the need for a substantial reform, both in the legal framework and in policies and practices of the Italian officials charged with administering the expulsion and detention regime of undocumented migrants.
[19] In the *N.C. v. Italy* case, this Court held that the claim for compensation in respect of detention in the framework of a criminal procedure available to a victim under article 314 of the Italian Criminal Procedure Code does ensure "a sufficient degree of certainty"; *N.C. v. Italy*, ECtHR, Application No. 24952/94, GC, paras. 49-58.

and is therefore *prima facie* not applicable to detention of migrants under the Immigration Law. The ICJ reported that the Court of Cassation has ruled that an unlawful administrative detention under the Immigration Law "gives rise to the right to reparation of the damage for the concrete deprivation of liberty, not justified by law".[20] However, it is not clear how this recent ruling has been applied by lower courts, raising doubts about the effectiveness of the compensation procedure.

III. Permissibility of detention under Article 5.1.f

This Court has repeated affirmed that any deprivation of liberty must be in conformity with the purpose of article 5, to protect the individual from arbitrariness.[21] For detention to be permissible under article 5.1.f it must be closely connected with one of the permitted purposes under that provision; it must be "lawful", in accordance with national law and procedures; it must be carried out in good faith; the place, regime and conditions of detention must be appropriate, and the length of detention must not exceed that reasonably required for the purpose pursued.[22] This section addresses certain of these criteria of particular relevance to this case.

1. Detention must be adequately "prescribed by law"

The principle of prescription by law has two essential aspects. First, for detention to have a sufficient basis in national law, the national law must clearly provide for deprivation of liberty.[23] Second, national law and procedures must be of sufficient quality to protect the individual from arbitrariness.[24] Laws imposing deprivation of liberty must be accessible and precise.[25] Their consequences must be foreseeable to the individuals they affect, and there must be clear procedures for imposing, reviewing and extending detention.[26] This Court has held that "the absence of elaborate reasoning for [a] deprivation of liberty renders that measure incompatible with the requirement of lawfulness inherent in Article 5 of the Convention."[27]

Under article 291 of the Treaty on the Functioning of the European Union, EU law provisions are binding and directly applicable to all EU member States, including Italy, when they are sufficiently detailed to create foreseeable legal obligations. They become part of the State's domestic law, automatically displacing any contrary national provision. **For this reason, the ICJ submits that European Union Law in the field of asylum and migration must be construed as constituting "national law" for the purposes of article 5 ECHR, unless domestic law provides for higher standards. This is in the light of the fact that EU law on asylum, i.e. the Common European Asylum System, is directly applicable in EU Member States as a minimum standard. Any application of national law in breach of EU law concerning the basis of detention under article 5.1. ECHR should be considered as a breach of the article 5.1 requirement of prescription by law.**

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[20] Court of Cassation, Sixth Civil Section, Judgment no. 17407/2014 of 30 July 2014.

[21] *Conka v Belgium,* ECtHR, Application No. 51564/99 para. 39, *Chahal v UK,* ECtHR, Application No. 22414/93, para.118; *Suso Musa v. Malta,* ECtHR, Application No. 42337/12, para. 89; *Gallardo Sanchez v. Italy*, ECtHR, Application No. 11620/07, para. 39.

[22] *Saadi v UK*, ECtHR, Application No. 13229/03, GC, para.74; *A v UK,* ECtHR, Application No. 3455/05, GC para. 164; *Louled Massoud v Malta*, ECtHR, Application No. 24340/08, paras. 60-62; *Suso Musa v. Malta*, ECtHR, Application No. 42337/12, paras. 92-93.

[23] *Abdolkhani and Karimnia v. Turkey*, ECtHR, Application No. 30471/08 para. 133.

[24] *Čonka v. Belgium*, *op. cit*., para. 39; *Amuur v. France*, ECtHR, Application No. 19776/92, para. 51. See also, *Servellón-García et al. v. Honduras*, IACtHR, Series C No. 152, Judgment of 21 September 2006, paras. 88–89; *Yvon Neptune v. Haiti*, IACtHR, Serie C No. 180. See also, UN Working Group on Arbitrary Detention (WGAD), Annual Report 1998, UN Doc. E/CN.4/1999/63, 18 December 1998, para. 69, Guarantee 2; WGAD, Annual Report 1999, UN Doc. E/CN.4/2000/4, 28 December 1999, Annex II, Deliberation No. 5 "Situations regarding immigrants and asylum-seekers", Principle 6; WGAD, Annual Report 2008, paras. 67 and 82.

[25] *Amuur v. France*, *op. cit.,* para. 51.

[26] *Abdolkhani and Karimnia v. Turkey*, *op. cit., Vélez Loor v. Panama*, IACtHR, Serie C no. 2018, para. 117. The Inter-American Commission on Human Rights has stressed that "[t]he grounds and procedures by which non-nationals may be deprived of their liberty should define with sufficient detail the basis for such action, and the State should always bear the burden of justifying a detention. Moreover, authorities have a very narrow and limited margin of discretion, and guarantees for the revision of the detention should be available at a minimum in reasonable intervals." IACHR, Report on Terrorism and Human Rights, OEA/Ser.L/V/II.116, para. 379.

[27] *Lokpo and Toure v. Hungary*, ECtHR, Application No. 10816/10, para. 24.

2. Grounds of detention

According to article 5.1.f. ECHR, detention pending expulsion may only be justified so long as deportation or extradition proceedings are in progress.[28] This test must be applied strictly, so that there is a real prospect of expulsion that is being diligently pursued, at all stages of the detention.[29] The UN Human Rights Committee has held that, under article 9.1 ICCPR, "[d]etention in the course of proceedings for the control of immigration … must be justified as reasonable, necessary and proportionate in the light of the circumstances and reassessed as it extends in time."[30]

Under EU law, the Return Directive provides under article 15.1 that detention is a measure of last resort, that may be ordered only "[u]nless other sufficient but less coercive measures can be applied effectively in a specific case."[31] It must last "for as short a period as possible and only [be] maintained as long as removal arrangements are in progress and executed with due diligence."[32] If alternative measures to detention are not available, then, and only then, may a State "keep in detention a third-country national who is the subject of return procedures."[33] In particular, "[w]hen it appears that a reasonable prospect of removal no longer exists for legal or other considerations or the conditions [for detention] no longer exist, detention ceases to be justified and the person concerned shall be released immediately."[34] The Court of Justice of the European Union has made clear that "only a real prospect that removal can be carried out successfully … corresponds to a reasonable prospect of removal, and that that reasonable prospect does not exist where it appears unlikely that the person concerned will be admitted to a third country … ."[35] Furthermore, it has stressed that a migrant's lack of identity documents cannot be considered to constitute *per se* a "lack of cooperation" unless his or her conduct demonstrates this lack of cooperation and was instrumental to the delay in the expulsion.[36]

In the case of **asylum seekers**, detention will not be justified for any significant length of time, during the course of asylum proceedings, where national and international law prohibits expulsion in the course of those proceedings.[37] In such cases, there will be an insufficiently close link between the detention and the aim of ensuring deportation. Indeed, under international refugee law, there is a presumption against detention, and a requirement that individual detention be justified as necessary, reasonable in all the circumstances and proportionate to a legitimate purpose.[38] Detention must never be automatic, it should be used only as a last resort where there is evidence that other lesser restrictions would be inadequate in the particular circumstances of the case, and it should

[28] *Chahal v UK*, *op. cit.,* para. 113; *Louled Massoud v. Malta, op. cit.,* paras. 68-70.
[29] *Chahal v UK*, *op. cit*., para. 113; *Quinn v. France*, ECtHR, Application No. 18580/91, para. 48; *Kolompar v. Belgium,* ECtHR, *Application* No. 11613/85; *A and others v. UK*, *op. cit.,* para. 167.
[30] *General Comment no. 35: Liberty and security of the person*, Human Rights Committee, UN Doc. CCPR/C/GC/35, 16 December 2014, para. 18.
[31] Article 15.1, EU Return Directive 2008/115/EC.
[32] Article 15.1, *ibid*.
[33] Article 15.1, *ibid*.
[34] Article 15.4, *ibid*.
[35] *Said Shamilovich Kadzoev (Huchbarov)*, Case C-357/09 PPU, CJEU, Judgment of the Court (Grand Chamber) of 30 November 2009, Ruling 5.
[36] *Ibid.*, Ruling 3 and 4.
[37] Articles 31-33, 1951 Convention, together with dicta of the Court in *R.U. v Greece,* ECtHR*,* Application no.2237/08 para. 94 and *S.D. v Greece*, ECtHR, Application No. 53541/07, para. 62, affirming that it is prohibited in international law to expel an asylum seeker before determination of his or her claim; *Lokpo and Touré v Hungary*, HCtHR, Application No.10816/10, paras. 20-24; *Alaa Al-Tayyar Abdelhakim v Hungary*, ECtHR, Application No.13058/11; *Said v Hungary*, ECtHR, Application No.13457/11. See, also, Asylum Procedures Directive 2005/85/EC, article 7.1: "Applicants shall be allowed to remain in the Member State, for the sole purpose of the procedure, until the determining authority has made a decision in accordance with the procedures at first instance….". See, article 6, Reception Conditions Directive 2003/9/EC. See further, *General Comment no. 35, op. cit.*, para. 18.
[38] Article 31, *Convention on the Status of Refugees; ExCom Conclusion No. 44*, UNHCR; UNHCR Revised Detention Guidelines, Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum Seekers and Alternatives to Detention, 2012, Guidelines 2, 3 and 4.

never be used as a punishment.[39] Where detention is imposed, it should be an exceptional measure, and must last for the shortest possible period.[40]

With regard to EU law, the Asylum Procedures Directive[41] in force at the time of the case at hand states in article 18.1 that a person shall not be held in detention on the sole basis that he or she is seeking asylum. The Reception Directive[42] establishes a presumption against detention in article 7.3, which provides for the right of asylum seekers to move freely in the territory, with restrictions to be imposed only where necessary, for example for legal reasons or for reasons of public order. The Return Directive provides in recital 9 of its preamble that "[i]n accordance with […] Directive 2005/85 […] a third-country national who has applied for asylum in a Member State should not be regarded as staying illegally on the territory of that Member State until a negative decision on the application, or a decision ending his or her right of stay as asylum seeker has entered into force".

The ICJ submits that the requirement that a "procedure [be] prescribed by law" and therefore permissible under article 5.1 ECHR, entails, for EU Member States, that the detention of a migrant or asylum seeker respect EU law. This includes EU provisions identified above for the prior identification of alternatives to detention, the assessment that the necessity and proportionality requirements have been met; and the recognition of the status of asylum seekers as "lawfully staying" in a Member State during the process of their asylum application. These requirements are reinforced by the provisions of international refugee law that are applicable to all Council of Europe States, and particularly in the Italian context, through the direct reference to such law in EU law and in the Immigration Law.[43]

3. Detention in good faith

This Court has consistently held that for detention not to be arbitrary, it must be imposed in good faith, i.e. it must be imposed genuinely for the purposes contemplated under Article 5.1.f.[44] Good faith in the imposition of detention implies a measure of openness and due process in the imposition of detention so that procedures under national law, which allow for alternatives to detention or for release from detention, such as a period of voluntary departure, are not circumvented or manipulated so as to deprive them of meaning. In *R.U. v. Greece,*[45] detention was found to be in bad faith where the tribunal reviewing detention ignored the fact that the detainee had submitted an application for asylum, notwithstanding that this would have been ground for his release under national law.

This Court has held that in the application of Article 5.1.f ECHR, 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 *M.S.S. v. Belgium and Greece*, the Grand Chamber held that even short periods of detention of four days and one week could not be regarded as insignificant because the "applicant, being an asylum

[39] UNHCR Revised Detention Guidelines, Guideline 4.1.4; 4.2.
[40] UNHCR Revised Guidelines on Detention, *op. cit.* Guideline 4.1, 4.2, 6. The Executive Committee Conclusions stipulate that detention may only be resorted to where necessary on grounds prescribed by law: to verify identity; to determine the elements on which the claim to refugee status or asylum is based; to deal with cases where refugees or asylum-seekers have destroyed their travel and / or identity documents or have used fraudulent documents in order to mislead the authorities of the State in which they intend to claim asylum; or to protect national security, public health or public order". *Conclusion No.44*, UNHCR, *op. cit.* Reaffirmed in *Conclusion No. 85*, UNHCR, *op. cit*. Fore more detailed sub-grounds, see UNHCR Revised Guidelines on Detention, Guideline 4.1.4: prevention of absconding; in cases of likelihood of non-cooperation; in connection with accelerated procedures only for manifestly unfounded or clearly abusive claims; for initial identity and/or security verification; and in order to record, within the context of a preliminary interview, the elements on which the application for international protection is based, which could not be obtained in the absence of detention. Finally, detention is also permitted to protect public health and national security. The Guidelines stipulate that detention of asylum seekers for other purposes, such as to deter future asylum-seekers, or to dissuade asylum seekers from pursuing their claims, or for punitive or disciplinary reasons, is contrary to the norms of refugee law.
[41] Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status.
[42] Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers.
[43] See, article 10.4, Immigration Law.
[44] *Saadi v UK, op. cit.*, para. 77.
[45] *R.U. v. Greece*, *op. cit.*, para. 95.

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".[46] While this consideration was expressed in the context of detention in light of article 3 ECHR, it should equally apply to the assessment of whether a detention has been arbitrary in light of article 5.1.f.[47] In a series of cases involving vulnerable persons, this Court has found the measure of detention not to have been carried out in good faith, as, despite the situation of vulnerability, the authorities had not considered less severe measures.[48] This principle has been applied in cases of persons affected by serious illness,[49] children and families,[50] and unaccompanied minors.[51]

It is submitted that, where the law or procedure provided for in national law is applied so as to deprive it of effect, and to prevent a migrant from availing himself or herself of alternatives to detention, or release from detention, detention will necessarily be undertaken in bad faith and will therefore be arbitrary.

In *Louled Massoud v Malta*, this Court stressed the importance, in protecting against arbitrary detention under article 5.1.f, of procedures for review of detention that can ensure an effective remedy to contest the lawfulness and length of detention and that protect against arbitrariness.[52] With regard to notification of migration detention orders, decisions or rulings to migrants, who face an unfamiliar legal system, often in an unfamiliar language, the authorities are required to take measures to ensure that information is available to detained persons, in a language they understand, that at a minimum provides information regarding the legal grounds for their detention, the reasons for it, and the process available for reviewing or challenging the decision to detain. For the information to be accessible, it must also be presented in a form that takes account of the individual's level of education, and legal advice may be required for the individual to fully understand his or her circumstances.[53]

The UNHCR Guidelines on detention state that asylum seekers "are entitled to minimum procedural guarantees".[54] These include the rights to be informed of the reasons of detention in a language they understand; to legal counsel; to be brought promptly before and have the detention decision reviewed by a judicial or other independent authority; to regular periodic review of the necessity of detention by these bodies; to challenge the lawfulness of the detention (*habeas corpus*); to access asylum procedures; to contact or be contacted by UNHCR; to privacy and confidentiality; and to be assisted in making written submissions.

It is submitted that, where proceedings for the review of detention are conducted by authorities that are not functionally independent, or lack adequate competency as to scope of review or power to order release, or where the procedures are ineffective in practice in allowing for release in appropriate cases or are subject to significant delay, they will be insufficient to protect against arbitrary detention.

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[46] *M.S.S. v Belgium and Greece*, ECtHR, Application No. 30696/09, GC, para. 232.

[47] Indeed, the UNHCR Guidelines on detention of asylum seekers state in Guideline 9 that "[b]ecause of their experience of seeking asylum, and the often traumatic events precipitating flight, asylum seekers may present with psychological illness, trauma, depression, anxiety, aggression, and other physical, psychological and emotional consequences. Such factors need to be weighed in the assessment of the necessity to detain". See also, Guideline 4.3. The Council of Europe's *Twenty Guidelines on Forced Return* (Guideline 6) establish a general principle that alternatives to detention of migrants should be considered first, irrespective of vulnerability.

[48] *Yoh-Ekale Mwanje v Belgium*, ECtHR, Application no. 10486/10, para. 124.

[49] *Ibid.*

[50] *Mubilanzile Mayeke and Kaniki Mitunga v Belgium*, ECtHR, Application No. 13178/03.

[51] *Rahimi v Geece*, ECtHR, Application No. 8687/08.

[52] *Louled Masood v Malta*, *op. cit.,* para. 71 (and paras. 43-47 on article 5.4).

[53] *Nasrulloyev v. Russia*, ECtHR, Application No. 656/06, para. 77; *Chahal v. United Kingdom*, *op. cit*., para. 118; *Saadi v. United Kingdom*, *op. cit*., para. 74; *Abdolkhani and Karimnia v. Turkey*, *op. cit.,* paras. 131–135; *Amuur v. France*, *op. cit*. See also, *Vélez Loor v. Panama*, IACtHR, Serie C no. 2018, paras. 116, 180; WGAD, Annual Report 1998, para. 69, Guarantees 1 and 5; WGAD, Annual Report 1999, *op. cit*., Principles 1 and 8; WGAD, Annual Report 2008, A/HRC/7/4, paras. 67 and 82.

[54] Guideline 7, UNHCR Detention Guidelines.

IV. Requirements of effective judicial review under Article 5.4

The right to challenge the lawfulness of detention judicially[55] is a fundamental and non-derogable protection against arbitrary detention, as well as against torture or ill-treatment in detention.[56] It requires that persons subject to any form of deprivation of liberty have effective access to an independent court or tribunal to challenge the lawfulness of their detention, and that they or their representative have the opportunity to be heard before the court.[57] The Human Rights Committee has affirmed that, under article 9.4 ICCPR, the right to *habeas corpus* "applies to all detention by official action or pursuant to official authorization, including detention in … immigration detention…."[58]

The UN Working Group on Arbitrary Detention's newly issued Basic Principles and Guidelines on *habeas corpus* provide that, in case of non-nationals, "including migrants regardless of their status, asylum seekers, refugees …, in a situation of deprivation of liberty [have] the right to bring proceedings before a court to challenge the arbitrariness and lawfulness as well as the necessity and proportionality of their detention and to receive without delay appropriate remedy."[59]

For a judicial review to accord with international human rights law, it must fulfil a number of requirements: it must be clearly prescribed by law; [60] it must be by an independent and impartial judicial body;[61] it must be prompt,[62] of sufficient scope to be effective and real and not merely a formal review of the grounds and circumstances of detention; and the judicial authority must have the power to order release. [63] The review must meet standards of due process and be able to ensure "equality of arms" between the parties. [64] Legal assistance must be provided to the extent necessary for an effective application for release. This Court has emphasized that, "although the authorities are not obliged to provide free legal aid in the context of detention proceedings …, the lack thereof, particularly where legal representation is required in the domestic context for the purposes of Article 5 § 4, may raise an issue as to the accessibility of such a remedy."[65] Where detention may be for a long period, procedural guarantees should be close to those for criminal procedures. [66]

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[55] Protected by articles 9.4 ICCPR, 5.4 ECHR, 7.6 ACHR and 14.6 ArCHR. See, also, article 37(d) CRC: "Every child deprived of his or her liberty shall have 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 before a court or other competent, independent and impartial authority, and to a prompt decision on any such action"; and article 17.2(f) CPED. See, WGAD, *Annual Report 1998*, *op. cit.*, Guarantees 3 and 4; WGAD, *Annual Report 1999*, *op. cit.*, Principle 3; WGAD, *Annual Report 2003,* UN Doc. E/CN.4/2004/3, 15 December 2003, para. 86; WGAD, *Annual Report 2008*, *op. cit.*, paras 67 and 82. The African Commission on Human and Peoples' Rights has derived the right to judicial review of detention under the right to access to a court and fair trial (article 7 ACHPR): *IHRDA and others v. Republic of Angola*, ACommHPR, paras. 58-60; *RADDH v. Zambia,* ACommHPR, para. 30.

[56] *Yvon Neptune v. Haiti*, IACtHR, *op. cit.*, para. 115; *Neira Alegría et al. v. Perú*, IACtHR, Series C No. 20, Judgment of 19 January 1995, para. 82; *La Cantuta v. Peru*, IACtHR, Series C No. 162, Judgment of 29 November 2006, para. 111; *Serrano Cruz Sisters v. El Salvador*, IACtHR, Series C No. 120, para. 79.

[57] *Al-Nashif v. Bulgaria*, ECtHR, *Application 50963/99*, para. 92; *De Wilde, Ooms and Versyp v. Belgium*, ECtHR, Plenary, Applications Nos. 2832/66; 2835/66; 2899/66, para. 73; *Winterwerp v. the Netherlands*, ECtHR, Application No. 6301/73; *Vélez Loor v. Panama*, *op. cit.,* para. 124.

[58] *General Comment no. 35, op. cit.*, para. 18.

[59] Principle 21, Report of the Working Group on Arbitrary Detention, Document A/HRC/30/XX, 4 May 2015 (http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15903&LangID=E). See also for more detail, Guideline 21.

[60] *Z.N.S. v. Turkey*, ECtHR, *Application 21896/08*, para. 60; *S.D. v. Greece,* ECtHR, *op. cit.*, para. 73.

[61] See, *Vélez Loor v. Panama*, IACtHR, *op. cit.*, para. 108.

[62] *Z.N.S. v. Turkey*, ECtHR, *op. cit.*, paras. 61-62; *Shakurov v. Russia*, ECtHR, Application No. 55822/10, Judgment of 5 June 2012, para. 187; *Eminbeyli v. Russia*, ECtHR, *op. cit.*, para. 10.5.

[63] *Bouamar v. Belgium*, ECtHR, Application No. 9106/80, Judgment of 29 February 1988; *A. and Others v. United Kingdom*, ECtHR, *op. cit.*, para. 202; *Chahal v. United Kingdom*, ECtHR, *op. cit.*, paras. 127-130; *Chahal v. United Kingdom*, ECtHR, *op. cit.*, para.128.

[64] *Bouamar v. Belgium,* ECtHR, *op. cit.*, para. 60. See, *Vélez Loor v. Panama*, IACtHR, *op. cit.*, paras. 107-109. *Bouamar v. Belgium,* ECtHR, paras. 60-63; *Winterwerp v. Netherlands,* ECtHR, *op. cit.*, para. 60: "essential that the person concerned has access to a court and the opportunity to be heard in person or through a legal representative"; *Lebedev v. Russia,* ECtHR, Application No. 4493/04, Judgment of 25 October 2007, paras. 84-89; *Suso Musa v. Malta*, ECtHR, *op. cit.*, paras. 61.

[65] *Suso Musa v. Malta*, ECtHR, Application no. 42337/12, Judgment no. 23 July 2013, paras. 61.

[66] *De Wilde, Ooms and Versyp v. Belgium*, ECtHR*, op. cit.*, para. 79; *A. and Others v. United Kingdom*, ECtHR, *op. cit.*, para. 217: "in view of the dramatic impact of the lengthy - and what appeared at that time to be indefinite - deprivation of liberty on the applicants' fundamental rights, Article 5 para. 4 must import substantially the same fair trial guarantees as Article 6 para. 1 in its criminal aspect".

This Court has held that the requirement of speediness of the judicial review of detention is an essential element of the effectiveness of the judicial control: delayed judicial review of detention is not effective.[67] If compliance with the right to a speedy decision has to be determined individually for each case, with regard to the circumstances,[68] then "[t]he opportunity to initiate such proceedings must be provided, both in theory and in practice, soon after the person is taken into detention and, if necessary, at reasonable intervals thereafter."[69] Concerning the period of review, in *Scherbina v. Russia,*[70] a delay of sixteen days in the review of a detention order was found not to comply with the speediness requirement of Article 5.4 ECHR. In the migration context, this Court held in *Suso Musa* that a Constitutional Court remedy, albeit formally accessible, was ineffective as it was "rather cumbersome for Article 5 § 4 purposes [and did not ensure] a speedy review of the lawfulness of an applicant's detention."[71]

Under EU law, when detention is ordered by administrative authorities, Member States must ensure that there is "speedy judicial review of the lawfulness of detention."[72] Alternatively, the migrant should have the "right to take proceedings by means of which the lawfulness of detention shall be subject to a speedy judicial review to be decided on as speedily as possible after the launch of the relevant proceedings. In such a case Member States shall immediately inform the third-country national concerned about the possibility of taking such proceedings."[73] With regard to judicial review of the detention, the Return Directive states that it must "be reviewed at reasonable intervals of time either on application by the third-country national concerned or *ex officio*. In the case of prolonged detention periods, reviews shall be subject to the supervision of a judicial authority."[74]

The Court of Justice of the European Union has recently set out detailed principles in relation to the judicial review of detention under the Return Directive. In *Bashir Mohamed Ali Mahdi*,[75] the Court ruled that the Directive, read in the light of Articles 6 and 47 of the Charter, entailed the following obligations:

- all decisions on detention, including on its extension, must be in the form of a written measure that includes the reasons in fact and in law for that decision;
- the mandatory judicial review must rule on the detention measure: on a case-by-case basis; applying the principle of proportionality; assessing whether detention may be replaced with a less coercive measure or whether the person concerned should be released;
- the court or judge must have the power to take into account the facts stated and evidence adduced by the administrative authority that has brought the matter before it, as well as any facts, evidence and observations which may be submitted to the judicial authority in the course of the proceedings.

It is clearly established that, to comply with Article 5.4, judicial review of detention must be speedily conducted by judicial bodies that are effective, independent and impartial, and before which the detained person has access to procedural protections. The ICJ further submits that speedy and effective judicial review in accordance with Article 5.4 entails an assessment of the lawfulness of the immigration detention both under the Convention and under the applicable national law, including, in EU Member States, EU law, and, as such, must

[67] *Scherbina v. Russia*, ECtHR, Application no. 41970/11, para. 62.
[68] *Rehbock v. Slovenia*, ECtHR, Application no. 29462/95, para. 84.
[69] *Molotchko v. Ukraine*, ECtHR, Application no. 12275/10, para. 148.
[70] *Scherbina v. Russia*, *op. cit.*, para. 65.
[71] *Suso Musa v Malta*, *op. cit.*, para. 52.
[72] Article 15.2.a, EU Return directive.
[73] Article 15.2.b, *ibid*. The Court of Justice of the European Union has held that, "where the extension of a detention measure has been decided in an administrative procedure in breach of the right to be heard, the national court responsible for assessing the lawfulness of that extension decision may order the lifting of the detention measure only if it considers, in the light of all of the factual and legal circumstances of each case, that the infringement at issue actually deprived the party relying thereon of the possibility of arguing his defence better, to the extent that the outcome of that administrative procedure could have been different," *M. G. and N. R. v Staatssecretaris van Veiligheid en Justitie*, Case C-383/13 PPU, Judgment of the Court (Second Chamber) of 10 September 2013, Ruling.
[74] Article 15.3, *ibid*.
[75] *Bashir Mohamed Ali Mahdi*, CJEU, Case no. C-146/14 PPU, Judgment of 5 June 2014, Ruling 3 and 4.

consider the requirement of necessity and proportionality and the prior consideration of alternatives to detention.

V. The right to an effective remedy and reparation, including compensation for unlawful or arbitrary detention

The right to an effect remedy and reparation is a fundamental principle of international law. The *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* (the Principles) affirm that States have an obligation to provide available, adequate, effective, prompt and appropriate remedies to victims of violations of international human rights law and international humanitarian law, including reparation. In accordance with these principles, States have a duty to provide a remedy for and to repair the harm suffered from violations of human rights, including unlawful or arbitrary detention in violation of the right to liberty.[76]

In accordance with this general principle, the right to an effective remedy for violations of human rights is protected in international human rights instruments, including in article 13 ECHR and article 2.3.a of the International Covenant on Civil and Political Rights (ICCPR). The article 13 right to an effective remedy, is given specific expression in the context of detention, in article 5.5 ECHR.[77]

It has been consistently affirmed that article 5.5 ECHR creates for the victim a direct and enforceable claim to compensation before the domestic courts:[78] it must be possible to apply for compensation regarding a deprivation of liberty in breach of article 5.1, 5.2, 5.3 or 5.4 ECHR.[79] To comply with the guarantees of article 5.5 ECHR, the State concerned must be able to ensure "the effective enjoyment of the right to compensation with a sufficient degree of certainty"[80]. Additionally, in *Ciulla v. Italy*, this Court had found the right of article 5.5 ECHR ensured with an insufficient degree of certainty, because of the lack of clarity as to the priority given to the Convention by the domestic authorities[81]. The right to compensation defined by article 5.5 ECHR does not entitle the applicant to a particular or defined amount.[82] Nevertheless, because the Convention is "intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective"[83], it has been held in several cases that compensation that is negligible or disproportionate to the seriousness of the violation is insufficient to comply with article 5.5 ECHR.[84]

The ICJ submits that, under article 5.5 ECHR, States have an obligation to provide accessible, prompt and effective procedures for compensation for unlawful or arbitrary detention. This obligation extends to any detention in breach of national law, including, in EU Member States, EU law provisions that form part of domestic law. The ICJ submits that, to be effective, the procedure must be judicial or at the very least a functionally independent administrative remedy subject to meaningful judicial review. Furthermore, the legal requirements and procedures must be sufficiently accessible to ensure availability of the remedy in practice by detained persons and their lawyers.

[76] ICJ Report, *op. cit*., p. 61.
[77] Similarly, article 9.5 ICCPR provides that "[a]nyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation."
[78] *Storck v. Germany*, ECtHR, Application no. 61603/00, para. 122; *Brogan and Others v. the United Kingdom*, ECtHR, Application no. 11209/84, para. 67; *A. and Other v. the United Kingdom*, *op. cit*., para. 229.
[79] See for example *Lobanov v. Russia*, ECtHR, Application no. 16159/03, para. 54.
[80] *N.C. v. Italy*, ECtHR, Application no. 24952/94, GC, para. 52.
[81] *Ciulla v. Italy*, ECtHR, Application no. 11152/84, paras. 22-23 & 43-45.
[82] *Şahin Çağdaş v. Turkey,* Application 28137/02, para. 34.
[83] *Artico v. Italy*, ECtHR, Application 6697/74, para. 33.
[84] *Cumber v. The United Kingdom*, ECtHR, Application no. 28779/95, para. 5.