

PROACTION

PROtection Against disCriminaTION of asylum-seekers and unaccompanied child migrants
Zaštita od diskriminacije tražilaca azila i dece bez pratnje u migracijama

HANDBOOK OF TRAINING MATERIALS



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Relevant law provisions

I. The Charter of Fundamental Rights of the European Union

Article 3

1. Everyone has the right to respect for his or her physical and mental integrity. ...

Article 4

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

Article 6

Everyone has the right to liberty and security of person.

Article 20

Everyone is equal before the law.

Article 21

1. Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.

2. Within the scope of application of the Treaties and without prejudice to any of their specific provisions, any discrimination on grounds of nationality shall be prohibited.

II. EU legislation

a) The Return Directive (2008/115/EC)

Article 15. Detention

1. Unless other sufficient but less coercive measures can be applied effectively in a specific case, Member States may only keep in detention a third-country national who is the subject of return procedures in order to prepare the return and/or carry out the removal process, in particular when:

(a) there is a risk of absconding or

(b) the third-country national concerned avoids or hampers the preparation of return or the removal process.

Any detention shall be for as short a period as possible and only maintained as long as removal arrangements are in progress and executed with due diligence.

2. Detention shall be ordered by administrative or judicial authorities.

Detention shall be ordered in writing with reasons being given in fact and in law.

When detention has been ordered by administrative authorities, Member States shall:

(a) either provide for a speedy judicial review of the lawfulness of detention to be decided on as speedily as possible from the beginning of detention;

(b) or grant the third-country national concerned 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.

The third-country national concerned shall be released immediately if the detention is not lawful.

3. In every case, detention shall 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.

4. When it appears that a reasonable prospect of removal no longer exists for legal or other considerations or the conditions laid down in paragraph 1 no longer exist, detention ceases to be justified and the person concerned shall be released immediately.

5. Detention shall be maintained for as long a period as the conditions laid down in paragraph 1 are fulfilled and it is necessary to ensure successful removal. Each Member State shall set a limited period of detention, which may not exceed six months.

6. Member States may not extend the period referred to in paragraph 5 except for a limited period not exceeding a further twelve months in accordance with national law in cases where regardless of all their reasonable efforts the removal operation is likely to last longer owing to:

- (a) a lack of cooperation by the third-country national concerned, or
- (b) delays in obtaining the necessary documentation from third countries.

Article 17. Detention of minors and families

1. Unaccompanied minors and families with minors shall only be detained as a measure of last resort and for the shortest appropriate period of time.

2. Families detained pending removal shall be provided with separate accommodation guaranteeing adequate privacy.

3. Minors in detention shall have the possibility to engage in leisure activities, including play and recreational activities appropriate to their age, and shall have, depending on the length of their stay, access to education.

4. Unaccompanied minors shall as far as possible be provided with accommodation in institutions provided with personnel and facilities which take into account the needs of persons of their age.

5. The best interests of the child shall be a primary consideration in the context of the detention of minors pending removal.

b) *The Reception Conditions Directive (2013/33/EU)*

Article 2

(h) 'detention': means confinement of an applicant by a Member State within a particular place, where the applicant is deprived of his or her freedom of movement;

Article 8. Detention

1. Member States shall not hold a person in detention for the sole reason that he or she is an applicant ...

2. When it proves necessary and on the basis of an individual assessment of each case, Member States may detain an applicant, if other less coercive alternative measures cannot be applied effectively.

3. An applicant may be detained only:

- (a) in order to determine or verify his or her identity or nationality;
- (b) in order to determine those elements on which the application for international protection is based which could not be obtained in the absence of detention, in particular when there is a risk of absconding of the applicant;
- (c) in order to decide, in the context of a procedure, on the applicant's right to enter the territory;
- (d) when he or she is detained subject to a return procedure under 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 (9), in order to prepare the return and/or carry out the removal process, and the Member State concerned can substantiate on the basis of objective criteria, including that he or she already

had the opportunity to access the asylum procedure, that there are reasonable grounds to believe that he or she is making the application for international protection merely in order to delay or frustrate the enforcement of the return decision;

- (e) when protection of national security or public order so requires;
- (f) in accordance with Article 28 of Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (10).

The grounds for detention shall be laid down in national law.

4. Member States shall ensure that the rules concerning alternatives to detention, such as regular reporting to the authorities, the deposit of a financial guarantee, or an obligation to stay at an assigned place, are laid down in national law.

Article 9. Guarantees for detained applicants

1. An applicant shall be detained only for as short a period as possible and shall be kept in detention only for as long as the grounds set out in Article 8(3) are applicable. Administrative procedures relevant to the grounds for detention set out in Article 8(3) shall be executed with due diligence. Delays in administrative procedures that cannot be attributed to the applicant shall not justify a continuation of detention.

2. Detention of applicants shall be ordered in writing by judicial or administrative authorities. The detention order shall state the reasons in fact and in law on which it is based.

3. Where detention is ordered by administrative authorities, Member States shall provide for a speedy judicial review of the lawfulness of detention to be conducted ex officio and/or at the request of the applicant. When conducted ex officio, such review shall be decided on as speedily as possible from the beginning of detention. When conducted at the request of the applicant, it shall be decided on as speedily as possible after the launch of the relevant proceedings. To this end, Member States shall define in national law the period within which the judicial review ex officio and/or the judicial review at the request of the applicant shall be conducted.

Where, as a result of the judicial review, detention is held to be unlawful, the applicant concerned shall be released immediately.

4. Detained applicants shall immediately be informed in writing, in a language which they understand or are reasonably supposed to understand, of the reasons for detention and the procedures laid down in national law for challenging the detention order, as well as of the possibility to request free legal assistance and representation.

5. Detention shall be reviewed by a judicial authority at reasonable intervals of time, ex officio and/or at the request of the applicant concerned, in particular whenever it is of a prolonged duration, relevant circumstances arise or new information becomes available which may affect the lawfulness of detention.

6. In cases of a judicial review of the detention order provided for in paragraph 3, Member States shall ensure that applicants have access to free legal assistance and representation. This shall include, at least, the preparation of the required procedural documents and participation in the hearing before the judicial authorities on behalf of the applicant.

Free legal assistance and representation shall be provided by suitably qualified persons as admitted or permitted under national law whose interests do not conflict or could not potentially conflict with those of the applicant.

7. Member States may also provide that free legal assistance and representation are granted:

- (a) only to those who lack sufficient resources; and/or
- (b) only through the services provided by legal advisers or other counsellors specifically designated by national law to assist and represent applicants.

8. Member States may also:

- (a) impose monetary and/or time limits on the provision of free legal assistance and representation, provided that such limits do not arbitrarily restrict access to legal assistance and representation;
- (b) provide that, as regards fees and other costs, the treatment of applicants shall not be more favourable than the treatment generally accorded to their nationals in matters pertaining to legal assistance.

9. Member States may demand to be reimbursed wholly or partially for any costs granted if and when the applicant's financial situation has improved considerably or if the decision to grant such costs was taken on the basis of false information supplied by the applicant.

10. Procedures for access to legal assistance and representation shall be laid down in national law.

Article 11. Detention of vulnerable persons and of applicants with special reception needs

...

2. Minors shall be detained only as a measure of last resort and after it having been established that other less coercive alternative measures cannot be applied effectively. Such detention shall be for the shortest period of time and all efforts shall be made to release the detained minors and place them in accommodation suitable for minors. The minor's best interests, as prescribed in Article 23(2), shall be a primary consideration for Member States. Where minors are detained, they shall have the possibility to engage in leisure activities, including play and recreational activities appropriate to their age.

3. Unaccompanied minors shall be detained only in exceptional circumstances. All efforts shall be made to release the detained unaccompanied minor as soon as possible. Unaccompanied minors shall never be detained in prison accommodation. As far as possible, unaccompanied minors shall be provided with accommodation in institutions provided with personnel and facilities which take into account the needs of persons of their age. Where unaccompanied minors are detained, Member States shall ensure that they are accommodated separately from adults.

....

6. In duly justified cases and for a reasonable period that shall be as short as possible Member States may derogate from the third subparagraph of paragraph 2, ... when the applicant is detained at a border post or in a transit zone....

Article 14 - Schooling and education of minors

1. Member States shall grant to minor children of applicants and to applicants who are minors access to the education system under similar conditions as their own nationals for so long as an expulsion measure against them or their parents is not actually enforced. Such education may be provided in accommodation centres.

The Member State concerned may stipulate that such access must be confined to the State education system.

Member States shall not withdraw secondary education for the sole reason that the minor has reached the age of majority.

2. Access to the education system shall not be postponed for more than three months from the date on which the application for international protection was lodged by or on behalf of the minor.

Preparatory classes, including language classes, shall be provided to minors where it is necessary to facilitate their access to and participation in the education system as set out in paragraph 1.

3. Where access to the education system as set out in paragraph 1 is not possible due to the specific situation of the minor, the Member State concerned shall offer other education arrangements in accordance with its national law and practice.

Article 17 - General rules on material reception conditions and health care

1. Member States shall ensure that material reception conditions are available to applicants when they make their application for international protection.

2. Member States shall ensure that material reception conditions provide an adequate standard of living for applicants, which guarantees their subsistence and protects their physical and mental health.

Member States shall ensure that that standard of living is met in the specific situation of vulnerable persons, in accordance with Article 21, as well as in relation to the situation of persons who are in detention.

3. Member States may make the provision of all or some of the material reception conditions and health care subject to the condition that applicants do not have sufficient means to have a standard of living adequate for their health and to enable their subsistence.

...

Article 18 - Modalities for material reception conditions

1. Where housing is provided in kind, it should take one or a combination of the following forms:

- a) premises used for the purpose of housing applicants during the examination of an application for international protection made at the border or in transit zones;
accommodation centres which guarantee an adequate standard of living;
- b) private houses, flats, hotels or other premises adapted for housing applicants.
- c) ...

3. Member States shall take into consideration gender and age-specific concerns and the situation of vulnerable persons in relation to applicants within the premises and accommodation centres referred to in paragraph 1(a) and (b).

4. Member States shall take appropriate measures to prevent assault and gender-based violence, including sexual assault and harassment, within the premises and accommodation centres referred to in paragraph 1(a) and (b).

5. Member States shall ensure, as far as possible, that dependent adult applicants with special reception needs are accommodated together with close adult relatives who are already present in the same Member State and who are responsible for them whether by law or by the practice of the Member State concerned.

...

Article 19 - Health care

1. Member States shall ensure that applicants receive the necessary health care which shall include, at least, emergency care and essential treatment of illnesses and of serious mental disorders.

2. Member States shall provide necessary medical or other assistance to applicants who have special reception needs, including appropriate mental health care where needed.

Article 21 - General principle

Member States shall take into account the specific situation of vulnerable persons such as minors, unaccompanied minors, disabled people, elderly people, pregnant women, single parents with minor children, victims of human trafficking, persons with serious illnesses, persons with mental disorders and persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence, such as victims of female genital mutilation, in the national law implementing this Directive.

Article 22 - Assessment of the special reception needs of vulnerable persons

1. In order to effectively implement Article 21, Member States shall assess whether the applicant is an applicant with special reception needs. Member States shall also indicate the nature of such needs.

That assessment shall be initiated within a reasonable period of time after an application for international protection is made and may be integrated into existing national procedures. Member States shall ensure that those special reception needs are also addressed, in accordance with the provisions of this Directive, if they become apparent at a later stage in the asylum procedure.

Member States shall ensure that the support provided to applicants with special reception needs in accordance with this Directive takes into account their special reception needs throughout the duration of the asylum procedure and shall provide for appropriate monitoring of their situation.

...

Article 23 - Minors

1. The best interests of the child shall be a primary consideration for Member States when implementing the provisions of this Directive that involve minors. Member States shall ensure a standard of living adequate for the minor's physical, mental, spiritual, moral and social development.

2. In assessing the best interests of the child, Member States shall in particular take due account of the following factors:

- a) family reunification possibilities;
 - b) the minor's well-being and social development, taking into particular consideration the minor's background;
 - c) safety and security considerations, in particular where there is a risk of the minor being a victim of human trafficking;
 - d) the views of the minor in accordance with his or her age and maturity.
3. Member States shall ensure that minors have access to leisure activities, including play and recreational activities appropriate to their age within the premises and accommodation centres referred to in Article 18(1)(a) and (b) and to open-air activities.
4. Member States shall ensure access to rehabilitation services for minors who have been victims of any form of abuse, neglect, exploitation, torture or cruel, inhuman and degrading treatment, or who have suffered from armed conflicts, and ensure that appropriate mental health care is developed and qualified counselling is provided when needed.
5. Member States shall ensure that minor children of applicants or applicants who are minors are lodged with their parents, their unmarried minor siblings or with the adult responsible for them whether by law or by the practice of the Member State concerned, provided it is in the best interests of the minors concerned.

c) The Qualification Directive (2011/95/EU)

- (With respect to the treatment of persons falling within the scope of this Directive, Member States are bound by obligations under instruments of international law to which they are party, including in particular those that prohibit discrimination.
- (Especially to avoid social hardship, it is appropriate to provide beneficiaries of international protection with adequate social welfare and means of subsistence, without discrimination in the context of social assistance. With regard to social assistance, the modalities and detail of the provision of core benefits to beneficiaries of subsidiary protection status should be determined by national law. The possibility of limiting such assistance to core benefits is to be understood as covering at least minimum income support, assistance in the case of illness, or pregnancy, and parental assistance, in so far as those benefits are granted to nationals under national law.

Article 27 - Access to education

1. Member States shall grant full access to the education system to all minors granted international protection, under the same conditions as nationals.
2. Member States shall allow adults granted international protection access to the general education system, further training or retraining, under the same conditions as third-country nationals legally resident.

Article 30 - Healthcare

1. Member States shall ensure that beneficiaries of international protection have access to healthcare under the same eligibility conditions as nationals of the Member State that has granted such protection.
2. Member States shall provide, under the same eligibility conditions as nationals of the Member State that has granted protection, adequate healthcare, including treatment of mental disorders when needed, to beneficiaries of international protection who have special needs, such as pregnant women, disabled people, persons who have undergone torture, rape or other serious forms of psychological, physical or sexual violence or minors who have been victims of any form of abuse, neglect, exploitation, torture, cruel, inhuman and degrading treatment or who have suffered from armed conflict.

Article 31. Unaccompanied minors

1. As soon as possible after the granting of international protection Member States shall take the necessary measures to ensure the representation of unaccompanied minors by a legal guardian

or, where necessary, by an organisation responsible for the care and well-being of minors, or by any other appropriate representation including that based on legislation or court order.

2. Member States shall ensure that the minor's needs are duly met in the implementation of this Directive by the appointed guardian or representative. The appropriate authorities shall make regular assessments.

3. Member States shall ensure that unaccompanied minors are placed either:

- (a) with adult relatives; or
- (b) with a foster family; or
- (c) in centres specialised in accommodation for minors; or
- (d) in other accommodation suitable for minors.

In this context, the views of the child shall be taken into account in accordance with his or her age and degree of maturity.

4. As far as possible, siblings shall be kept together, taking into account the best interests of the minor concerned and, in particular, his or her age and degree of maturity. Changes of residence of unaccompanied minors shall be limited to a minimum.

5. If an unaccompanied minor is granted international protection and the tracing of his or her family members has not already started, Member States shall start tracing them as soon as possible after the granting of international protection, whilst protecting the minor's best interests. If the tracing has already started, Member States shall continue the tracing process where appropriate. In cases where there may be a threat to the life or integrity of the minor or his or her close relatives, particularly if they have remained in the country of origin, care must be taken to ensure that the collection, processing and circulation of information concerning those persons is undertaken on a confidential basis.

6. Those working with unaccompanied minors shall have had and continue to receive appropriate training concerning their needs.

Article 32 - Access to accommodation

1. Member States shall ensure that beneficiaries of international protection have access to accommodation under equivalent conditions as other third-country nationals legally resident in their territories.

2. While allowing for national practice of dispersal of beneficiaries of international protection, Member States shall endeavour to implement policies aimed at preventing discrimination of beneficiaries of international protection and at ensuring equal opportunities regarding access to accommodation.

d) Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin

Article 2 - Concept of discrimination

1. For the purposes of this Directive, the principle of equal treatment shall mean that there shall be no direct or indirect discrimination based on racial or ethnic origin.

2. For the purposes of paragraph 1:

(a) direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation on grounds of racial or ethnic origin;

(b) indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.

3. Harassment shall be deemed to be discrimination within the meaning of paragraph 1, when an unwanted conduct related to racial or ethnic origin takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment. In this context, the concept of harassment may be defined in accordance with the national laws and practice of the Member States.

4. An instruction to discriminate against persons on grounds of racial or ethnic origin shall be deemed to be discrimination within the meaning of paragraph 1.

e) Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law

Article 1

1. Each Member State shall take the measures necessary to ensure that the following intentional conduct is punishable:

- a) publicly inciting to violence or hatred directed against a group of persons or a member of such a group defined by reference to race, colour, religion, descent or national or ethnic origin; the commission of an act referred to in point (a) by public dissemination or distribution of
- b) tracts, pictures or other material;
- c) publicly condoning, denying or grossly trivialising crimes of genocide, crimes against humanity and war crimes as defined in Articles 6, 7 and 8 of the Statute of the International Criminal Court, directed against a group of persons or a member of such a group defined by reference to race, colour, religion, descent or national or ethnic origin when the conduct is carried out in a manner likely to incite to violence or hatred against such a group or a member of such a group;
- d) publicly condoning, denying or grossly trivialising the crimes defined in Article 6 of the Charter of the International Military Tribunal appended to the London Agreement of 8 August 1945, directed against a group of persons or a member of such a group defined by reference to race, colour, religion, descent or national or ethnic origin when the conduct is carried out in a manner likely to incite to violence or hatred against such a group or a member of such a group.

....

III. International treaties

a) The International Covenant on Civil and Political Rights

Article 2.1

Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. (.)

Article 7

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

...

Article 9

1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.

...

4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

Article 10

1. All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.

...

Article 26

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

b) *International Covenant on Economic, Social and Cultural Rights*

Article 2

2. The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Article 3

The State Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant

Article 11

1. The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.

2. The States Parties to the present Covenant, recognizing the fundamental right of everyone to be free from hunger, shall take, individually and through international co-operation, the measures, including specific programmes, which are needed:

(a) To improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge, by disseminating knowledge of the principles of nutrition and by developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilization of natural resources;

(b) Taking into account the problems of both food-importing and food-exporting countries, to ensure an equitable distribution of world food supplies in relation to need.

Article 12

1. The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.

2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for:

(a) The provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child;

- (b) The improvement of all aspects of environmental and industrial hygiene;
- (c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases;
- (d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness.

Article 13

1. The States Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace.

2. The States Parties to the present Covenant recognize that, with a view to achieving the full realization of this right:

- (a) Primary education shall be compulsory and available free to all;
- (b) Secondary education in its different forms, including technical and vocational secondary education, shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education;
- (c) Higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education;
- (d) Fundamental education shall be encouraged or intensified as far as possible for those persons who have not received or completed the whole period of their primary education;
- (e) The development of a system of schools at all levels shall be actively pursued, an adequate fellowship system shall be established, and the material conditions of teaching staff shall be continuously improved.

3. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to choose for their children schools, other than those established by the public authorities, which conform to such minimum educational standards as may be laid down or approved by the State and to ensure the religious and moral education of their children in conformity with their own convictions.

4. No part of this article shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principles set forth in paragraph I of this article and to the requirement that the education given in such institutions shall conform to such minimum standards as may be laid down by the State.

c) The Convention on the Rights of the Child

Article 2

1. States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.

2. States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.

Article 3.1

In 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.

Article 9

1. States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence.

2. In any proceedings pursuant to paragraph 1 of the present article, all interested parties shall be given an opportunity to participate in the proceedings and make their views known.

3. States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests.

4. Where such separation results from any action initiated by a State Party, such as the detention, imprisonment, exile, deportation or death (including death arising from any cause while the person is in the custody of the State) of one or both parents or of the child, that State Party shall, upon request, provide the parents, the child or, if appropriate, another member of the family with the essential information concerning the whereabouts of the absent member(s) of the family unless the provision of the information would be detrimental to the well-being of the child. States Parties shall further ensure that the submission of such a request shall of itself entail no adverse consequences for the person(s) concerned.

Article 22

1. States Parties shall take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures shall, whether unaccompanied or accompanied by his or her parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present Convention and in other international human rights or humanitarian instruments to which the said States are Parties.

2. For this purpose, States Parties shall provide, as they consider appropriate, co-operation in any efforts by the United Nations and other competent intergovernmental organizations or non-governmental organizations co-operating with the United Nations to protect and assist such a child and to trace the parents or other members of the family of any refugee child in order to obtain information necessary for reunification with his or her family. In cases where no parents or other members of the family can be found, the child shall be accorded the same protection as any other child permanently or temporarily deprived of his or her family environment for any reason, as set forth in the present Convention.

Article 37

States Parties shall ensure that:

(a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age;

(b) No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time;

(c) Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances;

(d) 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.

d) The 1951 Convention relating to the status of refugees

Article 21

As regards housing, the Contracting States, in so far as the matter is regulated by laws or regulations or is subject to the control of public authorities, shall accord to refugees lawfully staying in their territory treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances.

Article 22

1. The Contracting States shall accord to refugees the same treatment as is accorded to nationals with respect to elementary education.

2. The Contracting States shall accord to refugees treatment as favourable as possible, and, in any event, not less favourable than that accorded to aliens generally in the same circumstances, with respect to education other than elementary education and, in particular, as regards access to studies, the recognition of foreign school certificates, diplomas and degrees, the remission of fees and charges and the award of scholarships.

e) UNESCO Convention against Discrimination in Education

Article 3

In order to eliminate and prevent discrimination within the meaning of this Convention, the States Parties thereto undertake:

(e) To give foreign nationals resident within their territory the same access to education as that given to their own nationals.

f) The European Convention on Human Rights

Article 3

No one shall be subject to torture or to inhuman or degrading treatment or punishment.

Article 5

1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
 - a. ...
 - b. the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.
2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.
3. ...
4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.
5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this article shall have an enforceable right to compensation.

Article 14

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

Article 2 Protocol 1

No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.

Article 1 Protocol 12

1 The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

2 No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1.

g) the European Social Charter (revised)

Article 7 – The right of children and young persons to protection

With a view to ensuring the effective exercise of the right of children and young persons to protection, the Parties undertake:

...

10. to ensure special protection against physical and moral dangers to which children and young persons are exposed, and particularly against those resulting directly or indirectly from their work.

Article 11 – The right to protection of health

With a view to ensuring the effective exercise of the right to protection of health, the Parties undertake, either directly or in cooperation with public or private organisations, to take appropriate measures designed *inter alia*:

1. to remove as far as possible the causes of ill-health;
2. to provide advisory and educational facilities for the promotion of health and the encouragement of individual responsibility in matters of health;
3. to prevent as far as possible epidemic, endemic and other diseases, as well as accidents.

Article 19 – The right of migrant workers and their families to protection and assistance

With a view to ensuring the effective exercise of the right of migrant workers and their families to protection and assistance in the territory of any other Party, the Parties undertake:

1. ...

4. to secure for such workers lawfully within their territories, insofar as such matters are regulated by law or regulations or are subject to the control of administrative authorities, treatment not less favourable than that of their own nationals in respect of the following matters:

1. ...

3. accommodation;

...

6. to facilitate as far as possible the reunion of the family of a foreign worker permitted to establish himself in the territory;

7. to secure for such workers lawfully within their territories treatment not less favourable than that of their own nationals in respect of legal proceedings relating to matters referred to in this article;

8. to secure that such workers lawfully residing within their territories are not expelled unless they endanger national security or offend against public interest or morality;

....

Article 31 – The right to housing

With a view to ensuring the effective exercise of the right to housing, the Parties undertake to take measures designed:

1. to promote access to housing of an adequate standard;
2. to prevent and reduce homelessness with a view to its gradual elimination;
3. to make the price of housing accessible to those without adequate resources.

Case-law extracts

I Court of Justice of the European Union

Bashir Mohamed Ali Mahdi, Case C-146/14 PPU, 5 June 2014

1. Article 15(3) and (6) of Directive 2008/115/EC ..., read in the light of Articles 6 and 47 of the Charter ..., must be interpreted as meaning that any decision adopted by a competent authority, on expiry of the maximum period allowed for the initial detention of a third-country national, on the further course to take concerning the detention must be in the form of a written measure that includes the reasons in fact and in law for that decision.
2. Article 15(3) and (6) of Directive 2008/115 must be interpreted as meaning that the 'supervision' that has to be undertaken by a judicial authority dealing with an application for extension of the detention of a third-country national must permit that authority to decide, on a case-by-case basis, on the merits of whether the detention of the third-country national concerned should be extended, whether detention may be replaced with a less coercive measure or whether the person concerned should be released, that authority thus having power to take into account the facts stated and evidence adduced by the administrative authority which 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.
3. Article 15(1) and (6) of Directive 2008/115 must be interpreted as precluding national legislation such as that at issue in the main proceedings, pursuant to which an initial six-month period of detention may be extended solely because the third-country national concerned has no identity documents. It is for the referring court alone to undertake an individual assessment of the facts and circumstances of the case in question in order to determine whether a less coercive measure may be applied effectively to that third-country national or whether there is a risk of him absconding.
4. Article 15(6)(a) of Directive 2008/115 must be interpreted as meaning that a third-country national who, in circumstances such as those in issue in the main proceedings, has not obtained an identity document which would have made it possible for him to be removed from the Member State concerned may be regarded as having demonstrated a 'lack of cooperation' within the meaning of that provision only if an examination of his conduct during the period of detention shows that he has not cooperated in the implementation of the removal operation and that it is likely that that operation lasts longer than anticipated because of that conduct, a matter which falls to be determined by the referring court.
5. Directive 2008/115 must be interpreted as meaning that a Member State cannot be obliged to issue an autonomous residence permit, or other authorisation conferring a right to stay, to a third-country national who has no identity documents and has not obtained such documentation from his country of origin, after a national court has released the person concerned on the ground that there is no longer a reasonable prospect of removal within the meaning of Article 15(4) of that directive. However, that Member State must, in such a case, provide the third-country national with written confirmation of his situation.

CJEU, *Wolfgang Glatzel v Freistaat Bayern*, Case no. C-356/12, Judgment of 22 May 2014

41 It must be determined whether the EU rules at issue in the main proceedings, laying down requirements for visual acuity for the drivers of power-driven vehicles in categories C1 and C1E is

contrary to Article 21(1) of the Charter, according to which '[a]ny discrimination based on any ground such as ... disability ... shall be prohibited'.

42 It should first be noted, first of all, that Article 52(1) of the Charter provides that any limitation on the exercise of the rights and freedoms recognised by the Charter must be provided for by law and must respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be imposed only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.

43 The principle of equal treatment is a general principle of EU law, enshrined in Article 20 of the Charter, of which the principle of non-discrimination laid down in Article 21(1) of the Charter is a particular expression. According to settled case-law, that principle requires the EU legislature to ensure, in accordance with Article 52(1) of the Charter, that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified A difference in treatment is justified if it is based on an objective and reasonable criterion, that is, if the difference relates to a legally permitted aim pursued by the legislation in question, and it is proportionate to the aim pursued by the treatment concerned

44 Next, as regards the specific question of discrimination on grounds of disability, the notion of 'disability' is not defined by the Charter itself.

45 In its case-law on equal treatment in the area of employment and occupation, the Court has already held that the definition of 'disability' must be understood, for the purposes of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation ... read in the light of the UN Convention on Disabilities, as long-term physical, mental or psychological impairments which in interaction with various barriers may hinder the full and effective participation of the person concerned in professional life on an equal basis with other workers

46 In those circumstances, it must be held, as far as concerns the issue of discrimination on grounds of disability, that Article 21(1) of the Charter requires the EU legislature, in particular, not to apply any difference in treatment on the basis of a limitation resulting, in particular, from long-term physical, mental or psychological impairments which in interaction with various barriers may hinder the full and effective participation of the person concerned in professional life on an equal basis with other persons, unless such a difference in treatment is objectively justified.

49 In that connection, it must be recalled that the Court has already held, as regards the general principle of equal treatment in the context of grounds such as age or sex, that a difference of treatment which is based on a characteristic related to such grounds does not constitute discrimination — that is to say, an infringement of Article 21(1) of the Charter — where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate

II European Court of Human Rights

***Amuur v. France*, Application no. 19776/92, Judgment of 25 June 1996**

42. In proclaiming the right to liberty, paragraph 1 of Article 5 [...] contemplates the physical liberty of the person; its aim is to ensure that no one should be dispossessed of this liberty in an arbitrary fashion. On the other hand, it is not in principle concerned with mere restrictions on the liberty of movement; such restrictions are governed by Article 2 of Protocol No. 4 (P4-2). In order to determine whether someone has been "deprived of his liberty" within the meaning of Article 5 [...], the starting-point must be his concrete situation, and account must be taken of a whole range of criteria such as the type, duration, effects and manner of implementation of the measure in question. The difference between deprivation of and restriction upon liberty is merely one of degree or intensity, and not one of nature or substance [...].

43. Holding aliens in the international zone does indeed involve a restriction upon liberty, but one which is not in every respect comparable to that which obtains in centres for the detention of aliens pending deportation. Such confinement, accompanied by suitable safeguards for the persons

concerned, is acceptable only in order to enable States to prevent unlawful immigration while complying with their international obligations, particularly under the 1951 Geneva Convention Relating to the Status of Refugees and the European Convention on Human Rights. States' legitimate concern to foil the increasingly frequent attempts to circumvent immigration restrictions must not deprive asylum-seekers of the protection afforded by these conventions.

Such holding should not be prolonged excessively, otherwise there would be a risk of it turning a mere restriction on liberty - inevitable with a view to organising the practical details of the alien's repatriation or, where he has requested asylum, while his application for leave to enter the territory for that purpose is considered - into a deprivation of liberty. In that connection account should be taken of the fact 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.

....

48. The mere fact that it is possible for asylum-seekers to leave voluntarily the country where they wish to take refuge cannot exclude a restriction on liberty, the right to leave any country, including one's own, being guaranteed, moreover, by Protocol No. 4 to the Convention (P4). Furthermore, this possibility becomes theoretical if no other country offering protection comparable to the protection they expect to find in the country where they are seeking asylum is inclined or prepared to take them in.

Guzzardi v. Italy, Application no. 7367/76, Judgment of 6 November 1980

93. The difference between deprivation of and restriction upon liberty is nonetheless merely one of degree or intensity, and not one of nature or substance. Although the process of classification into one or other of these categories sometimes proves to be no easy task in that some borderline cases are a matter of pure opinion, the Court cannot avoid making the selection upon which the applicability or inapplicability of Article 5 [...] depends.

...

It is admittedly not possible to speak of "deprivation of liberty" on the strength of any one of these factors taken individually, but cumulatively and in combination they certainly raise an issue of categorisation from the viewpoint of Article 5 [...]. In certain respects the treatment complained of resembles detention in an "open prison" or committal to a disciplinary unit [...].

The Court considers on balance that the present case is to be regarded as one involving deprivation of liberty.

A and others v. United Kingdom, Application no. 3455/05, Judgment of 19 February 2009

164. Article 5 § 1(f) does not demand that detention be reasonably considered necessary, for example to prevent the individual from committing an offence or fleeing. Any deprivation of liberty under the second limb of Article 5 § 1(f) will be justified, however, only for as long as deportation or extradition proceedings are in progress. If such proceedings are not prosecuted with due diligence, the detention will cease to be permissible under Article 5 § 1(f)... The deprivation of liberty must also 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 To avoid being branded as arbitrary, detention under Article 5 § 1(f) must be carried out in good faith; it must be closely connected to the ground of detention relied on by the Government; the place and conditions of detention should be appropriate; and the length of the detention should not exceed that reasonably required for the purpose pursued

....

202. Article 5 § 4 provides a *lex specialis* in relation to the more general requirements of Article 13 It 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. Article 5 § 4 does not guarantee a right to judicial review of such a scope as to empower the court, on all aspects of the case including questions of pure expediency, to substitute its own discretion for that of the decision-making authority. 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

203. The requirement of procedural fairness under Article 5 § 4 does not impose a uniform, unvarying standard to be applied irrespective of the context, facts and circumstances. Although it is not always necessary that an Article 5 § 4 procedure be attended by the same guarantees as those required under Article 6 for criminal or civil litigation, it must have a judicial character and provide guarantees appropriate to the type of deprivation of liberty in question

204. Thus, the proceedings must be adversarial and must always ensure “equality of arms” between the parties An oral hearing may be necessary, for example in cases of detention on remand Moreover, in remand cases, since the persistence of a reasonable suspicion that the accused person has committed an offence is a condition *sine qua non* for the lawfulness of the continued detention, the detainee must be given an opportunity effectively to challenge the basis of the allegations against him This may require the court to hear witnesses whose testimony appears *prima facie* to have a material bearing on the continuing lawfulness of the detention It may also require that the detainee or his representative be given access to documents in the case-file which form the basis of the prosecution case against him ...

Yoh-Ekale Mwanje v. Belgium, Application no. 10486/10, Judgment of 20 December 2011

24. Tout en reconnaissant que le délai légal de détention n’a pas été dépassé, la Cour observe que les autorités connaissaient l’identité exacte de la requérante, qu’elle résidait à une adresse fixe connue des autorités, qu’elle s’était toujours présentée aux convocations de l’OE et qu’elle avait entamé plusieurs démarches – déclaration de mariage et demande d’autorisation de séjour temporaire pour raisons médicales – en vue de régulariser sa situation. Elle rappelle aussi que la requérante était atteinte par le VIH, que son état de santé s’était dégradé durant sa détention et que, si elle avait été libérée, elle aurait été dépendante de l’aide médicale d’urgence qu’elle avait obtenue en décembre 2009. Malgré cette situation, les autorités n’ont pas envisagé une mesure moins sévère, telle que l’autorisation de séjour temporaire, pour sauvegarder l’intérêt public de la détention et éviter de maintenir en détention la requérante pendant sept semaines supplémentaires.

125. Dans ces conditions, la Cour n’aperçoit pas le lien entre la détention de la requérante et le but poursuivi par le Gouvernement de l’éloigner du territoire.

Partant, il y a eu violation de l’article 5 § 1 f) de la Convention.

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

118. La Cour considère, à l’instar de l’affaire *Muskhadzhivyeva et autres* précitée que, en dépit du fait qu’ils étaient accompagnés de leurs parents et même si le centre de rétention prévoyait une aile d’accueil des familles, que la situation particulière des enfants ne fut pas examinée et elles n’ont pas non plus recherché si le placement en rétention administrative était une mesure de dernier ressort à laquelle aucune alternative ne pouvait se substituer. Ainsi, la Cour estime que le système français ne leur a pas garanti, de manière suffisante, de droit à la liberté.

120. En revanche, en ce qui concerne les parents, la Cour observe que l’article 5 § 1 f) n’exige pas que la détention d’une personne contre laquelle une procédure d’expulsion est en cours soit considérée comme raisonnablement nécessaire

Suso Musa v. Malta, Application no. 42337/12, Judgment of 23 July 2013

61. ... The Court notes 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 [...].

Rahimi v. Greece, application no. 8687/08, judgment of 5 April 2011

86. La Cour prend en compte l'argument du Gouvernement, à savoir que le requérant est resté détenu à Pagani pour une période très limitée de deux jours. Or, elle rappelle que l'appréciation du seuil minimum de gravité qu'un mauvais traitement doit atteindre pour tomber sous le coup de l'article 3 de la Convention est relative par essence. Il dépend de l'ensemble des données de la cause ..., et notamment de la nature et du contexte du traitement, de sa durée et de ses effets physiques ou mentaux, ainsi que, parfois, du sexe, de l'âge et de l'état de santé de la victime 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.

...
108. ... La Cour note sur ce point que l'article 3 de la Convention relative aux droits de l'enfant du 20 novembre 1989 dispose que l'intérêt supérieur de l'enfant doit être une considération primordiale, entre autres, des autorités administratives dans toutes les décisions qui les concernent. De surcroît, l'article 37 de la même Convention prévoit que la mise en détention d'un enfant ne doit être qu'une mesure de dernier ressort Enfin, la Cour note que, dans le contexte de sa jurisprudence sur l'article 8 de la Convention et la protection de la vie familiale, elle a déjà admis qu'il existe actuellement un large consensus – y compris en droit international – autour de l'idée que dans toutes les décisions concernant des enfants, leur intérêt supérieur doit primer ...

109. Or, en l'occurrence, en 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.

110. Cela est d'autant plus vrai que, comme la Cour l'a déjà constaté dans le contexte de l'article 3 de la Convention, 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. Au vu de ce qui précède, la Cour conclut que la détention du requérant n'était pas « régulière » au sens de l'article 5 § 1 f) de la Convention et qu'il y a eu violation de cette disposition.

Mubilanzila Mayeka and Kaniki Mitunga v. Belgium, application no. 13178/03, judgment of 12 October 2006

102. However, the fact that the second applicant's detention came within paragraph (f) of Article 5 § 1 does not necessarily mean that it was lawful within the meaning of this provision, as the Court's case-law requires that there must be some relationship between the ground of permitted deprivation of liberty relied on and the place and conditions of detention ...

103. The Court notes that the second applicant was detained in a closed centre intended for illegal immigrants in the same conditions as adults; these conditions were consequently not adapted to the position of extreme vulnerability in which she found herself as a result of her position as an unaccompanied foreign minor.

104. In these circumstances, the Court considers that the Belgian legal system at the time and as it functioned in this instance did not sufficiently protect the second applicant's right to liberty.

105. There has therefore been a violation of the second applicant's rights under Article 5 § 1 of the Convention.

Bah v United Kingdom, Application no. 56328/07, Judgment of 27 September 2011

40. Having thus defined the scope of its examination, the Court begins by observing that there is no right under Article 8 of the Convention to be provided with housing However, as the Court has previously held with regard to other social benefits ..., where a Contracting State decides to provide such benefits, it must do so in a way that is compliant with Article 14. ...

41. ... only where there is differential treatment, based on an identifiable characteristic or "status", of persons in analogous or relevantly similar positions, can there be discrimination. ...

43. The Court now turns to the issue of the ground of distinction, or the basis for the differential treatment. ...

44. The Court must therefore decide whether the ground of distinction was indeed the applicant's son's immigration status, or rather his nationality, as the applicant claims.

45. The Court does not agree with the Government that immigration status cannot amount to a ground of distinction for the purposes of Article 14, since it is a legal rather than a personal status. The Court has previously found that a person's place of residence constitutes an aspect of personal status within the scope of Article 14 ..., in spite of the fact that a person can choose their place of residence, meaning that it is not an immutable personal characteristic. Similarly, immigration status where it does not entail, for example, refugee status, involves an element of choice, in that it frequently applies to a person who has chosen to reside in a country of which they are not a national. The Court further notes the Grand Chamber's judgment in *A. and Others v. the United Kingdom* ... in which, although it was not found necessary to consider the complaints under Article 14, the Grand Chamber nonetheless upheld the findings of the House of Lords that there had been impermissible discrimination on the grounds of nationality or immigration status. In so doing, the Court tacitly accepted immigration status as a possible ground of distinction within the scope of Article 14. Finally, the Court notes that it has in its previous case-law found that a large variety of different statuses, which could not be considered to be "personal" in the sense of being immutable or innate to the person, amounted to "other status" for the purposes of Article 14

46. The Court finds therefore, in line with its previous conclusions, that the fact that immigration status is a status conferred by law, rather than one which is inherent to the individual, does not preclude it from amounting to "other status" for the purposes of Article 14. In the present case, and in many other possible factual scenarios, a wide range of legal and other effects flow from a person's immigration status.

47. The Court notes that the nature of the status upon which differential treatment is based weighs heavily in determining the scope of the margin of appreciation to be accorded to Contracting States. As observed at paragraph 45 above, immigration status is not an inherent or immutable personal characteristic such as sex or race, but is subject to an element of choice. In the applicant's case, while she entered the United Kingdom as an asylum seeker, she was not granted refugee status. She cannot therefore be described as a person who was present in a Contracting State because, as a refugee, she could not return to her country of origin. Furthermore, she subsequently chose to have her son join her in the United Kingdom. Given the element of choice involved in immigration status, therefore, while differential treatment based on this ground must still be objectively and reasonably justifiable, the justification required will not be as weighty as in the case of a distinction based, for example, on nationality. Furthermore, given that the subject matter of this case – the provision of housing to those in need – is predominantly socio-economic in nature, the margin of appreciation accorded to the Government will be relatively wide ...

...

49. The Court finds that it is legitimate to put in place criteria according to which a benefit such as social housing can be allocated, when there is insufficient supply available to satisfy demand, so long as such criteria are not arbitrary or discriminatory. As the Court has previously held, any welfare system, to be workable, may have to use broad categorisations to distinguish between different groups in need The Court also points out its finding in the case of *Ponomaryovi v. Bulgaria* ... , that States may be justified in distinguishing between different categories of aliens resident on its territory and in limiting the access of certain categories of aliens to "resource-hungry public services". The Court takes the view that social housing is such a public service.

50. ... The Court further notes that these classes cannot be considered as arbitrary or discriminatory. Those who have a fixed right to be in the United Kingdom, such as refugees or those

with permanent, unconditional leave to remain, are entitled both to social housing and to housing assistance. Those whose leave to remain in the United Kingdom is conditional on their ability to support themselves without recourse to public funds are not. ...

...
52. In these circumstances, the Court finds that the differential treatment to which the applicant was subjected was reasonably and objectively justified by the need to allocate, as fairly as possible, the scarce stock of social housing available in the United Kingdom and the legitimacy, in so allocating, of having regard to the immigration status of those who are in need of housing. On the facts of the applicant's case, the effect of the differential treatment was not disproportionate to the legitimate aim pursued. Accordingly, there has been no violation of Article 14 of the Convention taken in conjunction with Article 8.

Ponomaryovi v. Bulgaria, Application no. 5335/05, Judgment of 21 June 2011

49. It must therefore be determined whether the applicants' situation fell within the scope of Article 2 of Protocol No. 1. On this point, it should firstly be noted that there is little doubt that secondary education is covered by that provision Secondly, although that provision cannot be interpreted as imposing a duty on the Contracting States to set up or subsidise particular educational establishments, any State doing so will be under an obligation to afford effective access to them Put differently, access to educational institutions existing at a given time is an inherent part of the right set out in the first sentence of Article 2 of Protocol No. 1 ...

51. Discrimination means treating differently, without an objective and reasonable justification, persons in relevantly similar situations; in other words, there is discrimination if the distinction at issue does not pursue a legitimate aim or the means employed to achieve it do not bear a reasonable relationship of proportionality to it

52. The States enjoy a certain margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment. The scope of this margin will vary according to the circumstances, the subject matter and its background Thus, the States are usually allowed a wide margin of appreciation when it comes to general measures of economic or social strategy On the other hand, very weighty reasons would have to be put forward before the Court could regard a difference of treatment based exclusively on the ground of nationality as compatible with the Convention

53. The Court would emphasise at the outset that its task in the present case is not to decide whether and to what extent it is permissible for the States to charge fees for secondary – or, indeed, any – education. It has in the past recognised that the right to education by its very nature calls for regulation by the State, and that this regulation may vary in time and place according to the needs and resources of the community The Court must solely determine whether, once a State has voluntarily decided to provide such education free of charge, it may deny that benefit to a distinct group of people, for the notion of discrimination includes cases where a person or group is treated, without proper justification, less favourably than another, even though the more favourable treatment is not called for by the Convention

54. Having thus clarified the limits of its inquiry, the Court starts by observing that a State may have legitimate reasons for curtailing the use of resource-hungry public services – such as welfare programmes, public benefits and health care – by short-term and illegal immigrants, who, as a rule, do not contribute to their funding. It may also, in certain circumstances, justifiably differentiate between different categories of aliens residing in its territory. For instance, the preferential treatment of nationals of member States of the European Union – some of whom were exempted from school fees when Bulgaria acceded to the Union ... – may be said to be based on an objective and reasonable justification, because the Union forms a special legal order, which has, moreover, established its own citizenship

55. Although similar arguments apply to a certain extent in the field of education – which is one of the most important public services in a modern State – they cannot be transposed there without qualification. It is true that education is an activity that is complex to organise and expensive to run, whereas the resources that the authorities can devote to it are necessarily finite. It is also true that in deciding how to regulate access to education, and in particular whether or not to charge fees for it and to whom, a State must strike a balance between, on the one hand, the educational needs of those under its jurisdiction and, on the other, its limited capacity to accommodate them. However, the Court cannot overlook the fact that, unlike some other public services ..., education is a right that

enjoys direct protection under the Convention. It is expressly enshrined in Article 2 of Protocol No. 1 It is also a very particular type of public service, which not only directly benefits those using it but also serves broader societal functions. Indeed, the Court has already had occasion to point out that “[i]n a democratic society, the right to education ... is indispensable to the furtherance of human rights [and] plays ... a fundamental role” Moreover, in order to achieve pluralism and thus democracy, society has an interest in the integration of minorities

56. In the Court’s view, the State’s margin of appreciation in this domain increases with the level of education, in inverse proportion to the importance of that education for those concerned and for society at large. Thus, at the university level, which to this day remains optional for many people, higher fees for aliens – and indeed fees in general – seem to be commonplace and can, in the present circumstances, be considered fully justified. The opposite goes for primary schooling, which provides basic literacy and numeracy – as well as integration into and first experiences of society – and is compulsory in most countries .. .

57. Secondary education, which is in issue in the present case, falls between those two extremes. The distinction is confirmed by the difference of wording between sub-paragraphs (a), (b) and (c) of Article 28 § 1 of the United Nations Convention on the Rights of the Child, the first of which enjoins States to “[m]ake primary education compulsory and available free to all”, whereas the second and the third merely call upon them to “[e]ncourage the development of different forms of secondary education ... and take appropriate measures such as the introduction of free education and offering financial assistance in case of need” and to “[m]ake higher education accessible to all on the basis of capacity by every appropriate means” (see paragraph 33 above). It is also confirmed by the differentiation between those three levels of education in the International Covenant on Economic, Social and Cultural Rights However, the Court is mindful of the fact that with more and more countries now moving towards what has been described as a “knowledge-based” society, secondary education plays an ever-increasing role in successful personal development and in the social and professional integration of the individuals concerned. Indeed, in a modern society, having no more than basic knowledge and skills constitutes a barrier to successful personal and professional development. It prevents the persons concerned from adjusting to their environment and entails far-reaching consequences for their social and economic well-being.

58. These considerations militate in favour of stricter scrutiny by the Court of the proportionality of the measure affecting the applicants.

59. In assessing that proportionality the Court does not need, in the very specific circumstances of this case, to determine whether the Bulgarian State is entitled to deprive all unlawfully residing aliens of educational benefits – such as free education – which it has agreed to provide to its nationals and certain limited categories of aliens. It is not the Court’s role to consider in the abstract whether national law conforms to the Convention It must confine its attention, as far as possible, to the particular circumstances of the case before it The Court will therefore have regard primarily to the applicants’ personal situation.

60. On that point, the Court observes at the outset that the applicants were not in the position of individuals arriving in the country unlawfully and then laying claim to the use of its public services, including free schooling Even when the applicants found themselves, somewhat inadvertently, in the situation of aliens lacking permanent residence permits ... , the authorities had no substantive objection to their remaining in Bulgaria and apparently never had any serious intention of deporting them Thus, any considerations relating to the need to stem or reverse the flow of illegal immigration clearly did not apply to the applicants’ case

61. Nor can it be said that the applicants tried to abuse the Bulgarian educational system It was not their choice to settle in Bulgaria and pursue their education there; they came to live in the country at a very young age because their mother had married a Bulgarian national The applicants could not realistically choose to go to another country and carry on their secondary studies there Moreover, there is no indication that the applicants, who were fully integrated in Bulgarian society and spoke fluent Bulgarian ..., had any special educational needs which would have required additional financing for their schools.

63. The Court, for its part, finds that in the specific circumstances of the present case the requirement for the applicants to pay fees for their secondary education on account of their nationality and immigration status was not justified. There has therefore been a violation of Article 14 of the Convention taken in conjunction with Article 2 of Protocol No. 1.

BS v Spain, Application no. 7159/08, Judgment of 24 July 2012

58. The Court considers that where the State authorities investigate violent incidents, they have an additional obligation to take all reasonable measures to identify whether there were racist motives and to establish whether or not ethnic hatred or prejudice may have played a role in the events. Admittedly, proving racial motivation will often be extremely difficult in practice. The respondent State's obligation to investigate possible racist overtones to a violent act is an obligation to use best endeavours and not absolute. The authorities must do what is reasonable in the circumstances to collect and secure the evidence, explore all practical means of discovering the truth and deliver fully reasoned, impartial and objective decisions, without omitting suspicious facts that may be indicative of racially induced violence

59. Furthermore, the authorities' duty to investigate the existence of a possible link between racist attitudes and an act of violence is an aspect of their procedural obligations arising under Article 3 of the Convention, but may also be seen as implicit in their responsibilities under Article 14 of the Convention to secure respect without discrimination for the fundamental value enshrined in Article 3. Owing to the interplay of the two provisions, issues such as those in the present case may fall to be examined under one of the two provisions only, with no separate issue arising under the other, or may require examination under both Articles. This is a question to be decided in each case on its facts and depending on the nature of the allegations made

III The Human Rights Committee

A v. Australia, Communication no. 560/1993, 30 April 1997

9.2 On the first question, the Committee recalls that the notion of "arbitrariness" must not be equated with "against the law" but be interpreted more broadly to include such elements as inappropriateness and injustice. ...

9.3 The Committee agrees that there is no basis for the author's claim that it is per se arbitrary to detain individuals requesting asylum. Nor can it find any support for the contention that there is a rule of customary international law which would render all such detention arbitrary.

9.4. The Committee observes however, that every decision to keep a person in detention should be open to review periodically so that the grounds justifying the detention can be assessed. In any event, detention should not continue beyond the period for which the State can provide appropriate justification. For example, the fact of illegal entry may indicate a need for investigation and there may be other factors particular to the individual, such as the likelihood of absconding and lack of cooperation, which may justify detention for a period. Without such factors detention may be considered arbitrary, even if entry was illegal.

9.5 ... In the Committee's opinion, court review of the lawfulness of detention under article 9, paragraph 4, which must include the possibility of ordering release, is not limited to mere compliance of the detention with domestic law. While domestic legal systems may institute differing methods for ensuring court review of administrative detention, what is decisive for the purposes of article 9, paragraph 4, is that such review is, in its effects, real and not merely formal. By stipulating that the court must have the power to order release "if the detention is not lawful", article 9, paragraph 4, requires that the court be empowered to order release, if the detention is incompatible with the requirements in article 9, paragraph 1, or in other provisions of the Covenant.... As the State party's submissions in the instant case show that court review available to A was, in fact, limited to a formal assessment of the self-evident fact that he was indeed a "designated person" within the meaning of the Migration Amendment Act, the Committee concludes that the author's right, under article 9, paragraph 4, to have his detention reviewed by a court, was violated.

C v. Australia, Communication no. 900/1999, 13 November 2002

8.2 ... In particular, the 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.

IV The Committee on the Rights of the Child

General Comment on the Treatment of Unaccompanied and Separated Children Outside their Country of Origin, UN Doc. CRC/GC/2005/6, 1 September 2005, para 61.

18. The principle of non-discrimination, in all its facets, applies in respect to all dealings with separated and unaccompanied children. In particular, it prohibits any discrimination on the basis of the status of a child as being unaccompanied or separated, or as being a refugee, asylum-seeker or migrant. This principle, when properly understood, does not prevent, but may indeed call for, differentiation on the basis of different protection needs such as those deriving from age and/or gender. Measures should also be taken to address possible misperceptions and stigmatization of unaccompanied or separated children within the society. Policing or other measures concerning unaccompanied or separated children relating to public order are only permissible where such measures are based on the law; entail individual rather than collective assessment; comply with the principle of proportionality; and represent the least intrusive option. In order not to violate the prohibition on non-discrimination, such measures can, therefore, never be applied on a group or collective basis.

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.

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.

22. Respect for best interests also requires that, where competent authorities have placed an unaccompanied or separated child "for the purposes of care, protection or treatment of his or her physical or mental health", the State recognizes the right of that child to a "periodic review" of their treatment and "all other circumstances relevant to his or her placement" (article 25 of the Convention).

41. States should ensure that access to education is maintained during all phases of the displacement cycle. Every unaccompanied and separated child, irrespective of status, shall have full access to education in the country that they have entered in line with articles 28, 29 (1) (c), 30 and 32 of the Convention and the general principles developed by the Committee. Such access should be granted without discrimination and in particular, separated and unaccompanied girls shall have equal access to formal and informal education, including vocational training at all levels. Access to quality

education should also be ensured for children with special needs, in particular children with disabilities.

42. The unaccompanied or separated child should be registered with appropriate school authorities as soon as possible and get assistance in maximizing learning opportunities. All unaccompanied and separated children have the right to maintain their cultural identity and values, including the maintenance and development of their native language. All adolescents should be allowed to enrol in vocational/professional training or education, and early learning programmes should be made available to young children. States should ensure that unaccompanied or separated children are provided with school certificates or other documentation indicating their level of education, in particular in preparation of relocation, resettlement or return.

43. States shall, in particular where government capacity is limited, accept and facilitate the assistance offered by UNICEF, the United Nations Educational, Scientific and Cultural Organization (UNESCO), UNHCR and other United Nations agencies within their respective mandates, as well as, where appropriate, other competent intergovernmental organizations or non-governmental organizations (art. 22 (2)) in order to meet the educational needs of unaccompanied and separated children.

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46. When implementing the right to enjoy the highest attainable standard of health and facilities for the treatment of illness and rehabilitation of health under article 24 of the Convention, States are obligated to ensure that unaccompanied and separated children have the same access to health care as children who are ... nationals

47. In ensuring their access, States must assess and address the particular plight and vulnerabilities of such children. They should, in particular, take into account the fact that unaccompanied children have undergone separation from family members and have also, to varying degrees, experienced loss, trauma, disruption and violence. Many such children, in particular those who are refugees, have further experienced pervasive violence and the stress associated with a country afflicted by war. This may have created deep-rooted feelings of helplessness and undermined a child's trust in others. Moreover, girls are particularly susceptible to marginalization, poverty and suffering during armed conflict, and many may have experienced gender-based violence in the context of armed conflict. The profound trauma experienced by many affected children calls for special sensitivity and attention in their care and rehabilitation.

48. The obligation under article 39 of the Convention sets out the duty of States to provide rehabilitation services to children who have been victims of any form of abuse, neglect, exploitation, torture, cruel, inhuman and degrading treatment or armed conflicts. In order to facilitate such recovery and reintegration, culturally appropriate and gender-sensitive mental health care should be developed and qualified psychosocial counselling provided.

49. States shall, in particular where government capacity is limited, accept and facilitate assistance offered by UNICEF, the World Health Organization (WHO), United Nations Joint Programme on HIV/AIDS (UNAIDS), UNHCR and other agencies (art. 22 (2)) within their respective mandates, as well as, where appropriate, other competent intergovernmental organizations or non-governmental organizations in order to meet the health and health-care needs of unaccompanied and separated children.

61. ... "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 ... only 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 ... 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. ... 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. ... 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.

General Comment no. 14 on the right of the child to have his or her best interests taken as a primary consideration, UN Doc. CRC/C/GC/14, 19 May 2013

75. An important element to consider is the child's situation of vulnerability, such as disability, belonging to a minority group, being a refugee or asylum seeker, victim of abuse, living in a street situation, etc. The purpose of determining the best interests of a child or children in a vulnerable situation should not only be in relation to the full enjoyment of all the rights provided for in the Convention, but also with regard to other human rights norms related to these specific situations, such as those covered in the Convention on the Rights of Persons with Disabilities, the Convention relating to the Status of Refugees, among others.

76. The best interests of a child in a specific situation of vulnerability will not be the same as those of all the children in the same vulnerable situation. Authorities and decision-makers need to take into account the different kinds and degrees of vulnerability of each child, as each child is unique and each situation must be assessed according to the child's uniqueness. An individualized assessment of each child's history from birth should be carried out, with regular reviews by a multidisciplinary team and recommended reasonable accommodation throughout the child's development process.

General Comment no. 15 on the right of the child to the enjoyment of the highest attainable standard of health, UN Doc. CRC/C/GC/15, 17 April 2013

In order to fully realize the right to health for all children, States parties have an obligation to ensure that children's health is not undermined as a result of discrimination, which is a significant factor contributing to vulnerability. A number of grounds on which discrimination is proscribed are outlined in article 2 of the Convention, including the child's, parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status. These also include sexual orientation, gender identity and health status, for example HIV status and mental health. Attention should also be given to any other forms of discrimination that might undermine children's health, and the implications of multiple forms of discrimination should also be addressed.

Children in disadvantaged situations and under-served areas should be a focus of efforts to fulfil children's right to health. States should identify factors at national and subnational levels that create vulnerabilities for children or that disadvantage certain groups of children. These factors should be addressed when developing laws, regulations, policies, programmes and services for children's health, and work towards ensuring equity.

General Comment no. 17 on the right of the child to rest, leisure, play, recreational activities, cultural life and the arts, UN Doc. CRC/C/GC/17, 17 April 2013

Article 2 (non-discrimination): The Committee emphasizes that States parties shall take all appropriate measures to ensure that all children have the opportunity to realize their rights under article 31 without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status. Particular attention should be given to addressing the rights of certain groups of children, including, inter alia, girls, children with disabilities, children living in poor or hazardous environments, children living in poverty, children in penal, health-care or residential institutions, children in situations of conflict or humanitarian disaster, children in rural communities, asylum-seeking and refugee children, children in street situations, nomadic groups, migrant or internally displaced children, children of indigenous origin and from minority groups, working children, children without parents and children subjected to significant pressure for academic attainment.

Article 22: Refugee and asylum-seeking children face profound challenges in realizing their rights under article 31 as they often experience both dislocation from their own traditions and culture and exclusion from the culture of the host country. Efforts must be made to ensure that refugee and asylum-seeking children have equal opportunities with children from the host country to enjoy the rights provided for in article 31. Recognition must also be afforded to the right of refugee children to preserve and practice their own recreational, cultural and artistic traditions.

Children in situations of conflict, humanitarian and natural disasters: The rights provided for in article 31 are often given lower priority in situations of conflict or disaster than the provision of food, shelter and medicines. However, in these situations, opportunities for play, recreation and cultural activity can play a significant therapeutic and rehabilitative role in helping children recover a sense of normality and joy after their experience of loss, dislocation and trauma. Play, music, poetry or drama can help refugee children and children who have experienced bereavement, violence, abuse or exploitation, for example, to overcome emotional pain and regain control over their lives. Such activities can restore a sense of identity, help them make meaning of what has happened to them, and enable them experience fun and enjoyment. Participation in cultural or artistic activities, as well as in play and recreation, offers children an opportunity to engage in a shared experience, to re-build a sense of personal value and self-worth, to explore their own creativity and to achieve a sense of connectedness and belonging. Settings for play also provide opportunities for monitors to identify children suffering from the harmful impact of conflict.

V The Committee on Economic, Social and Cultural Rights

General Comment no. 4

6. The right to adequate housing applies to everyone. While the reference to "himself and his family" reflects assumptions as to gender roles and economic activity patterns commonly accepted in 1966 when the Covenant was adopted, the phrase cannot be read today as implying any limitations upon the applicability of the right to individuals or to female-headed households or other such groups. Thus, the concept of "family" must be understood in a wide sense. Further, individuals, as well as families, are entitled to adequate housing regardless of age, economic status, group or other affiliation or status and other such factors. In particular, enjoyment of this right must, in accordance with article 2 (2) of the Covenant, not be subject to any form of discrimination.

7. In the Committee's view, the right to housing should not be interpreted in a narrow or restrictive sense which equates it with, for example, the shelter provided by merely having a roof over one's head or views shelter exclusively as a commodity. Rather it should be seen as the right to live somewhere in security, peace and dignity. This is appropriate for at least two reasons. In the first place, the right to housing is integrally linked to other human rights and to the fundamental principles upon which the Covenant is premised. This "the inherent dignity of the human person" from which the rights in the Covenant are said to derive requires that the term "housing" be interpreted so as to take account of a variety of other considerations, most importantly that the right to housing should be ensured to all persons irrespective of income or access to economic resources. Secondly, the reference in article 11 (1) must be read as referring not just to housing but to adequate housing. As both the Commission on Human Settlements and the Global Strategy for Shelter to the Year 2000 have stated: "Adequate shelter means ... adequate privacy, adequate space, adequate security, adequate lighting and ventilation, adequate basic infrastructure and adequate location with regard to work and basic facilities - all at a reasonable cost".

CESCR, General Comment no. 7

10. Women, children, youth, older persons, indigenous people, ethnic and other minorities, and other vulnerable individuals and groups all suffer disproportionately from the practice of forced eviction. Women in all groups are especially vulnerable given the extent of statutory and other forms of discrimination which often apply in relation to property rights (including home ownership) or rights of access to property or accommodation, and their particular vulnerability to acts of violence and sexual abuse when they are rendered homeless. The non-discrimination provisions of articles 2.2 and 3 of the Covenant impose an additional obligation upon Governments to ensure that, where evictions do occur, appropriate measures are taken to ensure that no form of discrimination is involved.

General Comment no. 14

18. By virtue of article 2.2 and article 3, the Covenant proscribes any discrimination in access to health care and underlying determinants of health, as well as to means and entitlements for their procurement, on the grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, physical or mental disability, health status (including HIV/AIDS), sexual orientation and civil, political, social or other status, which has the intention or effect of nullifying or impairing the equal enjoyment or exercise of the right to health. ...

19. With respect to the right to health, equality of access to health care and health services has to be emphasized. States have a special obligation to provide those who do not have sufficient means with the necessary health insurance and health-care facilities, and to prevent any discrimination on internationally prohibited grounds in the provision of health care and health services, especially with respect to the core obligations of the right to health. Inappropriate health resource allocation can lead to discrimination that may not be overt. For example, investments should not disproportionately favour expensive curative health services which are often accessible

only to a small, privileged fraction of the population, rather than primary and preventive health care benefiting a far larger part of the population.

General Comment no. 20

7. Non-discrimination is an immediate and cross-cutting obligation in the Covenant. Article 2, paragraph 2, requires States parties to guarantee non-discrimination in the exercise of each of the economic, social and cultural rights enshrined in the Covenant and can only be applied in conjunction with these rights. It is to be noted that discrimination constitutes any distinction, exclusion, restriction or preference or other differential treatment that is directly or indirectly based on the prohibited grounds of discrimination and which has the intention or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of Covenant rights. Discrimination also includes incitement to discriminate and harassment.

8. In order for States parties to “guarantee” that the Covenant rights will be exercised without discrimination of any kind, discrimination must be eliminated both formally and substantively:

(a) **Formal discrimination:** Eliminating formal discrimination requires ensuring that a State’s constitution, laws and policy documents do not discriminate on prohibited grounds; for example, laws should not deny equal social security benefits to women on the basis of their marital status;

(b) **Substantive discrimination:** Merely addressing formal discrimination will not ensure substantive equality as envisaged and defined by article 2, paragraph 2. The effective enjoyment of Covenant rights is often influenced by whether a person is a member of a group characterized by the prohibited grounds of discrimination. Eliminating discrimination in practice requires paying sufficient attention to groups of individuals which suffer historical or persistent prejudice instead of merely comparing the formal treatment of individuals in similar situations. States parties must therefore immediately adopt the necessary measures to prevent, diminish and eliminate the conditions and attitudes which cause or perpetuate substantive or de facto discrimination. For example, ensuring that all individuals have equal access to adequate housing, water and sanitation will help to overcome discrimination against women and girl children and persons living in informal settlements and rural areas.

9. In order to eliminate substantive discrimination, States parties may be, and in some cases are, under an obligation to adopt special measures to attenuate or suppress conditions that perpetuate discrimination. Such measures are legitimate to the extent that they represent reasonable, objective and proportional means to redress de facto discrimination and are discontinued when substantive equality has been sustainably achieved. Such positive measures may exceptionally, however, need to be of a permanent nature, such as interpretation services for linguistic minorities and reasonable accommodation of persons with sensory impairments in accessing health-care facilities.

10. Both direct and indirect forms of differential treatment can amount to discrimination under article 2, paragraph 2, of the Covenant:

(a) **Direct discrimination** occurs when an individual is treated less favourably than another person in a similar situation for a reason related to a prohibited ground; e.g. where employment in educational or cultural institutions or membership of a trade union is based on the political opinions of applicants or employees. Direct discrimination also includes detrimental acts or omissions on the basis of prohibited grounds where there is no comparable similar situation (e.g. the case of a woman who is pregnant);

(b) **Indirect discrimination** refers to laws, policies or practices which appear neutral at face value, but have a disproportionate impact on the exercise of Covenant rights as distinguished by prohibited grounds of discrimination. For instance, requiring a birth registration certificate for school enrolment may discriminate against ethnic minorities or non-nationals who do not possess, or have been denied, such certificates.

30. The ground of nationality should not bar access to Covenant rights, e.g. all children within a State, including those with an undocumented status, have a right to receive education and access to adequate food and affordable health care. The Covenant rights apply to everyone including non-

nationals, such as refugees, asylum-seekers, stateless persons, migrant workers and victims of international trafficking, regardless of legal status and documentation.

40. National legislation, strategies, policies and plans should provide for mechanisms and institutions that effectively address the individual and structural nature of the harm caused by discrimination in the field of economic, social and cultural rights. Institutions dealing with allegations of discrimination customarily include courts and tribunals, administrative authorities, national human rights institutions and/or ombudspersons, which should be accessible to everyone without discrimination. These institutions should adjudicate or investigate complaints promptly, impartially, and independently and address alleged violations relating to article 2, paragraph 2, including actions or omissions by private actors. Where the facts and events at issue lie wholly, or in part, within the exclusive knowledge of the authorities or other respondent, the burden of proof should be regarded as resting on the authorities, or the other respondent, respectively. These institutions should also be empowered to provide effective remedies, such as compensation, reparation, restitution, rehabilitation, guarantees of non-repetition and public apologies, and State parties should ensure that these measures are effectively implemented.

VI The Committee on the Elimination of Racial Discrimination

General Recommendation no. 30

29. Remove obstacles that prevent the enjoyment of economic, social and cultural rights by non-citizens, notably in the areas of education, housing, employment and health;

30. Ensure that public educational institutions are open to non-citizens and children of undocumented immigrants residing in the territory of a State party;

31. Avoid segregated schooling and different standards of treatment being applied to non-citizens on grounds of race, colour, descent, and national or ethnic origin in elementary and secondary school and with respect to access to higher education;

32. Guarantee the equal enjoyment of the right to adequate housing for citizens and non-citizens, especially by avoiding segregation in housing and ensuring that housing agencies refrain from engaging in discriminatory practices;

33. Take measures to eliminate discrimination against non-citizens in relation to working conditions and work requirements, including employment rules and practices with discriminatory purposes or effects;

34. Take effective measures to prevent and redress the serious problems commonly faced by non-citizen workers, in particular by non-citizen domestic workers, including debt bondage, passport retention, illegal confinement, rape and physical assault;

35. Recognize that, while States parties may refuse to offer jobs to non-citizens without a work permit, all individuals are entitled to the enjoyment of labour and employment rights, including the freedom of assembly and association, once an employment relationship has been initiated until it is terminated;

36. Ensure that States parties respect the right of non-citizens to an adequate standard of physical and mental health by, inter alia, refraining from denying or limiting their access to preventive, curative and palliative health services;

37. Take the necessary measures to prevent practices that deny non-citizens their cultural identity, such as legal or de facto requirements that non-citizens change their name in order to obtain citizenship, and to take measures to enable non-citizens to preserve and develop their culture;

38. Ensure the right of non-citizens, without discrimination based on race, colour, descent, and national or ethnic origin, to have access to any place or service intended for use by the general public, such as transport, hotels, restaurants, cafés, theatres and parks; ...

VII The European Committee of Social Rights

Medecins du Monde v France, Complaint no. 67/2011

36. The Committee recalls that Article E not only prohibits direct discrimination but also all forms of indirect discrimination. It also recalls that discrimination may arise either in situations where people in the same situation are treated differently or where people in different situations are treated identically. Discrimination may also arise by failing to take due and positive account of all relevant differences or by failing to take adequate steps to ensure that the rights and collective advantages that are open to all are genuinely accessible by and to all [...].

37. Thus, states Parties may treat differently foreigners lawfully and unlawfully present on their territories. However, in so doing, human dignity, which is a recognised fundamental value at the core of positive European human rights law, must be respected ([...]. Moreover, a state must ascertain that foreigners legally present are not treated in a discriminatory manner compared to its nationals.

38. The Committee further reiterates that in respect of complaints alleging discrimination, the burden of proof should not rest entirely on the complainant organisation, but should be shifted appropriately [...].

40. [...] Regardless of any traditions of the states parties, the Committee underlines the imperative of achieving equal treatment by taking differences between individuals into account. It recalls that it recognised that special consideration should be given to the needs and different lifestyle of the Roma, which are a specific type of disadvantaged group and a vulnerable minority [...].