BEFORE THE FOURTH SECTION,
EUROPEAN COURT OF HUMAN RIGHTS

Application No. 30737/24

Between

M.S.

Applicant

v.

Malta

Respondent

WRITTEN SUBMISSIONS ON BEHALF OF THE INTERVENOR

The AIRE Centre, the Dutch Council for Refugees, the European Council on Refugees and Exiles, the International Commission of Jurists, ILGA-Europe, Trans Europe and Central Asia

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pursuant to the Registrar's notification of 2 July 2025 on the Court's permission to intervene under Rule 44 § 3 of the Rules of the European Court of Human Rights

23 July 2025

Obligations under Article 3 and 13 of the Convention in relation to *non-refoulement*

1. Under Article 1 of the European Convention on Human Rights (the Convention or ECHR), the Contracting Parties' obligation to respect the human rights of persons within their jurisdiction includes the obligation to refrain from transferring individuals to other States or places where there is a real risk of a violation of their rights under Article 3 ECHR, among others.[1] The *non-refoulement* principle is of an absolute nature,[2] permitting no derogations either in law or in practice.[3]
2. Under the European Court of Human Rights' (the Court or ECtHR) jurisprudence, diligent compliance with the *non-refoulement* principle requires the domestic authorities to examine the conditions in the envisaged country/place of removal in light of Article 3,[4] among other ECHR provisions. Such an assessment must be "a rigorous one".[5] The removing State is under a duty of enquiry to verify, before removal, that the person concerned will not face a real risk of prohibited treatment in the country of destination. The existence of any such risk must be assessed primarily with regard to facts that were known or ought to have been known to the Contracting Party at the time of removal or during the proceedings before the Court.[6]
3. This requires Contracting Parties, *inter alia*, to assess all evidence at the core of a *non-refoulement* claim,[7] including, where necessary, by: a) obtaining such evidence *proprio motu*;[8] b) not imposing an unrealistic burden of proof on applicants or requiring them to bear the entire burden of proof;[9] c) considering all relevant country of origin information originating from reliable and objective sources;[10] and d) applying the principle of the benefit of the doubt, including in light of "specific vulnerabilities" of the persons concerned, if any.[11]
4. An applicant's (imputed) identity as an LGBTI[12] person is relevant to the assessment of whether the threshold of treatment incompatible with Article 3 is met. Specifically, severe discrimination against LGBTI persons, even in absence of physical violence, may give rise to feelings of fear, anguish or insecurity, which has been considered degrading by this Court and therefore prohibited by Article 3. In that, the discriminatory motive and intent have a bearing on the assessment of severity of acts under Article 3 ECHR.[13]

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[1] *Hirsi Jamaa and Others v. Italy*, No. 27765/09, (23 February 2012), §§ 157-158; *M.S.S. v. Belgium and Greece*, No. 30696/09, (21 January 2011), § 286; *Sharifi and Others v. Italy and Greece*, No. 16643/09, (21 October 2014), § 166.

[2] *Chahal v. the United Kingdom*, [GC], No. 22414/93, (15 November 1996), §§ 79-80.

[3] UN General Assembly, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984; *Adel Tebourski v. France*, UNCAT, CAT/C/38/D/300/2006, 11 May 2007, §§ 8.2 – 8.3. UN Human Rights Committee, General comment No. 31, The nature of the general legal obligation imposed on States Parties to the Covenant, 26 May 2004, CCPR/C/21/Rev.1/Add.13, § 12.

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

[5] *Sufi and Elmi v. the United Kingdom*, No. 8319/07 and 11449/07, 28 June 2011, § 214; *Chahal v. the United Kingdom* op.cit., § 96; *Saadi v. Italy*, No. 37201/06, 28 February 2008, § 128.

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

[7] *Jabari v. Turkey*, No. 40035/98, 11 July 2000, § 39-40; *Singh and Others v. Belgium*, No. 33210/11, 2 October 2012, § 104

[8] In *F.G v Sweden* [GC] this Court reiterated that the obligations incumbent on the States under Articles 2 and 3 ECHR entail that the authorities carry out an assessment of that risk of their own motion, in particular, where the national authorities have been made aware of the fact that the asylum-seeker may plausibly be a member of a group systematically exposed to practice of ill-treatment and there are serious reasons to believe in the existence of the practice in question and in their membership of the group concerned (§ 127).

[9] *M.S.S. v. Belgium and Greece*, GC, op.cit, § 344-359; *Hirsi Jamaa and Others v. Italy*, op.cit., § 122-158.

[10] *Salah Sheekh v. the Netherlands*, No. 1948/04, 11 January 2007, § 136.

[11] Mutatis mutandis *M.A. v. Switzerland*, No. 52589/13, 18 November 2014, § 55.

[12] The interveners use the acronym LGBTI throughout this intervention, unless specified differently by the referred institution.

[13] *Oganezova v Armenia*, No. 71367/12, 17 May 2022, § 97.

5. Furthermore, the interveners submit that laws and regulations directly or indirectly criminalising consensual same-sex sexual orientation or conduct are a violation of the rights guaranteed by the Convention to persecute individuals on account of their real or imputed sexual orientation with impunity.[14] This approach recognises the potential for persecution arising from the mere existence of these laws, even in the absence of a recent record of prosecutions and imprisonments, whether arising from misfeasance of State actors outside due process or – frequently – from the abuses of non-State actors, whose own discrimination and discriminatory violence are legitimised by the existence of discriminatory penal sanctions, and against whom the State fails to offer effective protection.[15]
6. In *Dudgeon v the United Kingdom*, the European Commission noted the possibility of such laws making it more likely that police and private actors would commit acts of extortion and other crimes as well as engage in discriminatory treatment,[16] instead of, or at times in addition to, prosecution. In *B. and C. v Switzerland*, this Court found the lack of available State protection against ill-treatment emanating from non-State actors may result in an Article 3 violation.[17] Most recently, in *M.I. v Switzerland*, this Court has reiterated its findings in *B. and C.*, namely, that while "prosecutions of LGBTI persons" in practice is decisive,[18] persecution based on sexual orientation may also include individual acts by "rogue" officials and non-State actors.[19]
7. Elaborating on the assessment of a *non-refoulement* claim, this Court has noted that in Article 3 and Article 13 claims concerning the removal of asylum seekers, its main concern is whether effective guarantees protecting applicants against arbitrary *refoulement* to the country from which they fled exist.[20] In that regard, States must identify and address the needs of individuals in "vulnerable situations," such as asylum seekers,[21] ensuring their access to legal procedures[22] with adequate safeguards,[23] including legal assistance and information. Further, individuals at an arguable risk of prohibited treatment under the Convention have the right to an effective remedy – one intended to guarantee not theoretical or illusory rights, but rights that are practical and effective – allowing for the review of the removal decision and if appropriate, its reversal.[24] This Court's jurisprudence has found a remedy ineffective, *inter alia*, when removal takes place before the individual is able to access that remedy.[25] This Court has reiterated that Article 13

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[14] *Dudgeon v. the United Kingdom*, No. 7525/76, 22 October 1981, §§ 40-46; *Norris v. Ireland*, No. 10581/83, 26 October 1988, §§ 38, 46-47; *Modinos v. Cyprus*, No. 15070/89, 22 April 1993, §§ 23, 24, 26; *A.D.T. v. the UK*, No. 35765/97, judgment, 31 July 2000, §§ 26 and 39; *Bayev and Others v. Russia*, Nos. 67667/09, 20 June 2017, § 68.

[15] This Court has recognised in that non-state actors include applicants' own family members as well as other non-state actors. See *B and C v Switzerland*, No. 889/19, 17 November 2020, §§ 60-61. Further, as the UN Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health,A/HRC/14/20, § 20. The UN Special Rapporteur on extrajudicial executions noted that criminalization increases social stigmatization and made people "more vulnerable to violence and human rights abuses, including death threats and violations of the right to life, which are often committed in a climate of impunity", A/57/138, § 37. UNHCR Guidelines on International Protection No.9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, 23 October 2012, § 27.

[16] European Commission's report in Dudgeon, cited in the Court's judgment in the same case, § 94.

[17] *B and C v Switzerland*, op. cit. §. 62 – 63.

[18] *M.I. v Switzerland*, No. 56390/21, 12 November 2024, § 51.

[19] *M.I. v Switzerland*, No. 56390/21, 12 November 2024, §§ 52-54.

[20] *A.B. and Y.W. v Malta*, No. 2559/23, 4 February 2025, § 63.

[21] *M.S.S. v. Belgium and Greece*, op.cit., § 251.

[22] *Hirsi Jamaa and Others v. Italy*, No. 27765/09, 23 February 2012.

[23] *Kebe and Others v. Ukraine*, No. 12552/12, 12 January 2017, § 104.

[24] *Shamayev and Others v. Georgia and Russia*, No. 36378/02, 12 April 2005, § 460; *M.S.S. v. Belgium and Greece*, op. cit.; *Čonka v. Belgium*, No. 51564/99, 5 February 2002, §§ 77-85.

[25] *Shamayev and Others v. Georgia and Russia*, op. cit., § 460; *Labsi v. Slovakia*, No. 33809/08, 15 May 2012, § 139, *Gebremedhin v France*, No. 25389/05, 26 July 2007, §54, § 66-67*; Baysakov and others v. Ukraine*, No. 54131/08, 18 February 2010, § 74; *M.S.S. v. Belgium and Greece*, op.cit., §.301- 313, §319; *Hirsi Jamaa and Others v. Italy*, op. cit., §§ 202, 204

requires independent and rigorous scrutiny of a claim, a prompt response and access to a remedy with automatic suspensive effect.[26] In *A.B. and Y.W. v Malta*, this Court found a violation of the procedural aspect of Article 3 and noted that the immigration authorities relied on an assessment made six years earlier, failed to consider country of origin information put forward by the applicants and disregarded submissions that a well-founded fear of persecution may be future-oriented and not solely arise from past persecution.[27]

Obligations under Article 3 and Article 13 in relation to detention conditions

8. This Court has reiterated that under Article 3, a Contracting Party must ensure that an individual is detained in conditions compatible with respect for human dignity, and that the manner and execution of the detention measures do not subject the individual to distress or hardship exceeding the unavoidable level of suffering inherent in detention.[28] Additionally, this Court has outlined that detention conditions must provide sufficient personal space, access to outdoor exercise, natural light and air, availability of ventilation and compliance with basic sanitary and hygiene requirements.[29]
9. The interveners submit that an international trend is emerging in regard to the placement of transgender individuals in gendered detention facilities, supporting a) an individual risk assessment and b) taking the gender identity of the person as a starting point.[30] The Council of Europe Committee of Ministers (CoM) recommends Member States in their CM Rec (2010)/5 to "ensure the safety and dignity of all persons in prison" and to take measures "to adequately protect and respect the gender identity of transgender persons". The Council of Europe Committee for the Prevention of Torture (CPT) points in its thematic report[31] towards the heightened vulnerability and high risk faced by transgender detainees of intimidation and abuse by other detainees and by prison staff.[32] The CPT supports, in principle, individual risk-assessment and placement of transgender detainees according to their gender identity, as placing them in a gendered section at odds with their gender identity significantly increases their risk of violence and intimidation.[33]
10. Article 13 ECHR guarantees the right to access a remedy at national level to enforce the substance of the Convention rights.[34] A remedy must be effective both in practice and in law and not unjustifiably hindered by the relevant authorities' acts or omissions.[35] This Court has noted that, where arguable complaints of inhuman or degrading detention conditions are raised,[36] an effective remedy must have the capacity to improve the material detention conditions. Where there is a breach of Article 3, an effective remedy must be capable of putting an end to the ongoing violation.[37] A domestic procedure must have the capacity to offer effective redress and function effectively in practice.[38] With respect to this, this Court has repeatedly called into question constitutional redress

[26] *A.B. and Y.W v Malta*, No. 2559/23, 4 February 2025, § 64.
[27] *A.B. and Y.W. v Malta*, No. 2559/23, 4 February 2025, §§ 51, 67-72.
[28] *A.D. v. Malta*, No. 12427/22, 17 October 2023, § 112.
[29] *A.D. V. Malta*, No. 12427/22, 17 October 2023, §§ 113-114.
[30] Council of Europe, Commissioner for Human Rights (2024), *Issue paper „Human Rights and Gender Identity and Expression*", pages 9, 59.
[31] Council of Europe, Committee on the Prevention of Torture and Inhuman Or Degrading Treatment or Punishment (2023), *Transgender Persons in Prison.* Prison Standard. Extract from the 33rd General Report CPT/Inf (2024) 16 – part;
[32] CPT (2023), p. 10.
[33] *Ibid*.
[34] *Neshkov and Others v. Bulgaria*, Nos. 36925/10 and 5 others, 27 January 2015, § 180.
[35] See for example, *El-Masri v. the former Yugoslav Republic of Macedonia* [GC], No. 39630/09, 13 December 2012, § 255.
[36] *G.B. and Others v. Turkey*, No. 4633/15, 17 October 2019, §§ 125-126.
[37] *G.B. and Others v. Turkey*, op. cit. § 129; *Neshkov and Others v. Bulgaria*, Nos. 36925/10 and 5 others, 27 January 2015, §§ 185-186.
[38] *G.B. and Others v. Turkey*, op. cit., § 131.

proceedings in Malta, finding them lengthy and not effective in practice as a remedy for the purposes of Article 3 complaints against ongoing detention conditions.[39]

11. This Court has indicated that an effective domestic remedy in this context must allow examination of both the admissibility and merits of the complaints during the period of detention. During this time, the authority or mechanism must take into account the vulnerability of the individual as well as the known detention conditions in the facility. In such cases, the relevant authority should show necessary diligence in reviewing the applicants' complaints, and the mechanism must have the capacity to provide an urgent response.[40]
12. This Court has held that the special importance attached to Article 3 means that, over and above a compensatory remedy, States are required to establish an effective mechanism to put an end to treatment prohibited by Article 3.[41]
13. **The interveners submit that Contracting Parties must ensure not only an available remedy against detention, but one that is effective in practice. Furthermore, detention conditions must be dignified and take account of the needs of vulnerable detainees, including LGBTI detainees.**

Obligations under Article 5(1) of the Convention.

14. Article 5(1) requires that any deprivation of liberty must be "in accordance with the law", which encompasses the principles of legality and protection against arbitrariness.[42] Detention must have a clear legal basis in national law, follow a procedure prescribed by law,[43] and be clearly defined and foreseeable in its application.[44] To ensure that no person is deprived of their liberty arbitrarily,[45] detention must be carried out in good faith; be closely connected to a permitted ground for deprivation of liberty; the place and conditions of detention must be appropriate; and the length of detention must not exceed what is reasonably required for the purpose pursued.[46]
15. This Court has further found that the duration of detention may, in itself, render it arbitrary. In *M.K. v. Hungary*, where the detention lasted five-and-a-half months, for the sole reason to confirm identity and nationality and ensure the applicant's availability for his asylum procedure, this Court stated that, "*this duration alone is capable of raising concerns, even in the absence of any indication that the detention took place in inappropriate conditions*."[47] Where detention takes place in inappropriate conditions, a strict approach is necessary, and this Court has previously found four months of detention to be unreasonable for the purposes of Article 5(1) ECHR.[48]
16. As with any form of deprivation of liberty, immigration detention, to be lawful, must be based on a reasoned decision,[49] and there must be a clear relationship between the ground of detention relied on and the place and conditions of detention.[50] Violations of Article 5 (1)(f) of the Convention are more likely to arise where the decisions detain asylum seekers are generalised or automatic, without an individual assessment of the particular needs of the persons concerned – or consideration of less

[39] *A.D. v. Malta,* No. 12427/22, 17 October 2023, §§ 198-202; *J.B. and others v. Malta*, No. 1766/23, 22 October 2024, §§ 68-71.
[40] *G.B. and Others v. Turkey*, op. cit. para 134; See also: *Popov v. France*, No. 39472/07, 19 January 2012, § 103; *Muskhadzhiyeva and Others v. Belgium*, No. 41442/07, 19 January 2010, § 63.
[41] *G.B. and Others v. Turkey*, op. cit., § 136.
[42] *Louled Massoud v. Malta*, No. 24340/08, 27 July 2010, §61; *Medvedyev v. France* [GC], No. 3394/03, 29 March 2010, §80.
[43] *Louled Massoud v. Malta*, No. 24340/08 (27 July 2010) §61; *Khlaifia and others v. Italy* [GC], No. 16483/12, 15 December 2016, §91.
[44] *Enhorn v. Sweden*, No. 56529/00, 25 January 2005, §36.
[45] *Nabil and Others v. Hungary*, No. 62116/12, 22 December 2015, §18.
[46] *Yoh-Ekale Mwanje v. Belgium*, No. 10486/10, 20 December 2011, § 117-119.
[47] *M.K. v. Hungary*, No. 46783/14, 9 June 2020, § 21; See also *L. v Hungary*, No. 6182/20, 21 March 2024, § 19.
[48] *Kanagaratnam and Others v. Belgium*, No. 15297/09, 13 December 2011, §§ 94–95.
[49] *Lokpo & Touré v Hungary*, No. 10816/10, 20 September 2011, §24.
[50] *Saadi v. UK* [GC], No. 13229, 29 January 2008, § 69.

intrusive measures.[51] Detention procedures must be individualised in order to identify additional vulnerabilities and prevent detention where it may not be safe or appropriate.[52]

17. Contracting Parties have a positive obligation to take appropriate measures to protect the liberty of persons, especially those in vulnerable situations.[53] This Court has held that asylum seekers are particularly vulnerable solely on account of their migration situation and flight trauma[54] and are members of a "particularly underprivileged and vulnerable population".[55]
18. Council of Europe bodies have similarly noted the importance of alternative measures to detention and advocated for their consideration in all cases where detention may be in prospect.[56] The CPT has stated that deprivation of liberty "should only be a measure of last resort, after a careful and individual examination of each case." It has emphasised that alternatives should be developed and used whenever possible and that detention without a time limit and with unclear prospects for release may amount to inhuman treatment.[57]
19. The interveners note the relevance of *O.M. v. Hungary,*[58] where this Court found that a homosexual asylum seeker's detention without a sufficient individual assessment or reflection of his vulnerability due to belonging to a sexual minority was in violation of Article 5 (1) of the Convention. In its analysis, this Court emphasised that in situations where asylum seekers claim to be part of a "vulnerable group" in the country which they had to leave, authorities should exercise particular care to avoid situations that could "reproduce the plight that forced them to flee in the first place".[59]
20. **The interveners affirm that Contracting Parties must ensure that detention is not arbitrary, that alternative measures have been considered, and that it is only used as a measure of last resort. Council of Europe institutions have repeatedly emphasised that individual assessments must be made, particularly, in light of asylum seekers' inherent vulnerability and to allow additional vulnerabilities, if any, to be identified and addressed.**

Obligations under Article 5(4) of the Convention

21. The safeguards against arbitrariness contained in Article 5(1) are rendered ineffective if the detained individual is unable in law or in practice to have access to judicial proceedings to challenge the lawfulness of detention, including with respect to its conditions. The right to challenge the lawfulness of detention judicially under Article 5(4) is a fundamental protection against arbitrariness; Article 5(4) is a *lex specialis* over and above the general requirements of Article 13. Article 5(4) entitles persons subject to any form of deprivation of liberty to bring proceedings before an independent court or tribunal to challenge the lawfulness of their detention[60] and to be heard before the court either in person or through a legal representative.[61] The interveners submit that this right is all the more important in cases involving families with children or individuals in "vulnerable situations", for example, LGBTI individuals.

[51] *Thimothawes v. Belgium*, No. 39061/11, 4 April 2017, §73; Also *Suso Musa v Malta*, No. 42337/12, 23 July 2013, §100.
[52] *Thimothawes v. Belgium*, No. 39061/11, 4 April 2017, §73.
[53] *Stanev v Bulgaria [GC]*, No. 36760/06, 12 January 2012, § 120.
[54] *M.S.S. v Belgium and Greece [GC]*, No. 30696/09, 21 November 2011, § 232.
[55] *M.S.S. v. Belgium and Greece*, op. cit., § 251.
[56] See the Commissioner for Human Right's Comment "High time for states to invest in alternatives to migration detention", Strasbourg, press release published on 31 January 2017.
[57] Council of Europe (CoE), European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), Factsheet: Immigration Detention (CPT/Inf(2017)3), published 10 March 2017.
[58] *O.M. v Hungary*, No. 9912/15, 5 July 2016.
[59] *O.M. v Hungary*, No. 9912/15, 5 July 2016, § 53.
[60] See *G.B. and Others v. Turkey*, No. 4633/15, 17 October 2019, §183; *Mooren v. Germany* [GC], No. 11364/03, 9 July 2009, §106; and *Ilnseher v. Germany* [GC], No. 10211/12, 4 December 2018, §251.
[61] *Al-Nashif v. Bulgaria*, No. 50963/99, 20 June 2022, §92; *De Wilde, Ooms and Versyp v. Belgium*, Nos. 2832/66; 2835/66; 2899/66, 18 June 1971, §73.

22. For an Article 5(4) remedy to be practical and effective, detainees must be informed of the legal basis and legal and factual reasons for their detention, in a manner they understand and in such a way as to give them an opportunity to challenge its legality.[62] For this reason, access to legal advice may be required.[63] In *Soldatenko v. Ukraine*, this Court stated that "the accessibility of a remedy implies, inter alia, that the circumstances voluntarily created by the authorities must be such as to afford applicants a realistic possibility of using the remedy".[64] In *Aden Ahmed v. Malta*[65] and *Mahamed Jama v. Malta*[66], the Court held that lack of access to a properly structured system of legal aid makes the remedy inaccessible.
23. Domestic courts "cannot treat as irrelevant, or disregard, concrete facts invoked by the detainee and capable of putting into doubt the existence of the conditions essential" for the lawfulness of the detention.[67] This may include the overall duration of detention the applicant has been held. Similarly, a violation of Article 5(4) was established in *E.A. v. Greece* due to the domestic judge's rejection of the applicant's objections to his detention without any consideration of his asylum application or any examination of the conditions of detention.[68]
24. The interveners wish to highlight that a remedy for the purposes of Article 5(4) must have a judicial character and the principles developed under Article 6(1) concerning independence and impartiality apply equally to Article 5(4).[69] The Court considered this in the case of *J.B. and others v Malta* and noted that due to the appointment procedure and non-transparent selection process, widespread concerns and a lack of safeguards of the Immigration Appeals Board, the applicant's doubts as to its independence were legitimate.[70] In light of this, the lack of responses to the applicant, breaches of time-limits and the lack of a speedy procedure, the Court concluded that the applicant did not have access to an effective remedy and, therefore, there had been a violation of Article 5(4).[71]
25. **The interveners submit that for applicants to benefit from their right to challenge the lawfulness of their detention under Article 5(4), they must be informed of the reasons for their detention, have access to legal representation, to the relevant documents and be heard in person. Review procedures must consider all concrete facts invoked by the detainee and must be concluded speedily.**

<u>European Union (EU) and International Standards</u>

26. The interveners note that under Article 53 ECHR, where Contracting Parties are also bound by EU law, the Court must ensure that the Convention rights are interpreted and applied in a manner that does not diminish the level of protection of rights guaranteed under the applicable EU law.
27. In determining whether the Contracting Parties' obligations under the Convention are engaged in a particular case - and, if so, the scope and content of these obligations - this Court has further considered the EU asylum *acquis* materially relevant when the respondent States are legally bound by that corpus of law.[72] The EU asylum *acquis* comprises a number of legal instruments and their

[62] *R.M. and others v. Poland*, No. 11247/18, 9 February 2023, § 29.
[63] *Louled Massoud v. Malta*, No. 24340/08, 27 July 2010, §§ 43-47; 71.
[64] *Soldatenko v. Ukraine*, No. 2440/07, 23 October 2008, § 125.
[65] *Aden Ahmed v. Malta*, No. 55352/12, 23 July 2013, § 66.
[66] *Mahamed Jama v. Malta*, No. 10290/13, 26 November 2015, § 65.
[67] *Nikolova v. Bulgaria* [GC], No. 31195/96, 25 March 1999, § 61.
[68] *E.A. v. Greece*, No. 74308/10 (30 July 2015) § 97.
[69] *J.B. v Malta and others*, No. 1766/23, 22 October 2024, § 149.
[70] *J.B. and others v Malta*, No. 1766/23, 22 October 2024, §§ 150-155.
[71] *J.B. and others v Malta*, No. 177623, 22 October 2024, §§ 156-159.
[72] *M.S.S. v. Belgium and Greece*, op. cit., §§ 57-86 and 250; *Sufi and Elmi v. the United Kingdom*, op. cit., §§ 30-32 and 219-226, where the Court had regard to Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (the Qualification Directive), as well as to a preliminary ruling by the CJEU in the case of *M. and N. Elgafaji v. Staatssecretaris van Justitie* asking, inter alia, whether Article 15(c)

interpretation by the Court of Justice of the EU (CJEU). The EU Charter of Fundamental Rights (CFR)[73] enshrines guarantees directly relevant to the issues under consideration, such as the right to asylum (Article 18), the right to liberty and security (Article 6), the protection of human dignity (Article 1), the prohibition of torture and inhuman and degrading treatment (Article 4), protection in the event of removal, expulsion or extradition (Article 19) and the right to an effective remedy and to a fair trial (Article 47). The Charter also sets out that any discrimination based on sex (which covers discrimination based on gender identity[74]) or sexual orientation is prohibited (Article 21).

28. In light of the applicable EU law, prevention of arbitrary detention requires consideration of less intrusive alternatives to detention, in particular the recast Reception Conditions Directive (RCD)[75] and the Return Directive.[76] Article 8 of the RCD affirms that a Member State may only detain an applicant if it proves necessary on the basis of an individual assessment and if less coercive, alternative measures cannot be applied. The CJEU has reiterated this in the case of *V.L. v. Ministerio Fiscal,*[77] where it held that "Articles 8 and 9 of that directive, read in conjunction with recitals 15 and 20 thereof, place significant limitations on the Member State's power to hold a person in detention" and that "national authorities may hold an applicant for international protection in detention only after having determined, on the basis of an individual assessment, whether such detention is proportionate to the aims pursued by detention."[78] In *K v. Staatssecretaris van Veiligheid en Justitie*[79] and *FMS and others v Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóságup*[80] the CJEU affirmed these limitations and emphasised the obligations of Member States to undertake an individualised assessment, enforce detention as a last resort and ensure that, if it is used, it be a proportionate measure for the objectives pursued. The CJEU underlined in *C, B and X* that, where the conditions for lawful detention are not met or cease to be met, the individual must be released immediately.[81]
29. The Return Directive, on the other hand, only applies in situations where the individual has exhausted all other avenues of regularisation and is thus no longer lawfully present.[82] It does not apply in situations where an asylum application (or an appeal against a refusal) is ongoing.[83] In those cases, where third country nationals have exhausted all procedural options under the ordinary immigration or asylum process, it provides for common procedures and standards for returning them. It provides that Member States should implement it without discrimination based on sex

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of the Qualification Directive offered supplementary or other protection to Article 3 of the Convention. See also *M.A. and Others v. Lithuania*, No. 59793/17, 11 December 2018, § 113, *N.D. and N.T. v. Spain*, Nos. 8675/15 and 8697/15, 13 February 2020, § 180.

[73] EU, Charter of Fundamental Rights of the European Union, 26 October 2012, 2012/C 326/02.

[74] Advocate General Opinion in Case C-769/22, European Commission v Hungary, 5 June 2025, § 62.

[75] Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast), Art 8(2)(4)

[76] Directive 2008/115/EC of the EU Parliament and Council on common standards and procedures in Member States for returning illegally staying third country-nationals.

[77] CJEU, Judgment of 25 June 2020, *VL v. Ministerio Fiscal*, C-36/20 PPU, ECLI:EU:C:2020:495; CJEU, Judgment of 14 September 2017, K, C18/16, ECLI:EU:C:2017:680.

[78] CJEU, Judgment of 25 June 2020, *VL v. Ministerio Fiscal*, op. cit., §§ 101-102.

[79] CJEU Judgment of 14 September 2017, *K v. Staatssecretaris van Veiligheid en Justitie,* C-18/16, ECLI:EU:C:2017:680, § 48.

[80] CJEU Judgment of 14 May 2020, *FMS and others v Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóságup*, C-924/19 PPU and C-925/19 PPU, ECLI:EU:C:2020:367, § 258.

[81] CJEU, *C, B and X*, Joined Cases C-704/20 and C-39/21, 8 November 2022, § 79-80; CJEU, *VL v. Ministerio Fiscal*, op.cit. §§101-102; CJEU, *K. v. Staatssecretaris van Veiligheid en Justitie* and *H.F. v. Belgische Staat*, C-331/16, 2 May 2018, §48; CJEU, Országos Idegenrendeszeti Főigazgatóság Délalföldi Regionális Igazgatóság, Joined Cases C-924/19 PPU and C-925/19 PPU, 14 May 2020, § 258.

[82] Return Directive, Recital 2, Article 4(2); Further, the Return Directive should not be seen as part of the EU asylum acquis as it applies only after an individual has received a final negative decision, rendering their stay on the territory illegal.

[83] CJEU, *Arslan,* C-534/11, 30 May 2013.

(which encompasses gender identity) or sexual orientation.[84] This Directive sets out instances when detention is possible "unless other sufficient but less coercive measures can be applied effectively" and provides that "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".[85] In a case concerning a third country national's detention for removal purposes, the CJEU held that a risk of absconding could be a justification for deprivation of liberty, only where an individual assessment finds that the enforcement of the return decision risks being compromised, and where less coercive measures are unavailable.[86] Furthermore, Article 5 and Article 9 affirm that the principle of *non-refoulement* must be respected and removal should be postponed where it would be violated.[87] Under the EU asylum *acquis*, as under the Convention,[88] due diligence must be exercised when detaining individuals. In order to guarantee the appropriate treatment of vulnerable asylum-seekers, Member States are required to carry out an individualised evaluation of the person's situation, within a reasonable time.[89]

30. Article 53 is also applicable to provisions of international law. Article 9 of the International Covenant on Civil and Political Rights (ICCPR)[90] guarantees the right to liberty and security of person, including the right not to be subject to arbitrary detention. With respect to this, the Human Rights Committee's General Comment No. 35 clarified that, "detention must be justified as reasonable, necessary and proportionate in the light of the circumstances and reassessed as it extends in time".[91] Furthermore, the interveners draw attention to Article 3 of the UN Convention against Torture (CAT), which prevents ratifying States from returning individuals to a State where they could be exposed to torture.[92] This is elaborated in the Committee's General Comment No. 4, which outlines sexual orientation and gender identity as a potential indicator of personal risk of torture.[93]
31. **The interveners submit that Contracting Parties must act in accordance with their EU obligations, particularly taking into account the fundamental rights of the CFR, the RCD requirement for detention to be a measure of last resort where alternative measures cannot be applied and the due diligence requirement under the Return Directive. International obligations in respect of detention and return, such as non-arbitrariness of detention under the ICCPR and the *non-refoulement* principle under the UN CAT must also be applied consistently.**

Safe Country of Origin: obligations and implications for LGBTI individuals under EU and international law

32. The concept of a safe country of origin provided by Directive 2013/32/EU[94] enables Member States to designate a third country as safe and presumes its safety for an applicant in the context of an individual examination of the application. The applicant is entitled to present counter-grounds based

[84] Return Directive (op cit), Recital 21.
[85] Return Directive (op cit), Chapter IV, Article 15 (1).
[86] CJEU, Landkreis Gifhorn, C-519/20, 10 March 2022, § 37
[87] Return Directive (op cit), Article 5, Article 9 (1)(a).
[88] *Chahal v. United Kingdom*, No. 22414/93, 15 November 1996 (GC), § 113; *A. v. United Kingdom*, No. 3455/05, 19 February 2009 (GC), § 164.
[89] Reception Conditions Directive (recast), Article 22.
[90] UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, UN, Treaty Series, vol. 999, § 171
[91] UN Human Rights Committee, General comment no. 35, Article 9 (Liberty and security of person), 16 December 2014, CCPR/C/GC/35, § 18.
[92] UN Convention Against Torture (op. cit)
[93] UN Committee Against Torture, General Comment No. 4 (2017) on the implementation of article 3 of the Convention in the context of article 22, § 45.
[94] Directive 2013/32/EU, on common procedures for granting and withdrawing international protection (recast) of 26 June 2013.

on their individual circumstances.[95] Article 37(3) of Directive 2013/32/EU obliges Member States to regularly review the situation in a "safe country of origin" and to remove the designation where conditions no longer justify it.[96] In de la Tour's Opinion, the Advocate General (AG) of the CJEU, in a case concerning a Bangladeshi applicant, considered that the existence of a general presumption of safety cannot relieve national authorities from ensuring full respect for the right to an effective remedy.[97]

33. Country of origin information is often crucial in both, designating a country as a safe country of origin and when assessing individual asylum claims. However, country of origin information is often collected with a male cisgender heterosexual lens, lacking complete and reliable human rights information on LGBTI persons.[98] Many asylum decisions are based on a lack of specific information as to the situation of LGBTI people in their country of origin. Often, a lack of information is wrongly equated with an absence of systematic problems for LGBTI people in their country of origin.[99] Frequently the safe country of origin concept fails to capture safety for vulnerable populations as a country can be safe for the majority of the population but not for LGBTI individuals.[100]
34. In Malta, the International Protection Agency (IPA) processes applications under the accelerated procedure, including in situations where the applicant is from a designated "safe country of origin". Of the 166 applications under the accelerated procedure in 2023, 109 of the applicants were from Bangladesh. Until 2022, the IPA generally refrained from rejecting international protection applications on "safe country of origin" grounds when an applicant claimed to be LGBTI and would offer an appeal in accordance with the regular procedure. However, this practice has changed and the "safe country of origin" determination now applies to all applications.[101]
35. The interveners draw attention to Section 377 of the Penal Code (1860) in Bangladesh, which criminalises "unnatural offences" defined as "carnal intercourse against the order of nature with any man, woman or animal", providing a punishment of life imprisonment and a fine.[102] Although there is acknowledgment of "third-gender individuals" (hijra), the police practices and societal attitudes remain broadly discriminatory, arbitrary arrests occur, and there are frequent attacks by extremist groups against LGBTI persons with limited intervention from the police.[103] Moreover, protections against hate crimes or discrimination in employment, health, education, access to goods and services or housing against LGBTI persons are absent.[104] Quick, transparent and accessible legal gender recognition (LGR) standards, as per this Court's standards, are not existent either.[105] In fact, Home

[95] Directive 2013/32/EU, on common procedures for granting and withdrawing international protection (recast) of 26 June 2013, Articles 36 -37.
[96] Article 37(3) of Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast).
[97] CJEU Joined cases C-758/24 and C-759/24, AG Opinion, 10 April 2025, § 96.
[98] ILGA-Europe (2016), *ILGA Europe Briefing on LGBTI Refugees and Asylum*, p. 9, Asylum Aid (), written submission to the submitted to the UK House of Commons, para 32, accessible at: https://publications.parliament.uk/pa/cm201314/cmselect/cmhaff/71/71/71we-1.htm; Bach Jhana, Forced Migration Review, *Assessing transgender asylum claims*, accessible at https://www.fmreview.org/bach/
[99] Sabine Jansen and Thomas Spijkerboer (2011), *Fleeing Homophobia*, p. 71, Sabine Jansen (2019), Pride or Shame? Assessing LGBTI Asylum Applications in the Netherlands following the XYZ And ABC Judgments, pp. 128, 159, 160, 163. See also *S.H. v United Kingdom*, No. 19956/06, 15 June 2010, § 69.
[100] ILGA Europe, Policy Briefing on LGBTI refugees and EU asylum legislation, 7 September 2021
[101] AIDA, Country Report Malta 2023 Update, October 2024 https://asylumineurope.org/wp-content/uploads/2024/09/AIDA-MT_2023-Update.pdf
[102] The Penal Code 1860, Chapter XVI, Section 377 http://bdlaws.minlaw.gov.bd/act-11/section-3233.html
[103] ILGA World: Kellyn Botha, Our identities under arrest: A global overview on the enforcement of laws criminalising consensual same-sex sexual acts between adults and diverse gender expressions, 2nd Edition (Geneva: ILGA, November 2023).
[104] *Ibid*. ILGA World, Database, information on Bangladesh is accessible at: https://database.ilga.org/bangladesh-lgbti
[105] *Ibid*.

Minister Asaduzzaman Khan Kamal declared in January 2024 that his government would never implement an 'anti-Islamic' law, explicitly citing a draft proposal for LGR.[106]

36. There is evidence of Section 377 being enforced to arrest, extort and harass individuals based on their real or imputed same-sex sexual orientation.[107] Furthermore, the mere existence of laws criminalising consensual same-sex conduct, including in countries where they have not been recently "enforced",[108] can give rise to acts of persecution, without necessarily leading to recorded court proceedings and convictions and also entails a real risk that the said laws may be enforced in the future.[109] The UN Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity has noted that such laws and policies are: "contrary to international human rights law, fuel stigma, legitimize prejudice and expose people to family and institutional violence and further human rights abuses, such as hate crimes, death threats and torture.'[110] Individuals who are open about their non-normative sexual orientation or gender identity in Bangladesh are likely to face treatment by non-State actors, which is sufficiently serious to amount to persecution or serious harm.[111]
37. The interveners note the UN Committee Against Torture's concern relating to reports of violence in Bangladesh against LGBTI individuals perpetrated both by private actors and law enforcement officials, which is facilitated by the criminalisation of same-sex sexual relations.[112] These observations are consistent with reports that organisations supporting the LGBTI community are either unable to register with the authorities or face significant barriers in doing so, and that LGBTI people and advocates face violence and threats in the absence of adequate police protection.[113]

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[106] *Ibid.*

[107] ILGA World: Kellyn Botha, Our identities under arrest: A global overview on the enforcement of laws criminalising consensual same-sex sexual acts between adults and diverse gender expressions, 2nd Edition (Geneva: ILGA, November 2023), p. 158.

[108] *Modinos v. Cyprus* and *Dudgeon v. the United Kingdom*. As long as statutes are not repealed, there continues to be a real risk of their enforcement and therefore a real risk that individuals would face criminal investigations, charges, trials, convictions and penalties such as imprisonment, because of their real or perceived sexual orientation or gender identity; UNHCR SOGI Guidelines, §§ 27, 29.

[109] In *Dudgeon v. the United Kingdom*, this Court observed that, notwithstanding the then apparent paucity or even absence of a record of prosecutions in these types of cases, it could not be said that the legislation in question was a dead letter, because there was no stated policy on the part of the authorities not to enforce the law (§41). In *Modinos v. Cyprus*, this Court reiterated this point by noting that, notwithstanding the fact that the Attorney-General had followed a consistent policy of not bringing criminal proceedings in respect of private homosexual conduct considering that the law in question was a dead letter, the said policy provided "no guarantee that action will not be taken by a future Attorney-General to enforce the law, particularly when regard is had to statements by Government ministers which appear to suggest that the relevant provisions of the Criminal Code are still in force", *Modinos*, judgment of the Court, § 23.

[110] UNHRC 2018 Report on protection against violence and discrimination based on SOGI, UN Doc. A/HCR/38/43, § 20. See also Interim report of the Special Rapporteur of the Commission on Human Rights on extrajudicial, summary or arbitrary Executions, UN Doc. A/57/138, § 37.

[111] Country Policy and Information Note: Sexual orientation and gender identity, Bangladesh, September 2023 https://www.gov.uk/government/publications/bangladesh-country-policy-and-information-notes/country-policy-and-information-note-sexual-orientation-and-gender-identity-bangladesh-september-2023-accessible

[112] Committee against Torture, Concluding observations on the initial report of Bangladesh, CAT/C/BGD/CO/1(2019), § 23.

[113]European Union Asylum Agency, Bangladesh: Country Focus, 11 July 2024. https://euaa.europa.eu/sites/default/files/publications/202407/2024_07_EUAA_COI_Report_Bangladesh-Country_Focus.pdf