**Administrative Detention of Asylum seekers**

European Judicial Training project

*- March 2018 -*

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# **A. General**

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| Key points * Under both EU law and international law, deprivation of liberty, aside from that resulting from criminal convictions, can only be imposed as a measure of a last resort following an individual assessment of each case, if other less coercive alternative measures cannot be applied effectively.
* Under the ECHR, a deprivation of liberty must be: justified for a specific purpose defined in Article 5.1.f; be ordered in accordance with a procedure prescribed by law; and not be arbitrary
* Under EU law, a deprivation of liberty must be in accordance with the law, necessary and proportionate
* A deprivation of liberty must comply with the procedural safeguards in Article 5 (2) on the right to be informed of the reasons, and Article 5 (4) of the ECHR on the right to have the detention decision reviewed speedily
* Under both EU and international law, deprivation of liberty or restriction on freedom of movement must comply with other human rights guarantees, such as: the conditions of detention respecting human dignity; never putting the health of individuals at risk.
* An individual who has been detained arbitrarily or unlawfully may have a claim for damages under both EU law and the ECHR (see Section 6.10).
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## 1. The nature of “detention”[[1]](#footnote-2)

Everyone has the right to liberty and security of person (article 5 ECHR, article 6 EU Charter and article 9 ICCPR). Detention of asylum seekers or undocumented migrants, either on entry to the country or pending deportation, must not be arbitrary and must be carried out in good faith pursuant to a legal basis.

Article 5.1.f ECHR

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: (…)

f. 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.

Article 9 [**International Covenant on Civil and Political Rights**](http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx) **(ICCPR)**

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.

3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.

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.

International law and standards establish that, in immigration control, detention should be the exception rather than the rule, and should be a measure of last resort, to be imposed only where other less restrictive alternatives, such as reporting requirements or restrictions on residence, are not feasible following a thorough assessment of all relevant facts and circumstances in the individual case ([*Saadi v. United Kingdom*](http://hudoc.echr.coe.int/eng?i=001-84709)).[[2]](#footnote-3) Detention must be justified as reasonable, necessary and proportionate in the light of the circumstances and reassessed as it extends in time.[[3]](#footnote-4) The decision to detain must consider relevant factors case by case and not be based on a mandatory rule for a broad category; must take into account less invasive means of achieving the same ends, such as reporting obligations, sureties or other conditions to prevent absconding; and must be subject to periodic re-evaluation and judicial review.[[4]](#footnote-5)

The EU Charter of Fundamental Rights provides among other things that everyone has the right to liberty and security of person (article 6) and no one shall be subjected to torture or to inhuman or degrading treatment or punishment (article 4; see also right to physical integrity (article 3) and human dignity (article 1).

The article 31 of the [Geneva Refugee Convention](http://www.unhcr.org/3b66c2aa10) and associated standards and guidance,[[5]](#footnote-6)establishes a presumption against detention, and the principle that detention must be justified as necessary in a particular case.

Detention of asylum seekers and refugees

* must never be automatic,
* should be used only as a last resort where there is evidence that other lesser restrictions would be inadequate in the particular circumstances of the case,
* should never be used as a punishment.

#### Deprivation of liberty/restrictions on freedom of movement

Deprivation of liberty is distinct from restrictions on freedom of movement (article 2 Protocol 4 ECHR, article 12 ICCPR).

**Article 2 protocol 4 ECHR**

**Article 2 Freedom of movement**

1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.

2. Everyone shall be free to leave any country, including his own.

3. No restrictions shall be placed on the exercise of these rights other than such as are in accordance with law and are necessary in a democratic society in the interests of national security or public safety, for the maintenance of ordre public, for the prevention of crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

4. The rights set forth in paragraph 1 may also be subject, in particular areas, to restrictions imposed in accordance with law and justified by the public interest in a democratic society.

**Article 12 ICCPR**

1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.

2. Everyone shall be free to leave any country, including his own.

3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.

4. No one shall be arbitrarily deprived of the right to enter his own country.

Deprivation of liberty involves more severe restriction of movement than mere interference with liberty of movement under article 12.[[6]](#footnote-7)

The Working group on arbitrary detention (WGAD) recommends that “(…) the guarantees available against arbitrary arrest and detention are extended to all forms of deprivation of liberty, including (…) detention of migrants and asylum seekers (…).”[[7]](#footnote-8)

Under international human rights law, a deprivation of liberty is not defined solely with reference to the classification imposed by national law, but rather takes into account the reality of the restrictions imposed on the individual concerned. For example, persons accommodated at a facility classified as a “reception”, “holding” or “accommodation” center and ostensibly not imposing “detention”, may, depending on the nature of the restrictions on their freedom of movement, and their cumulative impact, be considered under international human rights law to be deprived of their liberty. In assessing whether restrictions on liberty amount to deprivation of liberty under international human rights law, relevant factors will include the type of restrictions imposed; their duration; their effects on the individual; and the manner of implementation of the measure (*Amuur v. France*, para. 42). *[[8]](#footnote-9)*

The mere fact that a detained migrant is free to leave a place of detention by agreeing to depart from the country does not mean that the detention is not a deprivation of liberty. This was affirmed by the European Court of Human Rights in *Amuur v. France,* the Court noting that the possibility to leave the country would in many cases be theoretical if no other country could be relied on to receive the individual or to provide protection if the individual is under threat. The *UNHCR Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention* (“[UNHCR Guidelines on Detention](http://www.unhcr.org/publications/legal/505b10ee9/unhcr-detention-guidelines.html)”) take the same approach.[[9]](#footnote-10)

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| [***Amuur v. France***](http://hudoc.echr.coe.int/eng?i=001-57988)*,* ECtHR, Application No. 19776/92, Judgment of 25 June 1996Facts: The applicants, four Somali nationals, arrived in France by airplane after fleeing Somalia. They were held in the international zone of the Paris-Orly airport for twenty days.Analysis: The Court found that holding the applicants in the international zone of the airport resulted in a deprivation of liberty, and article 5.1 of the Convention was therefore applicable to the case. The Court further found that the deprivation of liberty had been unlawful, as the applicable provisions of French law in force at the time had not allowed the ordinary courts to review the conditions under which aliens were held or to impose a limit on the duration of their detention. Nor had these provisions provided for legal, humanitarian and social assistance.*Para. 43: “Holding aliens in the international zone does indeed involve a restriction upon liberty […] 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.”**Para. 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.”*Although by the force of circumstances the decision to order holding must necessarily be taken by the administrative or police authorities, its prolongation requires speedy review by the courts, the traditional guardians of personal liberties.  Above all, such confinement must not deprive the asylum-seeker of the right to gain effective access to the procedure for determining refugee status. |

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| [***Guzzardi v. Italy***](http://hudoc.echr.coe.int/eng?i=001-57498)*,* ECtHR, Application No. 7367/76, 6 November 1980Facts: The applicant, suspected of involvement with organized crime,, was detained in custody pending his trial. At the end of the maximum period of detention pending trial, he had been taken to an island where he was unable to work, keep his family permanently with him, practise the Catholic religion or ensure his son’s education.Analysis: The Court found that confinement on such a small island was a deprivation of liberty in breach of article 5.1 of the Convention. Article 5.1 is not concerned with mere restrictions on liberty of movement, and the starting point must be the 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. The difference between deprivation of liberty and on freedom of movement is merely one of degree or intensity, and not one of nature or substance, according to the Court.*Para. 92: “In order to determine whether someone has been "deprived of his liberty" within the meaning of Article 5 (art. 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.”**Para. 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 (art. 5) depends.”* |

## 2. Justification of immigration detention

#### Clear legal basis, arbitrariness, necessity and proportionality

All forms of detention must have a clear legal basis in national law and procedures and must not be arbitrary, unnecessary or disproportionate.

The right to liberty and security of the person under international human rights law requires that deprivation of liberty, to be justified, must be in accordance with law, and must not be arbitrary.

* + The ICCPR prohibits any detention that is “arbitrary” (article 9)
	+ The ECHR, provides for the lawfulness of detention on a series of specified legitimate purposes of detention. In relation to immigration detention, it permits detention in three specific situations:
		- to prevent unauthorised entry to the country (article 5.1.(f))
		- pending deportation or extradition (article 5.1.(f))
		- the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law (article 5.1.(b))[[10]](#footnote-11)

Under article 9 of the ICCPR, as well as in international refugee law in regards to asylum seekers, the State must show that the detention was reasonable, necessary and proportionate in the circumstances of the individual case, in order to establish that detention is not arbitrary.

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| The UN Human Rights has Committee has expanded at length on the meaning of “arbitrary deprivation of liberty”, pursuant to article 9 of the ICCPR, in its General Comment 35: In respect of immigration detention:1. Detention in the course of proceedings for the control of immigration is not per se arbitrary, but the detention must be justified as reasonable, necessary and proportionate in the light of the circumstances and reassessed as it extends in time.[[11]](#footnote-12) Asylum seekers who unlawfully enter a State party’s territory may be detained for a brief initial period in order to document their entry, record their claims and determine their identity if it is in doubt.[[12]](#footnote-13) To detain them further while their claims are being resolved would be arbitrary in the absence of particular reasons specific to the individual, such as an individualized likelihood of absconding, a danger of crimes against others or a risk of acts against national security.[[13]](#footnote-14) The decision must consider relevant factors case by case and not be based on a mandatory rule for a broad category; must take into account less invasive means of achieving the same ends, such as reporting obligations, sureties or other conditions to prevent absconding; and must be subject to periodic re-evaluation and judicial review.[[14]](#footnote-15) Decisions regarding the detention of migrants must also take into account the effect of the detention on their physical or mental health.[[15]](#footnote-16) Any necessary detention should take place in appropriate, sanitary, non-punitive facilities and should not take place in prisons. The inability of a State party to carry out the expulsion of an individual because of statelessness or other obstacles does not justify indefinite detention.[[16]](#footnote-17) Children should not be deprived of liberty, except as a measure of last resort and for the shortest appropriate period of time, taking into account their best interests as a primary consideration with regard to the duration and conditions of detention, and also taking into account the extreme vulnerability and need for care of unaccompanied minors.[[17]](#footnote-18)
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In its Deliberation No. 9 concerning the definition and scope of arbitrary deprivation of liberty under customary international law, the UN Working Group on Arbitrary Detention has set out the elements for arbitrariness. In summary form, it has indicated that “[t]he prohibition of arbitrariness comprises through examination of lawfulness, reasonableness, proportionality and necessity of any measure depriving a human being of her or his liberty. The prohibition of arbitrariness can arise at any stage of legal proceedings.”[[18]](#footnote-19)

**The European Court of Human Rights** has held that, in order to avoid arbitrariness, immigration detention must, in addition to complying with national law:

1. be carried out **in good faith** and not involve deception on the part of the authorities;
2. be closely connected to a **permitted ground**;
3. the **place and conditions** of detention must be appropriate, bearing in mind that the measure is applicable not to those who have committed or suspected to have committed criminal offences but to people who have fled from their own country, often in fear of their lives, so the specific vulnerable situation of the person must be taken into consideration (*MSS v Belgium and Greece*);
4. the **length of the detention must not exceed that reasonably required** for the purpose pursued.

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| [***Saadi v. United Kingdom***](http://hudoc.echr.coe.int/eng?i=001-84709), ECtHR, Application No. 13229/03, Judgment of 29 January 2008Facts: The applicant, an Iraqi Kurd asylum seeker, was detained in the UK in a centre used for asylum seekers considered unlikely to abscond and whose applications could be dealt with by the “fast-track” procedure, after he was granted “temporary admission”. He was given a standard form with the reasons for his detention and his rights, but which did not explain that he was being detained under the “fast-track” procedure. The applicant’s asylum claim was initially refused, but after being released, he was subsequently granted asylum after successfully appealing.Analysis: The Court interpreted Article 5.1(f) (“detention of a person to prevent his effecting an unauthorized entry”) as covering those who had surrendered themselves to the authorities and had applied for permission to enter, whether by way of asylum or otherwise. The Court found that seven-day detention of a “temporarily admitted” asylum seeker under the “fast-track” procedure was non-arbitrary and consistent with article 5.1. The 76-hour delay in providing the individual with the real reasons for his detention did not satisfy the promptness requirement of article 5.2. General statements – such as parliamentary announcements – could not replace the need for the individual being directly informed. Para. 65: “On this point, the Grand Chamber agrees […] that, until a State has “authorised” entry to the country, any entry is “unauthorised” and the detention of a person who wishes to effect entry and who needs but does not yet have authorisation to do so can be, without any distortion of language, to “prevent his effecting an unauthorised entry”. It does not accept that as soon as an asylum-seeker has surrendered himself to the immigration authorities, he is seeking to effect an “authorised” entry, with the result that detention cannot be justified under the first limb of Article 5 § 1 (f).”Para. 74: “To avoid being branded as arbitrary, therefore, such detention must be carried out in good faith; it must be closely connected to the purpose of preventing unauthorised entry of the person to the country; the place and conditions of detention should be appropriate, bearing in mind that “the measure is applicable not to those who have committed criminal offences but to aliens who, often fearing for their lives, have fled from their own country” (see Amuur, cited above, § 43); and the length of the detention should not exceed that reasonably required for the purpose pursued.”Para. 84: “The Chamber found a violation of this provision, on the grounds that the reason for detention was not given sufficiently “promptly”. It found that general statements – such as the parliamentary announcements in the present case – could not replace the need under Article 5 § 2 for the individual to be informed of the reasons for his arrest or detention.”  |

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| [***Suso Musa v. Malta***](http://hudoc.echr.coe.int/eng?i=001-122893), ECtHR, Application No. 42337/12, Judgment of 23 July 2013 Facts: This case concerned an asylum seeker from Sierra Leone. The applicant complained in particular that his detention had been unlawful and that he had not had an effective means to have the lawfulness of his detention reviewed. Analysis: Examining the applicant’s complaints of unlawful detention and lack of access to effective remedies, the Court found a violation of articles 5.1 and 5.4 of the Convention.*61. The Court finds it appropriate to point out that, as the applicant and the third-party intervener have submitted, had these remedies been effective in terms of their scope and speed, issues in relation to accessibility might also arise, particularly in respect of constitutional court proceedings. The Court notes the apparent lack of a proper system enabling immigration detainees to have access to effective legal aid. Indeed, the fact that the Government were able to supply only one example of a detainee under the Immigration Act making use of legal aid – despite the thousands of immigrants who have reached Maltese shores and have subsequently been detained in the past decade and who, as submitted by the Government, have no means of subsistence – appears merely to highlight this deficiency. 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 (…).* |

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| [*Amuur v. France*](http://hudoc.echr.coe.int/eng?i=001-57988)*,* ECtHR, Application No. 19776/92, Judgment of 25 June 199650.   … In laying down that any deprivation of liberty must be effected "in accordance with a procedure prescribed by law", Article 5 para. 1 (art. 5-1) primarily requires any arrest or detention to have a legal basis in domestic law. However, these words do not merely refer back to domestic law; … , they also relate to the quality of the law, requiring it to be compatible with the rule of law, a concept inherent in all the Articles of the Convention. In order to ascertain whether a deprivation of liberty has complied with the principle of compatibility with domestic law, it therefore falls to the Court to assess not only the legislation in force in the field under consideration, but also the quality of the other legal rules applicable to the persons concerned.  Quality in this sense implies that where a national law authorises deprivation of liberty - especially in respect of a foreign asylum-seeker - it must be sufficiently accessible and precise, in order to avoid all risk of arbitrariness. These characteristics are of fundamental importance with regard to asylum-seekers at airports, particularly in view of the need to reconcile the protection of fundamental rights with the requirements of States’ immigration policies. |

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| [**UNHCR Guidelines on Detention**](http://www.unhcr.org/publications/legal/505b10ee9/unhcr-detention-guidelines.html)Guideline 4.1 further specifies the grounds allowing for detention of asylum-seekers:* to protect public order:
	+ to prevent absconding and/or in cases of likelihood of non-cooperation;
	+ in connection with accelerated procedures for manifestly unfounded or clearly abusive claims;
	+ for initial identity and/or security verification;
	+ in order to record, within the context of a preliminary interview, the elements on which the application for international protection is based, which could not be obtained in the absence of detention;
* to protect public health;
* to protect national security.

Guideline 4.2: Detention can only be resorted to when it is determined to be necessary, reasonable in all the circumstances and proportionate to a legitimate purposeGuideline 4.3: Alternatives to detention need to be consideredGuideline 5: Detention must not be discriminatory |

The Guidelines stipulate that detention of asylum-seekers for other purposes, such as to deter future asylum-seekers, or to dissuade asylum-seekers from pursuing their claims, or for punitive or disciplinary reasons, is contrary to the norms of refugee law.

*EU law*

The [Reception Conditions Directive](http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32013L0033&from=NL) (2013/33/EU, RCD) states in its article 8.3 that:

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| An applicant may be detained only:

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| (a) | in order to determine or verify his or her identity or nationality; |

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| (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; |

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| (c) |  in order to decide, in the context of a procedure, on the applicant’s right to enter the territory; |

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| (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)](http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32013L0033#ntr9-L_2013180EN.01009601-E0009), 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; |

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| (e) | when protection of national security or public order so requires; |

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| (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)](http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32013L0033#ntr10-L_2013180EN.01009601-E0010). |

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

According to article 8 of the Reception Conditions Directive (2013/33/EU) and to article 26 of the [Asylum Procedures Directive](http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32013L0032&from=NL) (2013/32/EU), it is not lawful to detain a person solely for the reason that she or he has lodged an asylum application.

It is also not permissible to detain a person for the sole reason that he or she is subject to the Dublin Regulation (article 28.1 of the regulation). Exhaustive Regulation-compliant grounds for the detention of asylum seekers are listed in Article 8.3 of the Reception Conditions Directive. Asylum seekers may be detained in six different situations:

* to determine or verify the applicant’s identity or nationality;
* to determine elements of the asylum application, which could not be obtained in the absence of detention, in particular where there is a risk of absconding;
* to decide on the applicant’s right to enter the territory;
* if they are detained under the Return Directive and submit an asylum application to delay or frustrate the removal;
* when the protection of national security or public order so requires;
* and in accordance with Article 28 of the Dublin Regulation, which under certain conditions allows detention to secure transfer procedures under the Regulation.

The CJEU has clarified that the risk of absconding which is one of the grounds permitting detention under the Dublin Regulation must be clearly defined in national law. In the absence of such definition in national legislation, this ground cannot be used to justify detention under the Dublin Regulation (Case C-528/15, 15 March 2017, *Al Chodor*).[[19]](#footnote-20)

It should be underscored that grounds of detention which may superficially comply with EU Regulations and Directives still need to be consistent with other international legal obligations, including under the regional and universal human rights and refugee treaties.

#### Alternatives to detention

*International law*

The decision [to detain] “…must take into account less invasive means of achieving the same ends, such as reporting obligations, sureties or other conditions to prevent absconding; and must be subject to periodic re-evaluation and judicial review.[[20]](#footnote-21)” To establish the necessity and proportionality of detention in accordance with Article 9 ICCPR, it must be shown that other less intrusive measures have been considered and found to be insufficient. In *C v. Australia,[[21]](#footnote-22)* the Human Rights Committee found a violation of article 9.1 ICCPR on the basis that the State did not consider less intrusive means, such as “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 … arbitrary and constituted a violation of Article 9.1”.

The ECtHR has held that in the application of Article 5.1(f) ECHR, particular consideration must be given to alternatives to detention for vulnerable persons or groups, for the detention to be in good faith and free from arbitrariness. In *M.S.S. v. Belgium and Greece*, the Grand Chamber held that even short periods of detention of four days and one week could not be regarded as insignificant because the “applicant, being an asylum seeker, was particularly vulnerable because of everything he had been through during his migration and the traumatic experiences he was likely to have endured previously”.[[22]](#footnote-23) While this consideration was expressed in the context of detention in light of article 3 ECHR, it should equally apply to the assessment of whether the detention was arbitrary in light of article 5.1(f).

The *UNHCR Guidelines* on detention of asylum seekers state in Guideline 4.3 that “alternatives to detention need to be considered”.

Under EU law, detention must be a last resort and all alternatives must first be exhausted, unless such alternatives cannot be applied effectively in the individual case (article 8.2 of the recast Reception Conditions Directive (2013/33/EU), article 18.2 of the Dublin Regulation.

In Article 8.4, the recast Reception Conditions Directive obliges states to lay down rules for alternatives to detention in national law.

Alternatives to detention may include: reporting obligations, such as reporting to the police or immigration authorities at regular intervals; the obligation to surrender a passport or travel document; residence requirements, such as living and sleeping at a particular address; release on bail with or without sureties; guarantor requirements; release to care worker support or under a care plan with community care or mental health teams; or electronic monitoring, such as tagging.

# **B. Detention of applicants with specific vulnerabilities**

Detention of persons rendered vulnerable by their age, state of health or past experiences may, depending on the individual circumstances of the case, amount to cruel, inhuman or degrading treatment (violation of Article 3 ECHR, Article 7 ICCPR, CAT).

In particular:

* Asylum seekers, who may have suffered torture or ill-treatment or other traumatic experiences, sometimes with physical or mental health implications[[23]](#footnote-24)
* Persons with disabilities (UN Convention on the rights of persons with disabilities)
* Survivors of torture or trafficking[[24]](#footnote-25)
* Children[[25]](#footnote-26)
* Elderly persons[[26]](#footnote-27)

The Convention on the rights of persons with disabilities states in its article 14(2):

“States Parties shall ensure that if persons with disabilities are deprived of their liberty through any process, they are, on an equal basis with others, entitled to guarantees in accordance with international human rights law and shall be treated in compliance with the objectives and principles of the present Convention, including by provision of reasonable accommodation.”

*EU law*

Article 21 of the recast Reception Conditions Directive (2013/33/EU) lists persons considered to be vulnerable. It does not bar the detention of vulnerable persons, but when they are detained, article 11 of the Reception Conditions Directive requires that detailed attention be paid to their particular situation. This article also contains specific provisions for minors, who are only to be detained as a measure of last resort. All efforts must be made to release and place them in accommodation that is suitable for children. Unaccompanied minors seeking asylum must only be detained in exceptional circumstances and never placed in prison accommodation.

### Detention of children

Migrant children should be first and foremost **treated as children**. Persons who claim to be children should be treated as such until proven otherwise.[[27]](#footnote-28)

Detention of a child should be only as a **last resort and for the shortest** appropriate period of time.[[28]](#footnote-29)

In all actions relating to children an assessment of the child’s **best interests** must be undertaken separately and prior to a decision that will impact that child’s life (article 3 CRC, article 24.2 EU Charter).

“States parties [to the CRC and CMW] should assess and determine the best interests of the child at the different stages of migration and asylum procedures that could result in the detention or deportation of the parents due to their migration status. Best-interests determination procedures should be put in place in any decision that would separate children from their family, and the same standards applied in child custody, when the best interests of the child should be a primary consideration.”[[29]](#footnote-30)

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| [Joint general comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 (2017) of the Committee on the Rights of the Child on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return](http://tbinternet.ohchr.org/Treaties/CMW/Shared%20Documents/1_Global/CMW_C_GC_4-CRC_C_GC_23_8362_E.pdf) 10. Article 37 (b) of the Convention of the Rights of the Child establishes the general principle that a child may be deprived of liberty only as a last resort and for the shortest appropriate period of time. However, offences concerning irregular entry or stay cannot under any circumstances have consequences similar to those derived from the commission of a crime. Therefore, the possibility of detaining children as a measure of last resort, which may apply in other contexts such as juvenile criminal justice, is not applicable in immigration proceedings as it would conflict with the principle of the best interests of the child and the right to development. 11. Instead, States should adopt solutions that fulfil the best interests of the child, along with their rights to liberty and family life, through legislation, policy and practices that allow children to remain with their family members and/or guardians in non-custodial, community-based contexts while their immigration status is being resolved and the children’s best interests are assessed, as well as before return. When children are unaccompanied, they are entitled to special protection and assistance by the State in the form of alternative care and accommodation in accordance with the Guidelines for the Alternative Care of Children. When children are accompanied, the need to keep the family together is not a valid reason to justify the deprivation of liberty of a child. When the child’s best interests require keeping the family together, the imperative requirement not to deprive the child of liberty extends to the child’s parents and requires the authorities to choose non-custodial solutions for the entire family.12. Consequently, child and family immigration detention should be prohibited by law and its abolishment ensured in policy and practice. Resources dedicated to detention should be diverted to non-custodial solutions carried out by competent child protection actors engaging with the child and, where applicable, his or her family. The measures offered to the child and the family should not imply any kind of child or family deprivation of liberty and should be based on an ethic of care and protection, not enforcement. They should focus on case resolution in the best interests of the child and provide all the material, social and emotional conditions necessary to ensure the comprehensive protection of the rights of the child, allowing for children’s holistic development. Independent public bodies, as well as civil society organizations, should be able to regularly monitor these facilities or measures. Children and families should have access to effective remedies in case any kind of immigration detention is enforced.  |

The UN Committee on the Rights of the Child, the UN Special Rapporteur on the human rights of migrants[[30]](#footnote-31) and the Parliamentary Assembly of the Council of Europe[[31]](#footnote-32) all make it clear that immigration detention of migrant children is **not in their best interest** and that detention of vulnerable individuals, including unaccompanied children is prohibited in international law.

It cannot be in the best interests of a child for he or she to be detained because of their or their parents’ immigration status.[[32]](#footnote-33)

National authorities are obliged to place children in appropriate alternative accommodation. In any exceptional cases where children are detained, whether they are unaccompanied or with their families, the conditions of detention must be appropriate and the best interests of the child must guide all decisions concerning the detention.[[33]](#footnote-34)

The European Court for Human Rights jurisprudence makes it clear that in cases of children, the authorities must make an assessment of **necessity and proportionality and last resort** (see *Popov v. France* and *Rahimi v. Greece op. cit.*).

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| [*Popov v. France*](http://hudoc.echr.coe.int/eng?i=001-108710), ECtHR, Application Nos. 39472/07 and 39474/07, Judgment of 19 January 2012118. It is well established in the Court’s case-law under the sub-paragraphs of Article 5 § 1 that any deprivation of liberty must, in addition to falling within one of the exceptions set out in sub-paragraphs (a)-(f), be “lawful” (…). The Court has already stated, in two cases concerning similar facts, that there must be some relationship between the ground of permitted deprivation of liberty relied on and the place and conditions of detention (…); lastly, the length of the detention should not exceed that reasonably required for the purpose pursued (…).119. In the present case, the members of the family were held in administrative detention on account of the illegality of their presence in France, on premises that were not adapted to the children’s extreme vulnerability (…). The Court finds, as in the above-cited case of Muskhadzhivyeva and Others, that, in spite of the fact that they were accompanied by their parents, and even though the detention centre had a special wing for the accommodation of families, the children’s particular situation was not examined and the authorities did not verify that the placement in administrative detention was a measure of last resort for which no alternative was available. The Court thus finds that the French system did not sufficiently protect their right to liberty.120. As regards the parents, however, the Court observes that Article 5 § 1 (f) does not demand that the detention of a person against whom action is being taken with a view to deportation be reasonably considered necessary (see Chahal, cited above, § 112).121. Consequently, the Court finds that there has been a violation of Article 5 § 1 (f) of the Convention in respect of the children. (…)124. However, the Court notes that the law does not provide for the possibility of placing minors in administrative detention. As a result, children “accompanying” their parents find themselves in a legal vacuum, preventing them from using any remedies available to their parents. In the present case, there had been no order of the prefect for their removal that they could have challenged before the courts. Similarly, there had been no decision ordering their placement in administrative detention and the liberties and detention judge was therefore unable to review the lawfulness of their presence in the administrative detention centre. The Court thus finds that they were not guaranteed the protection required by the Convention.125. Accordingly, there has been a violation of Article 5 § 4 of the Convention in respect of the children. |

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| [***Rahimi v. Greece***](http://hudoc.echr.coe.int/eng?i=001-104367), ECtHR, Application No. 8687/08, Judgment of 5 July 2011Facts: This case concerned in particular the conditions in which a minor, a migrant from Afghanistan, who had entered Greece illegally, was held in the Pagani detention centre on the island of Lesbos and subsequently released with a view to his expulsion. Analysis: The Court held that there had been a violation of Article 3 of the Convention in respect of the applicant’s conditions of detention in the Pagani detention centre. Different factors gave cause to doubt the authorities’ good faith in executing the detention measure, in violation of Article 5.1(f). Moreover, even assuming that the remedies had been effective, the Court failed to see how the applicant could have exercised them, and found a violation of Article 5.4.*Para. 108: “Il n'en reste pas moins qu'en l'espèce, la décision de la mise en détention du requérant apparaît comme le résultat de l'application automatique de l'article 76 de la loi no 3386/2005, sans que sa situation particulière de mineur non accompagné soit examinée […]”**Para. 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.”* |

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| Several cases have highlighted the unlawfulness of detention, even where the child in question was accompanied by a parent: In [***Muskhadzhiyeva and Others v. Belgium***](http://hudoc.echr.coe.int/eng?i=002-1144)*,[[34]](#footnote-35)* the ECtHR ruled that the month-long detention in a closed transit centre of a mother and her four children, aged between seven months and seven years, constituted a violation of article 3 of the ECHR. In reaching its conclusions, the Court drew attention to the fact that the centre was “ill-equipped to receive children”, with serious consequences for their mental health.[***Popov v. France***](http://hudoc.echr.coe.int/eng?i=001-108710)*[[35]](#footnote-36)* concerns the administrative detention of a family for two weeks pending their deportation to Kazakhstan, confirms this ruling. The ECtHR found a violation of article 3 of the ECHR insofar as the French authorities had not measured the inevitably harmful effects on the two children (who were five months and three years old) of being held in a detention centre in conditions that were “ill-adapted to the presence of children”.The Court also found a violation of article 5 and article 8 in respect of the whole family and referred to article 37 of the CRC, which provides that “[e]very 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”. Similarly, in [***Kanagaratnam v. Belgium***](http://hudoc.echr.coe.int/eng?i=001-107895)*[[36]](#footnote-37)* the detention of an asylum-seeking mother and her three children in a closed centre for aliens in an irregular situation for four months amounted to a breach of articles 3 and 5 of the ECHR. Despite the fact that the children had been accompanied by their mother, the Court considered that, by placing them in a closed centre, the Belgian authorities had exposed them to feelings of anxiety and inferiority and had, in full knowledge of the facts, risked compromising their development.  |

Restrictions on residence may also raise issues in regard to the right to respect for family life, where they serve to separate members of a family.[[37]](#footnote-38)

***See also:***

* [Mubilanzila Mayeka and Kaniki Mitunga v. Belgium](http://hudoc.echr.coe.int/eng?i=001-77447), ECtHR, Application No. 13178/03, Judgment of 12 January 2007.

*EU law*

Article 24 [EU Charter](http://bit.ly/1cOIKR4)[[38]](#footnote-39) provides that children shall have the right to such protection and care as is necessary for their well-being. They may express their views freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity (para. 1). In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration (para. 2).

See also article 11.2 Reception Conditions Directive stating that: “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 (…) 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.”

The Directive equally states in paragraph 3 that “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.”

The detention conditions of asylum seekers are regulated in article 10 of the recast Reception Conditions Directive (2013/33/EU), with specific provisions for vulnerable persons included in article 11.

### Detainees with mental disorders

Detainees who are mentally ill or who are disturbed as a result of traumatic experiences require particular consideration where they are held in immigration detention. Their detention raises questions as to (a) whether the person should be detained at all or whether more suitable alternatives can be found; and, if detention is warranted, (b) the appropriate form of detention, conditions of detention, and provision of medical care.[[39]](#footnote-40)

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| [*Dybeku v Albania*](http://hudoc.echr.coe.int/eng?i=001-84028), ECtHR, Application no. 41153/06, Judgment of 2 June 2008, paras. 47 and 51.In Dybeku v Albania, the ECtHR found that the feeling of inferiority and powerlessness, which is typical of persons who suffer from a mental disorder, calls for increased vigilance in reviewing whether the Convention has been complied with.It found that the applicant’s specific medical condition (a chronic mental disorder) made him more vulnerable in detention, which exasperated his feelings of distress and fear. Given the fact that no action was taken to improve the conditions, and given the state of the conditions that the applicant was subjected to, the Court found a breach of Article 3. It found that considering ‘the nature, duration and severity of the ill-treatment to which the applicant was subjected and the cumulative negative effects on his health are sufficient to be qualified as inhuman and degrading’. |

Where the mental health condition of a detainee is caused or exacerbated by his or her detention, and where the authorities are aware of such conditions, continued detention may amount to cruel, inhuman or degrading treatment. In *C v. Australia* the Human Rights Committee found a violation of article 7 ICCPR as a result of the prolonged detention of a person with serious psychiatric illness which the authorities knew had come about as the result of his detention and which by the time of his eventual release, was so serious as to be irreversible.

### Detainees with serious illnesses

Cases of seriously physically ill persons have been considered by the ECtHR. In the case of Yoh-Ekale Mwanje v. Belgium,[[40]](#footnote-41) the ECtHR observed that the applicant had a serious and incurable disease, which the Belgian authorities were aware of, and which had worsened while she was detained. There was a delay in the applicant being examined by hospital specialists and in administering appropriate treatment. The Court considered that the authorities had not acted with due diligence in taking all measures reasonably expected of them to protect the applicant’s health and prevent its deterioration whilst she was detained. This exposed her to suffering over and above that expected for someone detained, with HIV, facing deportation, which constituted inhuman and degrading treatment.

### People with disabilities

Where disabled people are detained, measures are taken to ensure that conditions of detention are appropriate to their level of disability.[[41]](#footnote-42) Under Article 14 Convention on the Rights of Persons with Disabilities, States parties must “ensure that if persons with disabilities are deprived of their liberty they are, on an equal basis with others, entitled to guarantees in accordance with international human rights law and shall be treated in compliance with the objectives and principles of this Convention, including by provision of reasonable accommodation.” Article 2 of that Convention defines reasonable accommodation as “all means necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.”

### Survivors of torture

Asylum seekers should be screened at the outset of their detention to identify torture victims and traumatized persons among them so that appropriate treatment and conditions can be provided for them.[[42]](#footnote-43)

Being a victim of torture/traumatized asylum seeker is a personal circumstance, which has to be taken into account when examining the necessity of detention. Detaining someone who is a victim of torture/traumatized asylum seeker might have severe consequences on his/her mental health,[[43]](#footnote-44) which might be disproportionate to any legitimate objective pursued by the government when detaining such a person.

According to UNHCR’s detention guidelines (guideline 9.1), victims of torture and other serious physical, psychological or sexual violence also need special attention and should generally not be detained.

### Women detainees

Women held in immigration detention often face particular difficulties. These may include instances of gender-based violence or harassment, including sexual violence and abuse, perpetrated by both State actors and detainees; absence of childcare; inadequate and inappropriate provision of healthcare, goods and services needed by women; as well as other forms of gender discrimination.

According to UNHCR Guidelines on detention (guideline 9.3) pregnant women and nursing mothers should not be detained.[[44]](#footnote-45) Alternative arrangements should take into account the particular needs of women, including safeguards against sexual and gender-based violence and exploitation. Alternatives to detention would need to be pursued in particular when separate facilities for women and/or families are not available.

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| [*O.M. v. Hungary*](http://hudoc.echr.coe.int/eng?i=001-164466)*,* ECtHR, Application No. 9912/15, Judgment 5 July 201653. Lastly, the Court considers that, in the course of placement of asylum seekers who claim to be a part of a vulnerable group in the country which they had to leave, the authorities should exercise particular care in order to avoid situations which may reproduce the plight that forced these persons to flee in the first place. In the present case, the authorities failed to do so when they ordered the applicant’s detention without considering the extent to which vulnerable individuals – for instance, LGBT people like the applicant – were safe or unsafe in custody among other detained persons, many of whom had come from countries with widespread cultural or religious prejudice against such persons. Again, the decisions of the authorities did not contain any adequate reflection on the individual circumstances of the applicant, member of a vulnerable group by virtue of belonging to a sexual minority in Iran (see, *mutatis mutandis*, *Alajos Kiss v. Hungary*, no. [38832/06](http://hudoc.echr.coe.int/eng#%257B%2522appno%2522:%255B%252238832/06%2522%255D%257D), § 42, 20 May 2010).54. As a consequence, in the absence of a specific and concrete legal obligation, which the applicant failed to satisfy, Article 5 § 1 (b) of the Convention cannot convincingly serve as a legal basis for his asylum detention. The foregoing considerations, demonstrating that the applicant’s detention verged on arbitrariness, enable the Court to conclude that there was a violation of Article 5 § 1 of the Convention in the period from 7 p.m. on 25 June to 22 August 2014 (see, *mutatis mutandis*, *Blokhin v. Russia* [GC], no. [47152/06](http://hudoc.echr.coe.int/eng#%257B%2522appno%2522:%255B%252247152/06%2522%255D%257D), § 172, ECHR 2016). |

# **C. Duration of detention**

*International law*

Under international law, the permissible duration of detention, including for the purposes of article 5.1(f) of the ECHR will need take account of national law together with an assessment of the particular facts of the case. Time limits are an essential component of precise and foreseeable law governing the deprivation of liberty.

Both the ICCPR and the ECHR require that where detention is permitted at all, the length of detention must be as short as possible, and the more detention is prolonged, the more it is likely to become arbitrary.[[45]](#footnote-46)

“States parties … need to show that detention does not last longer than absolutely necessary, that the overall length of possible detention is limited and that they fully respect the guarantees provided for by article 9 in all cases.” [[46]](#footnote-47)

“Childrenshould not be deprived of liberty, except as a measure of last resort and for the shortest appropriate period of time, taking into account their best interests as a primary consideration with regard to the duration and conditions of detention, and also taking into account the extreme vulnerability and need for care of unaccompanied minors.”[[47]](#footnote-48)

Excessive length of detention, or uncertainty as to its duration, may also constitute cruel, inhuman or degrading treatment, and the Committee against Torture has repeatedly warned against the use of prolonged or indefinite detention in the immigration context.

See also:

[*Saadi v. United Kingdom*](http://hudoc.echr.coe.int/eng?i=001-84709), ECtHR, Application No. 13229/03, Judgment of 29 January 2008, para. 74.

[*Louled Massoud v. Malta*](http://hudoc.echr.coe.int/eng?i=001-100143), ECtHR, Application No. 24340/08, Judgment of 27 July 2010.

* [*Mohamad v. Greece*](http://hudoc.echr.coe.int/eng?i=001-148927), ECtHR, Application No. 70586/11, Judgment of 11 December 2014.

*EU law*

For asylum seekers article 9.1 of the revised Reception Conditions Directive as well as Article 28.3 of the [Dublin III Regulation](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:180:0031:0059:EN:PDF)[[48]](#footnote-49) stipulate that detention must be for the shortest period possible. Reduced time limits for submitting and responding to transfer requests apply when asylum seekers are detained under the Dublin Regulation.

# **D. Procedural safeguards in detention**

## 1. Information on reasons for detention

Although article 5.2 ECHR refers expressly only to the provision of reasons for “arrest”, the European Court of Human Rights has held that this obligation applies equally to all persons deprived of their liberty through detention, including immigration detention, as an integral part of protection of the right to liberty.[[49]](#footnote-50)

Article 5.2 ECHR

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.

Article 9.2 ICCPR

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.

The Human Rights Committee has stressed that “one major purpose of requiring that all arrested persons be informed of the reasons for the arrest is to enable them to seek release if they believe that the reasons given are invalid or unfounded; and that the reasons must include not only the general basis of the arrest, but enough factual specifics to indicate the substance of the complaint”, bearing consequences for the respect of the detainee’s right to *habeas corpus*.

Human Rights Committee, General Comment No.35:

“(...) ‘arrest’ means the commencement of a deprivation of liberty, that requirement applies regardless of the formality or informality with which the arrest is conducted and regardless of the legitimate or improper reason on which it is based.[[50]](#footnote-51) For some categories of vulnerable persons, directly informing the person arrested is required but not sufficient. When children are arrested, notice of the arrest and the reasons for it should also be provided directly to their parents, guardians, or legal representatives.”[[51]](#footnote-52)

The right to be informed of reasons for detention is also affirmed by international standards and guidelines relating to the detention of migrants and asylum seekers. The *Body of Principles for the Protection of all persons deprived of their liberty* provides in Principle 11.2 that: “a detained person and his counsel, if any, shall receive prompt and full communication of any order of detention, together with the reasons therefor.” Principle 13 provides that at the commencement of detention, or promptly thereafter, a detained person should be provided with information on and an explanation of his or her rights and how to avail himself of such rights.

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| [***Abdolkhani and Karimnia v. Turkey***](http://hudoc.echr.coe.int/eng?i=001-94127), Application No. 30471/08, Judgment of 22 September 2009Facts: The applicants, Iranian nationals and former members of the People’s Mojahedin Organisation in Iran, were being held, at the time of their application, in Gaziosmanpaşa Foreigners’ Admission and Accommodation Centre in Kırklareli (Turkey).Analysis: The applicants, who had been recognised as refugees by UNHCR, faced risk of ill-treatment contrary to article 3 upon Turkey’s proposed deportation of them to either Iran or Iraq. They had no effective opportunity to make an asylum claim or challenge their deportation, in contravention of article 13. Further their detention had no legal justification, the reasons for their detention were never communicated to them and they had been unable to challenge the detention’s lawfulness, in violation of Articles 5.1, 5.2 and 5.4.*Para. 135: “In sum, in the absence of clear legal provisions establishing the procedure for ordering and extending detention with a view to deportation and setting time-limits for such detention, the deprivation of liberty to which the applicants were subjected was not circumscribed by adequate safeguards against arbitrariness […]”**Para. 136: “In the absence of a reply from the Government and any document in the case file to show that the applicants were informed of the grounds for their continued detention, the Court is led to the conclusion that the reasons for the applicants’ detention from 23 June 2008 onwards were never communicated to them by the national authorities.”**Para. 142: “[…] the Court concludes that Turkish legal system did not provide the applicants with a remedy whereby they could obtain judicial review of the lawfulness of their detention […]”* |

Reasons for detention must be provided promptly. Although whether information is conveyed sufficiently promptly will depend on the individual circumstances of each case, they should in general be provided within hours of detention.

Human Rights Committee, General Comment No.35:

“That information [reasons for detention] must be provided immediately upon arrest. However, in exceptional circumstances, such immediate communication may not be possible. For example, a delay may be required before an interpreter can be present, but any such delay must be kept to the absolute minimum necessary.”[[52]](#footnote-53)

A “bare indication of the legal basis” for the detention is not sufficient; in addition, there must also be some indication of the factual basis for the detention.[[53]](#footnote-54)

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| [*Čonka v. Belgium*](http://hudoc.echr.coe.int/eng?i=001-60026), ECtHR, Application No. 51564/99, Judgment of 5 February 2002Para. 50“(…) in simple, non-technical language that he can understand, [of] the essential legal and factual grounds for his arrest so as to be able, if he sees fit, to apply to a court to challenge its lawfulness in accordance with paragraph 4.” |

The responsibility of the State to inform the detainee of the grounds for detention is not discharged where the detainee has managed to infer from the circumstances or various sources, the basis for the detention. In such circumstances, there remains an obligation on the State to provide the information.[[54]](#footnote-55)

*EU law*

The recast Reception Conditions Directive (2013/33/EU, article 9) and article 26.2 of the Asylum Procedures Directive include safeguards for asylum seekers.

Article 9.2 of the revised Reception Conditions Directive requires authorities to order detention of asylum seekers in writing and provide reasons in fact and in law and Article 9.4 requires Member States to immediately inform applicants of the detention order “in a language which they understand or are reasonably supposed to understand. They should also be informed of 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.”

## 2. Judicial review of the detention order

The right to challenge the lawfulness of detention judicially, protected by article 9.4 ICCPR and article 5.4 ECHR, is a fundamental protection against arbitrary detention, as well as against torture or ill-treatment in detention.

This right is of vital importance to detained migrants, in particular where no clear individualized grounds for detention have been disclosed to the detainee or to his or her lawyer. Since the right to judicial review of detention must be real and effective rather than merely formal, its consequence is that systems of mandatory detention of migrants or classes of migrants are necessarily incompatible with international human rights standards.

### Requirements of effective judicial review of detention

For a judicial review to meet international human rights law, it must fulfil a number of requirements.

* **The review must be clearly prescribed by law**. Both the law permitting detention, and the procedure for its review must be sufficiently certain, in theory and in practice, to allow a court to exercise effective judicial review of the permissibility of the detention under national law, and to ensure that the review process is accessible.
* **The review of detention must be accessible to all persons detained, including children**. In *Popov v. France*, the European Court of Human Rights found a violation of article 5.4 ECHR in respect of children detained in an immigration centre with their parents because “the law [did] not provide for the possibility of placing minors in administrative detention. As a result, children 'accompanying' their parents [found] themselves in a legal vacuum, preventing them from using any remedies available to their parents.” In addition to establishing when detention is permissible, the law must prescribe a specific legal process for review of the legality of detention, separate from the legal process leading to a decision to deport. In the absence of such a separate procedure, there will be no means of redress for an initially legitimate detention that becomes illegitimate, for example where a deportation is initially being pursued but is later suspended.
* **The review must be done by an independent and impartial judicial body.** This reflects the general standard of the right to a fair hearing, which is given more specific expression in guarantees relating to judicial review of detention. Exceptionally, for some forms of detention, legislation may provide for proceedings before a specialized tribunal, which must be established by law and must either be independent of the executive and legislative branches or enjoy judicial independence in deciding legal matters in proceedings that are judicial in nature.[[55]](#footnote-56)
* **The review must be of sufficient scope and have sufficient powers to be effective**. The scope of the judicial review required will differ according to the circumstances of the case and to the kind of deprivation of liberty involved. The European Court of Human Rights has held that the review should, however, be wide enough to consider the conditions which are essential for lawful detention. The review must be by a body which is more than merely advisory, and which has power to issue legally binding judgments capable of leading, to release. The Human Rights Committee has repeatedly emphasised that judicial review requires real and not merely formal review of the grounds and circumstances of detention, judicial discretion to order release. In *A v. Australia,[[56]](#footnote-57)* it found that allowing the court to order release of detainees only if they did not fall within a particular category of people was insufficient to provide an effective judicial review of detention. Article 9(4)] requires that the reviewing court must have the power to order release from the unlawful detention. When a judicial order of release (…) becomes operative (…), it must be complied with immediately, and continued detention would be arbitrary in violation of article 9.1 ICCPR.[[57]](#footnote-58)
* Persons deprived of liberty are entitled not merely to take proceedings, but to **receive a decision**, and without delay.[[58]](#footnote-59)
* **The review must meet standards of due process**. Although it is not always necessary that the review be attended by the same guarantees as those required for criminal or civil litigation, it must have a judicial character and provide guarantees appropriate to the type of deprivation of liberty in question ([*Bouamar v. Belgium*](http://hudoc.echr.coe.int/eng?i=001-57444)).[[59]](#footnote-60) Thus, proceedings must be adversarial and must always ensure guarantees as those required for cries. Legal assistance must be provided to the extent necessary for an effective application for release. Where detention may be for a long period, procedural guarantees should be close to those for criminal procedures .
* Unlawful detention includes detention that **was lawful at its inception** but has become unlawful because (…) the circumstances that justify the detention have changed.[[60]](#footnote-61)
* **The review must be prompt**. What is a reasonable time for judicial review of detention to take place will depend on the circumstances. The right to bring proceedings applies in principle from the moment of arrest and any substantial waiting period before a detainee can bring a first challenge to detention is impermissible.[[61]](#footnote-62) The Human Rights Committee found in *Mansour Ahani v. Canada* that a delay of nine and a half months to determine lawfulness of detention subject to a security certificate violated Article 9.4 ICCPR. However, in the same case a delay of 120 days before a later detention pending deportation could be challenged was permissible.In *ZNS v. Turkey,* the European Court of Human Rights held that, where it took two months and ten days for the courts to review detention, in a case that was not complex, the right to speedy review of detention was violated.

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| [**Z.N.S. v. Turkey**](http://hudoc.echr.coe.int/eng?i=001-96773), Application No. 21896/08, 19 January 2010Facts: The applicant, an Iranian national, converted to Protestantism after she had entered Turkey. She was arrested on suspicion of infringement of visa requirements and forging official documents and was detained with a view to deportation. The applicant repeatedly requested to be released from detention and given a temporary residence permit pending the outcome of her application for refugee status to the UNHCR, stating that she was against the Government in Iran and that she and her family had been oppressed in that country. She was transferred to the Kırklareli Centre and was informed that her case before the Turkish authorities was suspended pending the proceedings before the ECtHR. The applicant and her son were then granted refugee status, but a request against the decision not to suspend her detention was rejected and this decision was upheld by the regional court.Analysis: The Court found that there were substantial grounds for accepting that, on account of her religion, the applicant would risk being subjected to inhuman treatment if removed to her country of origin, in violation of article 3. The Court also found a violation of article 5.1 of the Convention, as the detention - in the absence of clear legal provisions in Turkey on the procedure for ordering and extending detention with a view to deportation and setting time-limits for such detention - constituted a deprivation of liberty which was not “lawful” for the purposes of article 5. The Court also found a violation of Article 5.4 of the Convention as the Turkish legal system had not provided the applicant with a remedy allowing her to obtain a speedy judicial review of her detention.*Para. 56:  “The Court reiterates that it has already examined the same grievance in the case of Abdolkhani and Karimnia (cited above, §§ 125-135). It found that the placement of the applicants in the Kırklareli Foreigners' Admission and Accommodation Centre in that case constituted a deprivation of liberty and concluded that, in the absence of clear legal provisions establishing the procedure for ordering and extending detention with a view to deportation and setting time-limits for such detention, the deprivation of liberty to which the applicants were subjected was not “lawful” for the purposes of Article 5 of the Convention.”**Para. 63: “Accordingly, the Court concludes that Turkish legal system did not provide the applicant with a remedy whereby she could obtain speedy judicial review of the lawfulness of her detention, within the meaning of Article 5 § 4 of the Convention (see S.D. v. Greece, no. 53541/07, § 76, 11 June 2009; and Abdolkhani and Karimnia, cited above, § 142).”* |

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| [***Mansour Ahani v. Canada***](http://hrlibrary.umn.edu/undocs/html/1051-2002.html), HRC, Communication No. 1051/2002, Views of 15 June 2004, UN Doc. CCPR/C/80/D/1051/2002 Facts: After he was accepted by Canada as a refugee, the applicant was designated as a suspected terrorist and assassin by Canadian authorities, who detained him and initiated deportation proceedings. The applicant exhausted every available recourses under Canadian law to avoid being returned to Iran, where he alleged he would be tortured and executed. He then petitioned the Human Rights Committee on but was deported by Canadian authorities despite the Committee’s request for interim measures of protection and before the Committee could deliver its views on his communication. Analysis: The Committee determined that Canada had violated its obligations under the International Covenant on Civil and Political Rights (ICCPR) in failing to provide the applicant with timely judicial review of his detention and the appropriate procedural safeguards in the proceedings that led to his expulsion.*Para. 10.2: As to the claims under article 9 concerning arbitrary detention and lack of access to court, the Committee notes the author's argument that his detention pursuant to the security certificate as well as his continued detention until deportation was in violation of this article. The Committee observes that, while the author was mandatorily taken into detention upon issuance of the security certificate, under the State party's law the Federal Court is to promptly, that is within a week, examine the certificate and its evidentiary foundation in order to determine its "reasonableness". In the event that the certificate is determined not to be reasonable, the person named in the certificate is released. […] The Committee observes, however, that when judicial proceedings that include the determination of the lawfulness of detention become prolonged the issue arises whether the judicial decision is made "without delay" as required by the provision, unless the State party sees to it that interim judicial authorization is sought separately for the detention. In the author's case, no such separate authorization existed although his mandatory detention until the resolution of the "reasonableness" hearing lasted four years and ten months. […] Consequently, there has been a violation of the author’s rights under article 9, paragraph 4, of the Covenant. 10.4 As to the author's later detention, after the issuance of a deportation order in August 1998, for a period of 120 days before becoming eligible to apply for release, the Committee is of the view that such a period of detention in the author's case was sufficiently proximate to a judicial decision of the Federal Court to be considered authorized by a court and therefore not in violation of article 9, paragraph 4.”* |

In *Shakurov v. Russia*,[[62]](#footnote-63) the Court held that delays of thirteen and thirty-four days to examine appeals against detention orders in non-complex cases were in breach of article 5.4 ECHR. In *Embenyeli v. Russia*, where it took five months to process a review of detention, there had also been a violation of Article 5.4.

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| [**Eminbeyli v. Russia**](http://hudoc.echr.coe.int/eng?i=001-91447), Application no. 42443/02, 26 February 200966.  […] The notion of “promptly” in the latter provision indicates greater urgency than that of “speedily” in Article 5 § 4 […]. Even so, a period of approximately five months from the lodging of the application for release to the final judgment does appear, prima facie, difficult to reconcile with the notion of “speedily”. However, in order to reach a firm conclusion, the special circumstances of the case have to be taken into account […].67.  The Court observes that eleven weeks elapsed between the lodging of the application for judicial review on 1 October 2001 and the date of the first hearing on 20 December 2001. The Government explained that the delay was caused by the transfer of the case file to the prosecution authorities and back to the District Court. In this connection, the Court reiterates that Article 5 § 4 of the Convention imposes on Contracting States the duty to organise their judicial system in such a way that their courts can meet the obligation to examine detention matters speedily […]. |

*EU law*

Article 47 of the EU Charter of Fundamental Rights demands that any individual in a situation governed by EU law has the right to an effective remedy and to a fair and public hearing within a reasonable time.

Article 9.3 of the recast Reception Conditions Directive requires a speedy judicial review when detention is ordered by administrative authorities.

In addition, Article 9.5 of the Reception Conditions Directive establishes that detention has to be reviewed at reasonable intervals of time either by application from the third-country national or *ex officio*. The review must be carried out by a judicial authority in case of asylum seekers, whereas for persons in return procedures, this is only required in cases of prolonged detention. Where the extension of a detention measure has been decided in breach of the right to be heard, the national court responsible for assessing the lawfulness of that extension decision may order the lifting of the detention measure only if it considers that the infringement at issue actually deprived the party relying thereon of the possibility of arguing his defence better, to the extent that the outcome of that administrative procedure could have been different. Provision of legal aid is regulated. Article 47 of the Charter also requires that all individuals have the possibility of being advised, represented and defended in legal matters, and that legal aid be made available to ensure access to justice.

### Effective judicial review in national security cases

Special procedures for judicial review of detention in cases involving national security or counter-terrorism concerns, raise particular issues in regard to article 9.4 ICCPR and equivalent protections, where they rely on the use of “closed” evidence not available to the detainee or his or her representatives. Detention on the basis of national security certificates in Canada, as well as counter-terrorism administrative detentions in the UK, illustrate these difficulties. In *A v. UK,* the European Court of Human Rights found that the system of review of administrative detention of persons subject to immigration control and suspected of terrorism, which relied on special advocates to scrutinise closed evidence and represent the interests of the detainee in regard to the allegations it raised, without the detainee being aware of them, did not provide sufficient fair procedures to satisfy article 5.4. The Court held that the detainee had to be provided with sufficient information to enable him to give instructions to the special advocate. Where the open material consisted only of general assertions, and the decision on detention was based mainly on the closed material, Article 5.4 would be violated. In *Mansour Ahani v. Canada,* the Human Rights Committee held that a hearing on a security certificate which formed the basis for the detention of a non-national pending deportation was sufficient to comply with due process under Article 14 ICCPR. The Committee based its decision on the fact that the non-national had been provided by the Court with a redacted summary of the allegations against him, and that the Court had sought to ensure that despite the national security constraints in the case, the detainee could respond to the case against him, make his own case and cross-examine witnesses.

### Reparation for unlawful detention

*The UN Basic Principles and Guidelines on the right to a remedy and reparation for victims of gross violations of international human rights law and serious violations of international humanitarian law* (the Principles) affirm that States have an obligation to provide available, adequate, effective, prompt and appropriate remedies to victims of violations of international human rights law and international humanitarian law, including reparation.

In accordance with this general principle, persons who are found by domestic or international courts or other appropriate authorities to have been wrongly detained have a right to reparation, in particular compensation, for their wrongful detention (article 5.5 ECHR; article 9.5 ICCPR). Under the ICCPR this right arises whenever there is “unlawful” detention, i.e. detention which is either in violation of domestic law, or in violation of the Covenant. Under the ECHR, it arises only where there is detention in contravention of the Convention itself (although in practice this will include cases where the detention did not have an adequate basis in domestic law). The award of compensation must be legally binding and enforceable: *ex gratia* payments will not be sufficient (*Brogan and Others v. United Kingdom*).[[63]](#footnote-64)

The principle that the information must be provided in a form that is accessible, may require, in the case of migrants, that it be translated.

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| Human Rights Committee, General comment No. 35, Article 9 (Liberty and security of person), 16 Dec 2014The right to compensation for unlawful or arbitrary arrest or detention49. Paragraph 5 of article 9 of the Covenant provides that anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation. Like paragraph 4, paragraph 5 articulates a specific example of an effective remedy for human rights violations, which States parties are required to afford. Those specific remedies do not replace, but are included alongside, the other remedies that may be required in a particular situation for a victim of unlawful or arbitrary arrest or detention by article 2, paragraph 3, of the Covenant.[[64]](#footnote-65) Whereas paragraph 4 provides a swift remedy for release from ongoing unlawful detention, paragraph 5 clarifies that victims of unlawful arrest or detention are also entitled to financial compensation.50. Paragraph 5 obliges States parties to establish the legal framework within which compensation can be afforded to victims, as a matter of enforceable right and not as a matter of grace or discretion. The remedy must not exist merely in theory, but must operate effectively and payment must be made within a reasonable period of time. Paragraph 5 does not specify the precise form of procedure, which may include remedies against the State itself or against individual State officials responsible for the violation, so long as they are effective.[[65]](#footnote-66) Paragraph 5 does not require that a single procedure be established providing compensation for all forms of unlawful arrest, but only that an effective system of procedures exist that provides compensation in all the cases covered by paragraph 5. Paragraph 5 does not oblige States parties to compensate victims *sua sponte*, but rather permits them to leave commencement of proceedings for compensation to the initiative of the victim.[[66]](#footnote-67)51. Unlawful arrest and detention within the meaning of paragraph 5 include such arrest and detention arising within either criminal or non-criminal proceedings, or in the absence of any proceedings at all.[[67]](#footnote-68) The “unlawful” character of the arrest or detention may result from violation of domestic law or violation of the Covenant itself, such as substantively arbitrary detention and detention that violates procedural requirements of other paragraphs of article 9.[[68]](#footnote-69) However, the fact that a criminal defendant was ultimately acquitted, at first instance or on appeal, does not in and of itself render any preceding detention “unlawful”.[[69]](#footnote-70) 52. The financial compensation required by paragraph 5 relates specifically to the pecuniary and non-pecuniary harm resulting from the unlawful arrest or detention.[[70]](#footnote-71) When the unlawfulness of the arrest arises from the violation of other human rights, such as freedom of expression, the State party may have further obligations to provide compensation or other reparation in relation to those other violations, as required by article 2, paragraph 3, of the Covenant.[[71]](#footnote-72) |

*EU law*

The CJEU in the case of *Francovich[[72]](#footnote-73)* established that national courts must provide a remedy for damages caused by a breach of an EU provision by an EU Member State. The principle has not yet been applied to breaches caused by a Member State’s non- implementation of a directive in the context of immigration detention.

## 3. Access to a lawyer and UNHCR, medical attention, family members

### Right of access to a lawyer

Migrants brought into detention have the right to prompt access to a lawyer, and must be promptly informed of this right.[[73]](#footnote-74)

International standards and guidelines also state that detainees should have access to legal advice and facilities for confidential consultation with their lawyer at regular intervals thereafter. Where necessary, free legal assistance should be provided.

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| [**Suso Musa v. Malta**](http://hudoc.echr.coe.int/eng?i=001-122893), Application No. 42337/12, Judgment of 23 July 201361.  The Court finds it appropriate to point out that, as the applicant and the third-party intervener have submitted, had these remedies been effective in terms of their scope and speed, issues in relation to accessibility might also arise, particularly in respect of constitutional court proceedings. The Court notes the apparent lack of a proper system enabling immigration detainees to have access to effective legal aid. Indeed, the fact that the Government were able to supply only one example of a detainee under the Immigration Act making use of legal aid – despite the thousands of immigrants who have reached Maltese shores and have subsequently been detained in the past decade and who, as submitted by the Government, have no means of subsistence – appears merely to highlight this deficiency. 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 […]. |

Translation of key legal documents, as well as interpretation during consultations with the lawyer, should be provided where necessary. Facilities for consultation with lawyers should respect the confidentiality of the lawyer-client relationship (*Body of Principles for the Protection of all persons deprived of their liberty*, Principle 18.).

Although article 5 ECHR does not expressly provide for the right of detainees to have access to a lawyer, the European Court of Human Rights has held that failure to provide any or adequate access to a lawyer, or measures taken by the State to obstruct such access, may violate article 5.4 ECHR where they prevent the detainee from effectively challenging the lawfulness of detention.[[74]](#footnote-75)

Interference with the confidentiality of lawyer/client discussions in detention has also been found to violate the right to challenge the lawfulness of detention under article 5.4.[[75]](#footnote-76)

In EU law, specific provisions on free legal assistance and representation for asylum seekers are included in Article 9 of the Reception Conditions Directive.

### Right of access to medical attention

On first entering into detention, there is also a right of prompt access to a doctor of one’s choice, who can assess for physical health conditions as well as mental health issues which may affect justification of any detention, place of detention, or medical treatment or psychological support required during detention.[[76]](#footnote-77)

### Right to inform family members or others of detention

The possibility to notify a family member, friend, or other person with a legitimate interest in the information, of the fact and place of detention, and of any subsequent transfer, is an essential safeguard against arbitrary detention, consistently protected by international standards (article 17.2(d) CPED; article 10.2, UN *Declaration on the Protection of All Persons from Enforced Disappearance*; Principle 16, *Body of Principles for the Protection of all persons deprived of their liberty*; WGAD, *Annual Report 1998*, para. 69, Guarantee 6).

Article 18.1 of the *Convention on the Protection of all Persons from Enforced Disappearance* provides that any person with a legitimate interest, such as relatives of the person deprived of liberty, their representatives or their counsel, have the right of access to at least information on the authority that ordered the deprivation of liberty; the date, time and place where the person was deprived of liberty and admitted to detention; the authority responsible for supervising the detention; the whereabouts of the person, including, in the event of a transfer, the destination and the authority responsible for the transfer; the date, time and place of release; information relating to the state of health of the person; and in the event of their death during detention, the circumstances and cause of death and the destination of the remains.

This right is of general application and applies, therefore, also to detention of migrants and asylum-seekers. The *Council of Europe Guidelines on Human Rights Protection in the Context of Accelerated Asylum Procedures* also affirm the importance of this right in the immigration detention context (*European Guidelines on Accelerated Asylum Procedures*, CMCE, Principle XI.5.).

### Right of access to UNHCR

Persons seeking asylum have the right, following detention, “to contact and be contacted by the local UNHCR Office, available national refugee bodies or other agencies and an advocate. The right to communicate with these representatives in private, and the means to make such contact should be made available.” (*UNHCR Guidelines on Detention*, Guideline 7(vii))

They should be informed of this right promptly following detention, as it is established by the *UN Body of Principles for the Protection of all Persons Deprived of their liberty*.

The *Council of Europe Guidelines on Accelerated Asylum Procedures* also affirm that this right must be applied in accelerated asylum procedures.

# **E. Detention Conditions**

Even where detention of migrants can be justified, international human rights law imposes further constraints on the place and regime of detention, the conditions of detention, and the social and medical services available to detainees. In addition, it imposes obligations to protect detainees from violence in detention. The most relevant standard for the treatment of detainees is the prohibition on cruel, inhuman and degrading treatment (article 16 CAT, articles 7 and 10 ICCPR, article 3 ECHR, Rule 1 Nelson Mandela Rules[[77]](#footnote-78)). States have obligations to take effective measures to prevent acts of torture and of cruel, inhuman or degrading treatment or punishment including to keep under systematic review arrangements for the custody and treatment of persons subjected to any form of detention with a view to preventing torture and ill-treatment (CAT).

Detained persons must be treated with humanity and respect for their dignity (article 10 ICCPR, article 1 ECHR and article 4 EU Charter).

The OPCAT[[78]](#footnote-79) also requires State Parties to establish one or more independent national mechanisms for the prevention of torture and cruel, inhuman or degrading treatment or punishment with powers of access to detention centres.

## 1. Place of detention

Except for short periods, detained migrants should be held in specifically designed centres in conditions tailored to their legal status and catering for their particular needs (CPT Standards). Detention of migrants in unsuitable locations, including police stations or prisons, may lead or contribute to violations of freedom from torture or cruel, inhuman or degrading treatment.

While detention of a migrant at an airport may be acceptable for a short period of a few hours on arrival, more prolonged detention without appropriate facilities for sleeping, eating or hygiene could amount to ill-treatment.[[79]](#footnote-80) Although immigration detainees may have to spend some time in ordinary police detention facilities, given that the conditions in such places may generally be inadequate for prolonged periods of detention, the time they spend there should be kept to the absolute minimum (CPT Standards).

Asylum seekers and migrants should be kept separate from convicted persons or persons detained pending trial.

## 2. Conditions in detention facilities

Facilities where migrants are detained must provide conditions that are sufficiently clean, safe, and healthy to be compatible with freedom from torture or other cruel, inhuman or degrading treatment (“ill-treatment”) and the right to be treated with humanity and with respect for the inherent dignity of the human person (Article 10 ICCPR).

Economic pressures or difficulties caused by an increased arrivals of migrants cannot justify a failure to comply with the prohibition on torture or other ill-treatment, given its absolute nature ([*M.S.S. v. Belgium and Greece*](http://hudoc.echr.coe.int/eng?i=001-103050)*)*.

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| [***M.S.S. v Belgium and Greece***](http://hudoc.echr.coe.int/eng?i=001-103050), Application No. 30696/09, 21 January 2011 Facts: The applicant, an Afghan national, entered the European Union via Greece. He subsequently arrived in Belgium, where he applied for asylum. By virtue of the Dublin II Regulation he was transferred back to Greece in June 2009. On arriving at Athens airport, he was immediately placed in detention in an adjacent building, where, according to his reports, he was locked up in a small space with 20 other detainees, access to the toilets was restricted, detainees were not allowed out into the open air, were given very little to eat and had to sleep on dirty mattresses or on the bare floor.Analysis: The Court held that there had been a violation of article 3 of the Convention by Greece because of the applicant’s detention conditions. Despite the fact that he had been kept in detention for a relatively short period of time, the Court found that, taken together, the feeling of arbitrariness, inferiority and anxiety he must have experienced, as well as the profound effect such detention conditions indubitably had on a person’s dignity, had constituted a degrading treatment. In addition, as an asylum seeker the applicant was particularly vulnerable, because of his migration and the traumatic experiences he was likely to have endured. The Court also held that there had been a violation of article 13 taken together with article 3 by Greece because of the deficiencies in the asylum procedure followed in the applicant’s case, a violation of article 3 by Belgium both because of having exposed the applicant to risks linked to the deficiencies in the asylum procedure in Greece and because of having exposed him to detention and living conditions in Greece that were in breach of Article 3, and a violation of article 13 taken together with article 3 by Belgium because of the lack of an effective remedy against the applicant’s expulsion order.*Para. 216: …[T]he confinement of aliens, 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, in particular 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.**Para. 217: Where the Court is called upon to examine the conformity of the manner and method of the execution of the measure with the provisions of the Convention [on Human Rights], it must look at the particular situations of the persons concerned […].**Para. 218: The States must have particular regard to Article 3 of the Convention, which enshrines one of the most fundamental values of democratic societies and prohibits in absolute terms torture and inhuman or degrading treatment or punishment irrespective of the circumstances and of the victim’s conduct […].* |

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| [***S.D. v. Greece***](http://hudoc.echr.coe.int/eng?i=001-93036), ECtHR, Application No. 53541/07, 11 September 2009 Facts: The applicant, a Turkish national, was detained for two months in a holding facility at a border guard station in Greece after entering the country irregularly. During his detention, he was not allowed to go outside or make telephone calls, and had no access to blankets, clean sheets or hot water. Analysis: The Court held that there had been a violation of article 3 with regards to the applicant’s detention conditions in Soufli and Attiki, thereby taking into account the personal situation of torture of the applicant in Turkey, which left important clinical and psychological scars on him. It further found a violation of articles 5.1 and 5.4 due to the unlawful detention of the applicant and the lack of remedies to challenge it. *Para. 52: S’agissant de la situation personnelle du requérant, la cour observe que celui-ci avait subi des tortures sévères en Turquie, qui lui avaient laissé des séquelles cliniques et psychologiques importantes. Le fait que cet état n’ait été attesté de manière officielle, par le Centre médical de rétablissement des victimes de la torture, qu’après la fin de sa détention, ne change rien à ce constat.**Para. 53: Eu égard à ce qui précède, la Cour estime que les conditions de détention du requérant, en tant que réfugié et demandeur d’asile, combinées à la durée excessive de sa détention en de pareilles conditions, s’analysent en un traitement dégradant.* |

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| [**Popov v. France**](http://hudoc.echr.coe.int/eng?i=001-108710), ECtHR, Applications nos. 39472/07 and 39474/07, 19 January 201296. The Commissioner for Human Rights and the CPT also raised the question of administrative detention centres being unsuited to the accommodation of families and to the needs of children, taking the view that, in addition to the ill-adapted material conditions, the lack of privacy, stress, insecurity and hostile environment in such centres also had harmful consequences for minors, at odds with the international principles on the protection of children. In response to this criticism, the French authorities acknowledged, in 2006, that the furnishings in family rooms were not always adapted to infants (see paragraphs 38 to 40 above). |

### Cumulative effect of poor conditions

The cumulative effect of a number of poor conditions may lead to violation of the prohibition on ill-treatment[[80]](#footnote-81). Furthermore, the longer the period of detention, the more likely that poor conditions will cross the threshold of ill-treatment. The test is an objective one, and can be met irrespective of whether there had been any intent on the part of the authorities to humiliate or degrade[[81]](#footnote-82).

General living conditions of prisoners, with regards to light, ventilation, temperature, sanitation, nutrition, drinking water, access to open air and physical exercise, personal hygiene, health care and adequate personal space that apply to all prisoners without exception are addressed in international standards including the standards of the Council of Europe Committee for the Prevention of Torture (CPT)[[82]](#footnote-83) and the Nelson Mandela Rules.[[83]](#footnote-84)

Whether conditions are cruel, inhuman or degrading must also be seen in the context of the individual – it may depend on the sex, age or health of the individual detainee. For those held in immigration detention, it is also relevant that they are not charged with or convicted of any crime, which should be reflected in the conditions of detention and facilities at the detention centre.[[84]](#footnote-85)

### Personal space and Overcrowding

Severe overcrowding has regularly been determined by international tribunals to amount to a violation of freedom from cruel, inhuman or degrading treatment. The European Court of Human Rights has ruled, in the case of [*Aden Ahmed v. Malta*](http://hudoc.echr.coe.int/eng?i=001-122894),[[85]](#footnote-86) that, in “deciding whether or not there has been a violation of Article 3 on account of the lack of personal space, the Court has to have regard to the following three elements:

(a) each detainee must have an individual sleeping place in the cell;

(b) each detainee must dispose of at least three square meters of floor space; and

(c) the overall surface area of the cell must be such as to allow the detainees to move freely between the furniture items.

The absence of any of the above elements creates in itself a strong presumption that the conditions of detention amounted to degrading treatment and were in breach of Article 3. […]”.

Where overcrowding is less severe, it may nevertheless lead to violations of freedom from cruel, inhuman or degrading treatment when considered in conjunction with other conditions of detention, including poor ventilation or access to natural light or air, poor heating, inadequate food, poor sanitation or lack of a minimum of privacy.

### Access to healthcare

Although there is no general obligation to release detainees on health grounds, there is an obligation to protect their physical and mental wellbeing while in detention, by providing medical care and medicines appropriate to the health condition of a detainee ([*Keenan v. United Kingdom*](http://hudoc.echr.coe.int/eng?i=001-59365)).[[86]](#footnote-87) For example, failure to provide medical supervision and drugs necessary to detainees with HIV, or with severe epilepsy, leading to exacerbation of their conditions, can undermine the dignity of the detainee, and cause anguish and hardship beyond that normally inherent in detention, in violation of Article 3 ECHR. Such a violation may occur even in the absence of demonstrated deterioration of the health condition of a detainee.

The standards of the CPT, as well as the Nelson Mandela Rules specify that prisoners should enjoy the same standards of health care that are available in the community, and should have access to necessary health-care services free of charge without discrimination on the grounds of their legal status (Nelson Mandela Rules, rule 24).[[87]](#footnote-88)

### Protection from ill-treatment, including violence in detention

Physical or sexual assaults, or excessive or inappropriate use of physical restraint techniques - may violate rights including the right to life and freedom from torture or cruel, inhuman or degrading treatment and rights to physical integrity. Where a person is unlawfully killed or subjected to cruel, inhuman or degrading treatment while in detention, there is a presumption that State agents are responsible, and the onus is on the State to provide a satisfactory and convincing explanation to the contrary.

In addition, where the State authorities know or ought to know that particular individuals held in detention face a real or immediate threat from private actors to their life, freedom from cruel, inhuman or degrading treatment, or physical integrity, there is an obligation to take all reasonable measures to prevent or end the situation ([*Osman v. United Kingdom*](http://hudoc.echr.coe.int/eng?i=001-58257)).[[88]](#footnote-89) This arises as part of the general positive obligations on States to exercise due diligence and take reasonable measures to prevent, protect against and investigate acts of private persons in violation of these rights (CCPR, *General Comment No. 31*, para. 8).

Obligations to protect are heightened for persons held in detention, in respect of whom the State has a special duty of care.

In situations where there is clear potential for gender or ethnic violence in detention, for example, appropriate preventive and security measures must be put in place. In [*Rodic and 3 others v. Bosnia-Herzegovina*](http://hudoc.echr.coe.int/eng?i=001-86533)*,[[89]](#footnote-90)* the ECtHR held that two Serb prisoners held in open, crowded conditions in an ethnic Bosnian dominated prison, and subjected to violence by fellow prisoners, without any adequate security measures being taken by the authorities, suffered mental anxiety as a result of the threat and anticipation of violence that amounted to a violation of article 3 ECHR.

In addition to protection from the acts of officials or fellow detainees, the State also has an obligation to take reasonable measures within its power to protect detained persons from acts of self-harm or suicide.

Women in detention may face particular risks of sexual or gender-based violence, either from officials or from private actors. States are required to take measures to prevent and protect detainees from all sexual violence in detention, including by making it a criminal offence, and enforcing the criminal law. Certain forms of sexual violence in detention, such as rape, amount to torture ([*Aydin v. Turkey*](http://hudoc.echr.coe.int/eng?i=001-58371)).[[90]](#footnote-91)

*EU law*

Article 10 of the Recast Reception Conditions Directive that should be read in light of the obligations under the EU Charter *inter alia* articles 1 and 4 sets a number of requirements, including:

* detention of applicants shall normally take place in specialized detention facilities;
* the applicants should have access to open-air spaces;
* the applicants should have an opportunity to communicate with family members, UNHCR, legal advisers or counsellors and persons representing relevant non-governmental organizations.

# **Annex I. – International and EU legal standards**

## I. International law

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| Article 31 of the 1951 Convention Relating to the Status of Refugees1. The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of Article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.2. The Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularized or they obtain admission into another country. The Contracting States shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country. |

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| [UNHCR Guidelines](http://www.unhcr.org/publications/legal/505b10ee9/unhcr-detention-guidelines.html) *on the Applicable Criteria and Standards relating to the Detention of Asylum Seekers and Alternatives to Detention* *Terminology*1. For the purposes of these Guidelines, “detention” refers to the deprivation of liberty or confinement in a closed place which an asylum-seeker is not permitted to leave at will, including, though not limited to, prisons or purpose-built detention, closed reception or holding centres or facilities.
2. The place of detention may be administered either by public authorities or private contractors; the confinement may be authorised by an administrative or judicial procedure, or the person may have been confined with or without “lawful” authority. Detention or full confinement is at the extreme end of a spectrum of deprivations of liberty […]. Other restrictions on freedom of movement in the immigration context are likewise subject to international standards. Distinctions between deprivation of liberty (detention) and lesser restrictions on movement is one of *“degree or intensity and not one of nature or substance”.* While these Guidelines focus more closely on detention (or total confinement), they also address in part measures short of full confinement.
3. Detention can take place in a range of locations, including at land and sea borders, in the “international zones” at airports, on islands, on boats, as well as in closed refugee camps, in one’s own home (house arrest) and even extraterritorially. Regardless of the name given to a particular place of detention, the important questions are whether an asylum-seeker is being deprived of his or her liberty *de facto* and whether this deprivation is lawful according to international law. (…)

Guideline 3: Detention must be in accordance with and authorised by lawGuideline 4: Detention must not be arbitrary, and any decision to detain mustbe based on an assessment of the individual’s particular circumstances* Guideline 4.1: Detention is an exceptional measure and can only be justified for a legitimate purpose
* Guideline 4.2: Detention can only be resorted to when it is determined to be necessary, reasonable in all the circumstances and proportionate to a legitimate purpose
* Guideline 4.3: Alternatives to detention need to be considered

Guideline 5: Detention must not be discriminatoryGuideline 6: Conditions of detention must be humane and dignifiedGuideline 7: Indefinite detention is arbitrary and maximum limits on detention should be established in lawGuideline 8: Decisions to detain or to extend detention must be subject to minimum procedural safeguards |

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| [UNHCR Guidelines on Detention](http://www.unhcr.org/publications/legal/505b10ee9/unhcr-detention-guidelines.html)Guideline 7(ii): “Free legal assistance should be provided where it is also available to nationals similarly situated, and should be available as soon as possible after arrest or detention to help the detainee understand his/her rights.”Guideline 9.2: Children51. General principles relating to detention outlined in these Guidelines apply *a fortiori* to children, who should in principle not be detained at all. The United Nations Convention on the Rights of the Child (CRC) provides specific international legal obligations in relation to children and sets out a number of guiding principles regarding the protection of children:* The best interests of the child shall be a primary consideration in all actions affecting children, including asylum-seeking and refugee children (Article 3 in conjunction with Article 22, CRC).
* There shall be no discrimination on the grounds of race, colour, sex, language, religion, political or other opinions, national, ethnic or social origin, property, disability, birth or other status, or on the basis of the status, activities, expressed opinions, or beliefs of the child’s parents, legal guardians or family members (Article 2, CRC).
* Each child has a fundamental right to life, survival and development to the maximum extent possible (Article 6, CRC).
* Children should be assured the right to express their views freely and their views should be given “due weight” in accordance with the child’s age and level of maturity (Article 12, CRC).
* Children have the right to family unity (*inter alia*, Articles 5, 8 and 16, CRC) and the right not to be separated from their parents against their will (Article 9, CRC). Article 20(1) of the CRC establishes that a child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State.
* Article 20(2) and (3) of the CRC require that States Parties shall, in accordance with their national laws, ensure alternative care for such a child. Such care could include, *inter alia,* foster placement or, if necessary, placement in suitable institutions for the care of children. When considering options, due regard shall be paid to the desirability of continuity in a child’s upbringing and to the child’s ethnic, religious, cultural and linguistic background.
* Article 22 of the CRC requires that States Parties take appropriate measures to ensure that children who are seeking refugee status or who are recognised refugees, whether accompanied or not, receive appropriate protection and assistance.
* Article 37 of the CRC requires States Parties to ensure that the detention of children be used only as a measure of last resort and for the shortest appropriate period of time.
* Where separation of a child or children from their parents is unavoidable in the context of detention, both parents and child are entitled to essential information from the State on the whereabouts of the other unless such information would be detrimental to the child (Article 9(4), CRC).
1. Overall an ethic of care–and not enforcement–needs to govern interactions with asylum-seeking children, including children in families, with the best interests of the child a primary consideration. The extreme vulnerability of a child takes precedence over the status of an “illegal alien”. States should *“utilize, within the framework of the respective child protection systems, appropriate procedures for the determination of the child’s best interests, which facilitate adequate child participation without discrimination, where the views of the child are given due weight in accordance with age and maturity, where decision makers with relevant areas of expertise are involved, and where there is a balancing of all relevant factors in order to assess the best option.”*
2. All appropriate alternative care arrangements should be considered in the case of children accompanying their parents, not least because of the well-documented deleterious effects of detention on children’s well-being, including on their physical and mental development. The detention of children with their parents or primary caregivers needs to balance, *inter alia,* the right t o family and private life of the family as a whole, the appropriateness of the detention facilities for children, and the best interests of the child.
3. As a general rule, unaccompanied or separated children should not be detained. Detention cannot be justified based solely on the fact that the child is unaccompanied or separated, or on the basis of his or her migration or residence status. Where possible they should be released into the care of family members who already have residency within the asylum country. Where this is not possible, alternative care arrangements, such as foster placement or residential homes, should be made by the competent child care authorities, ensuring that the child receives appropriate supervision. Residential homes or foster care placements need to cater for the child’s proper development (both physical and mental) while longer term solutions are being considered. A primary objective must be the best interests of the child.
4. Ensuring accurate age assessments of asylum-seeking children is a specific challenge in many circumstances, which requires the use of appropriate assessment methods that respect human rights standards. Inadequate age assessments can lead to the arbitrary detention of children. It can also lead to the housing of adults with children. Age- and gender-appropriate accommodation needs to be made available.
5. Children who are detained benefit from the same minimum procedural guarantees as adults, but these should be tailored to their particular needs (see Guideline 9). An independent and qualified guardian as well as a legal adviser should be appointed for unaccompanied or separated children. During detention, children have a right to education which should optimally take place outside the detention premises in order to facilitate the continuation of their education upon release. Provision should be made for their recreation and play, including with other children, which is essential to a child’s mental development and will alleviate stress and trauma (see also Guideline 8).
6. All efforts, including prioritisation of asylum processing, should be made to allow for the immediate release of children from detention and their placement in other forms of appropriate accommodation.

Guideline 9.3 WomenAs a general rule, pregnant women and nursing mothers, who both have special needs, should not be detained. Alternative arrangements should also take into account the particular needs of women, including safeguards against sexual and gender-based violence and exploitation. Alternatives to detention would need to be pursued in particular when separate facilities for women and/or families are not available. Where detention is unavoidable for women asylum-seekers, facilities and materials are required to meet women’s specific hygiene needs. The use of female guards and warders should be promoted. All staff assigned to work with women detainees should receive training relating to the gender-specific needs and human rights of women. Women asylum-seekers in detention who report abuse are to be provided immediate protection, support and counselling, and their claims must be investigated by competent and independent authorities, with full respect for the principle of confidentiality, including where women are detained together with their husbands/partners/other relatives. Protection measures should take into account specifically the risks of retaliation.Women asylum-seekers in detention who have been subjected to sexual abuse need to receive appropriate medical advice and counselling, including where pregnancy results, and are to be provided with the requisite physical and mental health care, support and legal aid. |

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| [UNHCR Guidelines on Unaccompanied Children](http://www.unhcr-centraleurope.org/pdf/resources/legal-documents/unhcr-handbooks-recommendations-and-guidelines/unhcr-guidelines-on-dealing-with-unaccompanied-children-seeking-asylum-1997.html)7.6 Children seeking asylum should not be kept in detention. This is particularly important in the case of unaccompanied children. 7.7 States which, regrettably and contrary to the preceding recommendation, may keep children seeking asylum in detention, should, in any event, observe Article 37 of the Convention of the Rights of the Child, according to which detention shall be used only as a measure of last resort and for the shortest appropriate period of time. If children who are asylum seekers are detained in airports, immigration-holding centres or prisons, they must not be held under prison-like conditions. All efforts must be made to have them released from detention and, placed in other appropriate accommodation. If this proves impossible, special arrangements must be made for living quarters which are suitable for children and their families. The underlying approach to such a programme should be ‘care’ and not ‘detention’. Facilities should not be located in isolated areas where culturally-appropriate community resources and legal access may be unavailable. 7.8 During detention, children have the right to education which should optimally take place outside the detention premises in order to facilitate the continuance of their education upon release. Under the UN Rules for Juveniles Deprived of their Liberty E-38, States are required to provide special education programmes to children of foreign origin with particular cultural or ethnic needs.  |

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| [European Convention for the Protection of Human Rights and Fundamental Freedoms](http://www.echr.coe.int/Documents/Convention_ENG.pdf) **(ECHR)**Article 3 – Prohibition of torture No one shall be subjected to torture or to inhuman or degrading treatment or punishment.Article 5 – Right to liberty and security1. 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. the lawful [detention](https://en.wikipedia.org/wiki/Detention_%2528imprisonment%2529) of a person after [conviction](https://en.wikipedia.org/wiki/Conviction) by a competent court;b. the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;c. the lawful [arrest](https://en.wikipedia.org/wiki/Arrest) or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;d. the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;e. the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;f. 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 or she understands, of the reasons for his arrest and of any charge against him.3. Everyone arrested or detained in accordance with the provisions of paragraph 1.c of this article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.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. |

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| [**International Covenant on Civil and Political Rights**](http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx) **(ICCPR)**Article 7No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.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. 3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement. 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 101. All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.2.(a) Accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons;(b) Accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication.3. The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation. Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status. |

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| [**Convention on the rights of the child**](http://www.ohchr.org/en/professionalinterest/pages/crc.aspx) **(CRC)**Article 21. 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 3.1In 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 91. 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 221. 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 37States 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. |

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| [General Comment No. 6](http://www.refworld.org/docid/42dd174b4.html)*: Treatment of Unaccompanied and Separated Children Outside Their Country of Origin,* CRC, UN Doc. CRC/GC/2005/6, 1 September 200561. “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 and pay full respect to article 37 (a) and (c) of the Convention and other international obligations. Special arrangements must be made for living quarters that are suitable for children and that separate them from adults, unless it is considered in the child’s best interests not to do so. Indeed, the underlying approach to such a programme should be “care” and not “detention”. Facilities should not be located in isolated areas where culturally appropriate community resources and access to legal aid are unavailable. Children should have the opportunity to make regular contact and receive visits from friends, relatives, religious, social and legal counsel and their guardian. They should also be provided with the opportunity to receive all basic necessities as well as appropriate medical treatment and psychological counselling where necessary. During their period in detention, children have the right to education which ought, ideally, to take place outside the detention premises in order to facilitate the continuance of their education upon release. They also have the right to recreation and play as provided for in article 31 of the Convention. In order to effectively secure the rights provided by article 37 (d) of the Convention, unaccompanied or separated children deprived of their liberty shall be provided with prompt and free access to legal and other appropriate assistance, including the assignment of a legal representative.  |

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| [**Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment**](http://www.ohchr.org/en/ProfessionalInterest/pages/cat.aspx) **(CAT)**Article 2.1Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.Article 11Each State Party shall keep under systematic review interrogation rules, instructions, methods and practices as well as arrangements for the custody and treatment of persons subjected to any form of arrest, detention or imprisonment in any territory under its jurisdiction, with a view to preventing any cases of torture.Article 16.1Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article I, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. In particular, the obligations contained in articles 10, 11, 12 and 13 shall apply with the substitution for references to torture of references to other forms of cruel, inhuman or degrading treatment or punishment. |

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| Working Group on Arbitrary Detention, [Annual Report 2008](https://documents-dds-ny.un.org/doc/UNDOC/GEN/G08/100/91/PDF/G0810091.pdf?OpenElement)67. As regards those States which have not ratified the ICCPR, the Working Group concurs with the legal analysis by the Human Rights Committee in its general comment No. 29.22 There it is rightfully stated that, in addition to those enumerated in article 4, paragraph 2 of the ICCPR, certain other rights are non-derogable even during a state of emergency, such as the right to take proceedings before a court to enable the court to decide without delay on the lawfulness of detention. In the view of the Working Group these guarantees represent peremptory norms of (customary) international law so that they are also binding on States which are not parties to the Covenant.82. With regard to detention in the context of counter-terrorism measures and in states of emergency the Working Group recommends that: (a) States of emergencies must only be imposed, and measures taken thereunder, including deprivation of liberty, must only be carried out, in strict conformity with article 4 of the International Covenant on Civil and Political Rights and in stringent compliance with the principle of proportionality. The right to habeas corpus must not be suspended; (b) Governments should duly follow release orders rendered by competent judicial authorities and refrain from re-detaining the individual concerned on the same grounds, also during states of emergency; (c) Countries in legal transition, where civilians may still be tried under military jurisdiction, should provide for an independent and civil judicial authority before which civilians are able to challenge the competence of the military court. Demarcation of competences for release of detainees. |

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| [Guidelines of the Committee of Ministers of the Council of Europe on child friendly justice](http://www.coe.int/t/dghl/cooperation/ccje/meetings/plenary/Lignes_dir_justice_adapt%25C3%25A9eauxenfants_en.asp), 2010 *(Adopted by the Committee of Ministers on 17 November 2010 at the 1098th meeting of the Ministers' Deputies)*Deprivation of liberty19. Any form of deprivation of liberty of children should be a measure of last resort and be for the shortest appropriate period of time. 20. When deprivation of liberty is imposed, children should, as a rule, be held separately from adults. When children are detained with adults, this should be for exceptional reasons and based solely on the best interests of the child. In all circumstances, children should be detained in premises suited to their needs. 21. Given the vulnerability of children deprived of liberty, the importance of family ties and promoting the reintegration into society, competent authorities should ensure respect and actively support the fulfilment of the rights of the child as set out in universal and European instruments. In addition to other rights, children in particular should have the right to: *a.* maintain regular and meaningful contact with parents, family and friends through visits and correspondence, except when restrictions are required in the interests of justice and the interests of the child. Restrictions on this right should never be used as a punishment; *b.* receive appropriate education, vocational guidance and training, medical care, and enjoy freedom of thought, conscience and religion and access to leisure, including physical education and sport; *c.* access programmes that prepare children in advance for their return to their communities, with full attention given to them in respect of their emotional and physical needs, their family relationships, housing, schooling and employment possibilities and socio-economic status. 22. The deprivation of liberty of unaccompanied minors, including those seeking asylum, and separated children should never be motivated or based solely on the absence of residence status.  |

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| [Body of Principles for the Protection of all persons deprived of their liberty](http://www.un.org/documents/ga/res/43/a43r173.htm)**, 1988, UN Doc. A/RES/43/173**Principle 11.2 “a detained person and his counsel, if any, shall receive prompt and full communication of any order of detention, together with the reasons therefor.” Principle 13 provides that at the commencement of detention, or promptly thereafter, a detained person should be provided with information on and an explanation of his or her rights and how to avail himself of such rights.Principle 14: a person who does not adequately speak the language used by the authorities, is entitled to receive this information in a language he understands. |

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| [Council of Europe Guidelines on human rights protection in the context of accelerated asylum proceedings](http://www.refworld.org/docid/4a857e692.html)Guideline XI.5 (…) [d]etained asylum seekers shall be informed promptly, in a language which they understand, of the legal and factual reasons for their detention, and the available remedies.“children, including unaccompanied minors should, as a rule, not be placed in detention. In those exceptional cases where children are detained, they should be provided with special supervision and assistance.” |

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| Theo Van Boven, UN Special Rapporteur on Torture, [Annual Report to the Commission on Human Rights](https://documents-dds-ny.un.org/doc/UNDOC/GEN/G03/173/27/PDF/G0317327.pdf?OpenElement), UN Doc. E/CN.4/2004/56, 23 December 200349. The Special Rapporteur notes that one of the most frequent obstacles to the respect of the human dignity and to the prohibition of torture and other forms of ill-treatment in places of detention is overcrowding. In order to improve the conditions of detention and in accordance with international standards, including rule 1 (5) of the United Nations Standard Minimum Rules for Non-custodial Measures (the Tokyo Rules), the Special Rapporteur encourages States to avoid holding people in custody where possible. This is particularly applicable in cases of pre-trial detention and detention of children, asylum-seekers and refugees. |

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| [General Comment No. 14](http://www.refworld.org/pdfid/4538838d0.pdf), The Right to the Highest Attainable Standard of Health (Art. 12), CESCR, UN Doc. E/C.12/2000/4, 11 August 200034. … “In particular, States are under the obligation to respect the right to health by, *inter alia*, refraining from denying or limiting equal access for all persons, including prisoners or detainees, minorities, asylum seekers and illegal immigrants, to preventive, curative and palliative health services.” |

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| [General Comment No. 13](http://www.ohchr.org/EN/Issues/Education/Training/Compilation/Pages/d%29GeneralCommentNo13Therighttoeducation%28article13%29%281999%29.aspx)*, The right to education*, CESCR, UN Doc. E/C.12/1999/10, 8 December 199934. (…) “confirms that the principle of non-discrimination extends to all persons of school age residing in the territory of a State Party, including non-nationals, and irrespective of their legal status.” |

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| [UN Rules for the Protection of Juveniles Deprived of their Liberty](http://www.un.org/documents/ga/res/45/a45r113.htm), UNGA, UN Doc. A/RES/45/113, 14 December 199038. Every juvenile of compulsory school age has the right to education suited to his or her needs and abilities and designed to prepare him or her for return to society. Such education should be provided outside the detention facility in community schools wherever possible and, in any case, by qualified teachers through programmes integrated with the education system of the country so that, after release, juveniles may continue their education without difficulty. Special attention should be given by the administration of the detention facilities to the education of juveniles of foreign origin or with particular cultural or ethnic needs. Juveniles who are illiterate or have cognitive or learning difficulties should have the right to special education. 39. Juveniles above compulsory school age who wish to continue their education should be permitted and encouraged to do so, and every effort should be made to provide them with access to appropriate educational programmes. |

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| [Recommendation R(1998)7](https://rm.coe.int/16804fb13c) *of the Committee of Ministers to member states concerning the ethical and organisational aspects of health care in prison*, adopted by the Committee of Ministers on 8 April 1998 at the 627th meeting of the Ministers' DeputiesPrisoners suffering from serious mental disturbance should be kept and cared for in a hospital facility which is adequately equipped and possesses appropriately trained staff.12. (…) “asylum seekers should be screened at the outset of their detention to identify torture victims and traumatised persons among them so that appropriate treatment and conditions can be provided for them”.  |

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| [Convention on the Rights of people with Disabilities](http://www.un.org/disabilities/documents/convention/convoptprot-e.pdf) (CRPD)Article 2 *Reasonable accommodation (means)* “all means necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.”Article 14*States parties must* “ensure that if persons with disabilities are deprived of their liberty they are, on an equal basis with others, entitled to guarantees in accordance with international human rights law and shall be treated in compliance with the objectives and principles of this Convention, including by provision of reasonable accommodation.” |

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| [European Guidelines on accelerated asylum procedures](http://www.assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17387&lang=en), Parliamentary Assembly CoE, 7 October 2005Guideline XI.3 “in those cases where other vulnerable persons are detained, they should be provided with adequate assistance and support.”  |

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| [General Comment No. 16](http://www.refworld.org/docid/453883f922.html)*, The right to respect of privacy, family, home and correspondence, and protection of honour and reputation*, CCPR, UN Doc. HRI/GEN/1/Rev.9 (Vol.I), 8 April 19888. (…) “persons being subjected to body search by State officials, or medical personnel acting at the request of the State, should only be examined by persons of the same sex.” |

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| [CPT Standards](http://www.cpt.coe.int/en/documents/eng-standards-scr.pdf)*,* Extract from the 10th General Report [CPT/Inf (2000) 13]Page 78, para. 27. (…) examples of pregnant women being shackled or otherwise restrained to beds or other items of furniture during gynaecological examinations and/or delivery. Such an approach is completely unacceptable, and could certainly be qualified as inhuman and degrading treatment. Other means of meeting security needs can and should be found. |

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| [General recommendation No. 26](http://www2.ohchr.org/english/bodies/cedaw/docs/GR_26_on_women_migrant_workers_en.pdf) *on women migrant workers,* CEDAW, UN Doc. CEDAW/C/2009/WP.1/R, 5 December 200826(j) (...) “States parties should ensure that women migrant workers who are in detention do not suffer discrimination or gender-based violence, and that pregnant and breastfeeding mothers as well as women in ill health have access to appropriate services.” |

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| [Joint general comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 (2017) of the Committee on the Rights of the Child on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return](http://tbinternet.ohchr.org/Treaties/CMW/Shared%20Documents/1_Global/CMW_C_GC_4-CRC_C_GC_23_8362_E.pdf), paras. 5-13Right to liberty (articles 16 and 17 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families; article 37 of the Convention on the Rights of the Child) 5. Every child, at all times, has a fundamental right to liberty and freedom from immigration detention. The Committee on the Rights of the Child has asserted that the detention of any child because of their or their parents’ migration status constitutes a child rights violation and contravenes the principle of the best interests of the child. In this light, both Committees have repeatedly affirmed that children should never be detained for reasons related to their or their parents’ migration status and States should expeditiously and completely cease or eradicate the immigration detention of children. Any kind of child immigration detention should be forbidden by law and such prohibition should be fully implemented in practice. 6. Immigration detention is understood by the Committees as any setting in which a child is deprived of his/her liberty for reasons related to his/her, or his/her parents’, migration status, regardless of the name and reason given to the action of depriving a child of his or her liberty, or the name of the facility or location where the child is deprived of liberty. “Reasons related to migration status” is understood by the Committees to be a person’s migratory or residence status, or the lack thereof, whether relating to irregular entry or stay or not, consistent with the Committees’ previous guidance. 7. In addition, both the Committee on the Rights of the Child and the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families have emphasized that children should not be criminalized or subject to punitive measures, such as detention, because of their or their parents’ migration status. Irregular entry and stay do not constitute crimes per se against persons, property or national security. Criminalizing irregular entry and stay exceeds the legitimate interest of States parties to control and regulate migration, and leads to arbitrary detention. 8. The Committee on the Rights of the Child, in relation to unaccompanied and separated children, stated in 2005 that children should not be deprived of their liberty and that 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.9. The Committees emphasize the harm inherent in any deprivation of liberty and the negative impact that immigration detention can have on children’s physical and mental health and on their development, even when they are detained for a short period of time or with their families. The Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment has stated that “within the context of administrative immigration enforcement ... the deprivation of liberty of children based on their or their parents’ migration status is never in the best interests of the child, exceeds the requirement of necessity, becomes grossly disproportionate and may constitute cruel, inhuman or degrading treatment of migrant children”.10. Article 37 (b) of the Convention of the Rights of the Child establishes the general principle that a child may be deprived of liberty only as a last resort and for the shortest appropriate period of time. However, offences concerning irregular entry or stay cannot under any circumstances have consequences similar to those derived from the commission of a crime. Therefore, the possibility of detaining children as a measure of last resort, which may apply in other contexts such as juvenile criminal justice, is not applicable in immigration proceedings as it would conflict with the principle of the best interests of the child and the right to development. 11. Instead, States should adopt solutions that fulfil the best interests of the child, along with their rights to liberty and family life, through legislation, policy and practices that allow children to remain with their family members and/or guardians in non-custodial, community-based contexts while their immigration status is being resolved and the children’s best interests are assessed, as well as before return. When children are unaccompanied, they are entitled to special protection and assistance by the State in the form of alternative care and accommodation in accordance with the Guidelines for the Alternative Care of Children. When children are accompanied, the need to keep the family together is not a valid reason to justify the deprivation of liberty of a child. When the child’s best interests require keeping the family together, the imperative requirement not to deprive the child of liberty extends to the child’s parents and requires the authorities to choose non-custodial solutions for the entire family.12. Consequently, child and family immigration detention should be prohibited by law and its abolishment ensured in policy and practice. Resources dedicated to detention should be diverted to non-custodial solutions carried out by competent child protection actors engaging with the child and, where applicable, his or her family. The measures offered to the child and the family should not imply any kind of child or family deprivation of liberty and should be based on an ethic of care and protection, not enforcement. They should focus on case resolution in the best interests of the child and provide all the material, social and emotional conditions necessary to ensure the comprehensive protection of the rights of the child, allowing for children’s holistic development. Independent public bodies, as well as civil society organizations, should be able to regularly monitor these facilities or measures. Children and families should have access to effective remedies in case any kind of immigration detention is enforced. 13. In the view of the Committees, child protection and welfare actors should take primary responsibility for children in the context of international migration. When a migrant child is first detected by immigration authorities, child protection or welfare officials should immediately be informed and be in charge of screening the child for protection, shelter and other needs. Unaccompanied and separated children should be placed in the national/local alternative care system, preferably in family-type care with their own family when available, or otherwise in community care when family is not available. These decisions have to be taken within a child-sensitive due process framework, including the child’s rights to be heard, to have access to justice and to challenge before a judge any decision that could deprive him or her of liberty, and should take into account the vulnerabilities and needs of the child, including those based on their gender, disability, age, mental health, pregnancy or other conditions.  |

## II. EU law

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| [**Charter of Fundamental Rights of the European Union**](http://fra.europa.eu/en/charterpedia/title/i-dignity)Article 1- Human DignityHuman Dignity is inviolable. It must be respected and protected.Article 3.1 - Right to the integrity of the personEveryone has the right to respect for his or her physical and mental integrity.ARTICLE 4- Prohibition of torture and inhuman or degrading treatmentNo one shall be subjected to torture or to inhuman or degrading treatment or punishment.ARTICLE 6 - Right to liberty and securityEveryone has the right to liberty and security of person. |

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| [**Reception Conditions Directive**](http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%253A32013L0033) (recast) 2013/33/EUArticle 8Detention1.   Member States shall not hold a person in detention for the sole reason that he or she is an applicant in accordance with 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.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 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.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 9Guarantees for detained applicants1.   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 needs1. The health, including mental health, of applicants in detention who are vulnerable persons shall be of primary concern to national authorities. Where vulnerable persons are detained, Member States shall ensure regular monitoring and adequate support taking into account their particular situation, including their health.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.4. Detained families shall be provided with separate accommodation guaranteeing adequate privacy.5. Where female applicants are detained, Member States shall ensure that they are accommodated separately from male applicants, unless the latter are family members and all individuals concerned consent thereto. Exceptions to the first subparagraph may also apply to the use of common spaces designed for recreational or social activities, including the provision of meals.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, paragraph 4 and the first subparagraph of paragraph 5, when the applicant is detained at a border post or in a transit zone, with the exception of the cases referred to in Article 43 of Directive 2013/32/EU. |

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| [**Qualification Directive**](http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%253A32011L0095)Article 31 – Unaccompanied minors1. 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. |

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| [**Dublin Regulation**](http://eur-lex.europa.eu/legal-content/EN/ALL/;jsessionid=jHNlTp3HLjqw8mqGbQSpZh1VWpjCyVQq14Hgcztw4pbfSQZffnrn!557467765?uri=CELEX:32013R0604)Article 28 - Detention1.   Member States shall not hold a person in detention for the sole reason that he or she is subject to the procedure established by this Regulation.2.   When there is a significant risk of absconding, Member States may detain the person concerned in order to secure transfer procedures in accordance with this Regulation, on the basis of an individual assessment and only in so far as detention is proportional and other less coercive alternative measures cannot be applied effectively.3.   Detention shall be for as short a period as possible and shall be for no longer than the time reasonably necessary to fulfil the required administrative procedures with due diligence until the transfer under this Regulation is carried out.Where a person is detained pursuant to this Article, the period for submitting a take charge or take back request shall not exceed one month from the lodging of the application. The Member State carrying out the procedure in accordance with this Regulation shall ask for an urgent reply in such cases. Such reply shall be given within two weeks of receipt of the request. Failure to reply within the two-week period shall be tantamount to accepting the request and shall entail the obligation to take charge or take back the person, including the obligation to provide for proper arrangements for arrival.Where a person is detained pursuant to this Article, the transfer of that person from the requesting Member State to the Member State responsible shall be carried out as soon as practically possible, and at the latest within six weeks of the implicit or explicit acceptance of the request by another Member State to take charge or to take back the person concerned or of the moment when the appeal or review no longer has a suspensive effect in accordance with Article 27(3).When the requesting Member State fails to comply with the deadlines for submitting a take charge or take back request or where the transfer does not take place within the period of six weeks referred to in the third subparagraph, the person shall no longer be detained. Articles 21, 23, 24 and 29 shall continue to apply accordingly.4.   As regards the detention conditions and the guarantees applicable to persons detained, in order to secure the transfer procedures to the Member State responsible, Articles 9, 10 and 11 of Directive 2013/33/EU shall apply. |

# **Annex II. Most recent case law on detention for analysis**

ECtHR

[***Khlaifia v Italy***](http://hudoc.echr.coe.int/eng?i=001-170054), ECtHR, Application No. [16483/12](http://hudoc.echr.coe.int/eng#%7B%22appno%22:%5B%2216483/12%22%5D%7D), Judgment of 15 December 2016

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| *1. Principles established in the Court’s case-law*128. The Court reiterates that Article 5 § 4 entitles detained persons to institute proceedings for a review of compliance with the procedural and substantive conditions which are essential for the “lawfulness”, in Convention terms, of their deprivation of liberty. The notion of “lawfulness” under paragraph 4 of Article 5 has the same meaning as in paragraph 1, such that a 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 (see E. v. Norway, 29 August 1990, § 50, Series A no. 181-A). The reviewing “court” must not have merely advisory functions but must have the competence to “decide” the “lawfulness” of the detention and to order release if the detention is unlawful (see Ireland v. the United Kingdom, 18 January 1978, § 200, Series A no. 25; Weeks v. the United Kingdom, 2 March 1987, § 61, Series A no. 114; Chahal v. the United Kingdom, 15 November 1996, § 130, Reports 1996V; and A. and Others v. the United Kingdom, cited above, § 202).129. The forms of judicial review satisfying the requirements of Article 5 § 4 may vary from one domain to another, and will depend on the type of deprivation of liberty in issue. It is not the Court’s task to inquire into what would be the most appropriate system in the sphere under examination (see Shtukaturov v. Russia, no. [44009/05](http://hudoc.echr.coe.int/eng#%257B%2522appno%2522:%255B%252244009/05%2522%255D%257D), § 123, ECHR 2008, and Stanev, cited above, § 169).130. The existence of the remedy must nevertheless be sufficiently certain, not only in theory but also in practice, failing which it will lack the requisite accessibility and effectiveness (see Vachev v. Bulgaria, no. [42987/98](http://hudoc.echr.coe.int/eng#%257B%2522appno%2522:%255B%252242987/98%2522%255D%257D), § 71, ECHR 2004-VIII, and Abdolkhani and Karimnia, cited above, § 139).131. Article 5 § 4 also secures to persons arrested or detained the right to have the lawfulness of their detention decided “speedily” by a court and to have their release ordered if the detention is not lawful (see, for example, Baranowski, cited above, § 68). Proceedings concerning issues of deprivation of liberty require particular expedition (see Hutchison Reid v. the United Kingdom, no. [50272/99](http://hudoc.echr.coe.int/eng#%257B%2522appno%2522:%255B%252250272/99%2522%255D%257D), § 79, ECHR 2003-IV), and any exceptions to the requirement of “speedy” review of the lawfulness of a measure of detention call for strict interpretation (see Lavrentiadis v. Greece, no. [29896/13](http://hudoc.echr.coe.int/eng#%257B%2522appno%2522:%255B%252229896/13%2522%255D%257D), § 45, 22 September 2015). The question whether the principle of speedy proceedings has been observed is not to be addressed in the abstract but in the context of a general assessment of the information, taking into account the circumstances of the case (see Luberti v. Italy, 23 February 1984, §§ 33-37, Series A no. 75; E. v. Norway, cited above, § 64; and Delbec v. France, no. [43125/98](http://hudoc.echr.coe.int/eng#%257B%2522appno%2522:%255B%252243125/98%2522%255D%257D), § 33, 18 June 2002), particularly in the light of the complexity of the case, any specificities of the domestic procedure and the applicant’s behaviour in the course of the proceedings (see Bubullima v. Greece, no. [41533/08](http://hudoc.echr.coe.int/eng#%257B%2522appno%2522:%255B%252241533/08%2522%255D%257D), § 27, 28 October 2010). In principle, however, since the liberty of the individual is at stake, the State must ensure that the proceedings are conducted as quickly as possible (see Fuchser v. Switzerland, no. [55894/00](http://hudoc.echr.coe.int/eng#%257B%2522appno%2522:%255B%252255894/00%2522%255D%257D), § 43, 13 July 2006, and Lavrentiadis, cited above, § 45).*2. Application of those principles in the present case*132. In cases where detainees had not been informed of the reasons for their deprivation of liberty, the Court has found that their right to appeal against their detention was deprived of all effective substance (see, in particular, Shamayev and Others, cited above, § 432; Abdolkhani and Karimnia, cited above, § 141; Dbouba v. Turkey, no. [15916/09](http://hudoc.echr.coe.int/eng#%257B%2522appno%2522:%255B%252215916/09%2522%255D%257D), § 54, 13 July 2010; and Musaev v. Turkey, no. [72754/11](http://hudoc.echr.coe.int/eng#%257B%2522appno%2522:%255B%252272754/11%2522%255D%257D), § 40, 21 October 2014). Having regard to its finding, under Article 5 § 2 of the Convention, that the legal reasons for the applicants’ detention in the CSPA and on the ships had not been notified to them (see paragraphs 117-22 above), the Court must reach a similar conclusion under this head.133. This consideration suffices for the Court to conclude that the Italian legal system did not provide the applicants with a remedy whereby they could obtain a judicial decision on the lawfulness of their deprivation of liberty (see, mutatis mutandis, S.D. v. Greece, no. [53541/07](http://hudoc.echr.coe.int/eng#%257B%2522appno%2522:%255B%252253541/07%2522%255D%257D), § 76, 11 June 2009) and makes it unnecessary for the Court to determine whether the remedies available under Italian law could have afforded the applicants sufficient guarantees for the purposes of Article 5 § 4 of the Convention (see, for example and mutatis mutandis, Shamayev and Others, cited above, § 433).134. As an additional consideration, and in response to the Government’s argument to the effect that an appeal to the Agrigento Justice of the Peace against the refusal-of-entry orders met the requirements of Article 5 § 4 of the Convention (see paragraph 126 above), the Court would note, first, that the refusal-of-entry orders did not make any reference to the applicants’ detention or to the legal or factual reasons for such a measure (see paragraph 119 above), and secondly that the orders were only notified to the applicants when it was too late, on 27 and 29 September 2011 respectively (see paragraph 120 above), shortly before they were returned by plane. This was rightly pointed out by the Chamber. It follows that the orders in question cannot be regarded as the decisions on which the applicants’ detention was based, and the lodging of an appeal against them with the Justice of the Peace could not, in any event, have taken place until after the applicants’ release on their return to Tunisia.135. There has thus been a violation of Article 5 § 4 of the Convention. |

[**Abdullahi Elmi and Aweys Abubakar v Malta**](http://hudoc.echr.coe.int/eng?i=001-168780), Application Nos. 25794/13 and 28151/13, Judgment of 22 November 2016[[91]](#footnote-92)

 On article 5.4

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| *1. The parties’ submissions*121. The applicants relied on the Court’s findings in *Louled Massoud v. Malta* (no. [24340/08](http://hudoc.echr.coe.int/eng#%257B%2522appno%2522:%255B%252224340/08%2522%255D%257D), 27 July 2010), whereby the Court held that the available remedies in the Maltese domestic system were ineffective and insufficient for the purposes of Article 5 § 4. A summary of their submissions can be found in *Mahamed Jama* (cited above, §§ 109-11).122. The Government submitted that this review was provided by Article 409A of the Maltese Criminal Code, and even if that were not so, it could be provided by means of proceedings before the constitutional jurisdictions. A summary of their lawyers’ submissions can be found in *Mahamed Jama* (cited above, §§ 112-14).*2. The Court’s assessment*123. The Court has already had occasion to examine such complaints and found that it had not been shown that applicants in situations such as that of the present case had at their disposal an effective and speedy remedy under domestic law by which to challenge the lawfulness of their detention (see, inter alia, Mahamed Jama, cited above, §§ 115-21, and Moxamed Ismaaciil and Abdirahman Warsame, cited above, § 112-18). There is no reason to hold otherwise in the present case.124. Article 5 § 4 of the Convention has therefore been violated. |

On article 5.1

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| 139. The Court refers to its general principles relevant to the present case as reiterated in Mahamad Jama (cited above, §§ 136-40). 140. It is noted that the applicants do not complain about the lawfulness and compliance with Article 5 of their detention between their arrival and the date when they applied for asylum (see paragraph 129 above, in primis).141. As to the subsequent period the Court observes that the applicants had been detained in accordance with the provisions of the Immigration Act (Articles 5 and 14(2), Chapter 217 of the Laws of Malta). While expressing reservations about the quality of all the applicable laws seen together in such context, the Court has already accepted that in cases similar to those of the applicants, the detention had a sufficiently clear legal basis, and that up to the decision on an asylum claim, such detention can be considered to fall under the first limb of Article 5 § 1 (f), namely to “prevent effecting an unauthorised entry” (see Suso Musa, cited above, § 99 and Mahamed Jama, cited above, § 144). There is no reason to find otherwise in the present case.142. It remains to be determined whether the detention in the present case was not arbitrary, namely whether it was carried out in good faith; whether it was closely connected to the ground of detention relied on by the Government; whether the place and conditions of detention were appropriate and whether the length of the detention exceeded that reasonably required for the purpose pursued.143. The Court has already noted a series of odd practices on the part of the domestic authorities when dealing with immigrant arrivals and subsequent detentions and it expressed its reservations as to the Government’s good faith in applying an across-the-board detention policy (save for specific vulnerable categories) and the by-passing of the voluntary departure procedure (see Suso Musa, cited above § 100 and Mahamed Jama, cited above, § 146) - reservations which it maintains, noting that the two practices persisted in the present case (see paragraphs 7 and 10 above in connection with the first applicant, and paragraphs 12 and 15 with the second applicant).144. Nevertheless, the focus of the applicants’ complaint concerns the fact that they were detained despite the fact that at the time they had claimed to be minors (and later found to be so). The Court reiterates that the necessity of detaining children in an immigration context must be very carefully considered by the national authorities (see Mahamed Jama, cited above, § 147). It is positive that in the Maltese context, when an individual is found to be a minor, the latter is no longer detained, and he or she is placed in a non-custodial residential facility, and that detention of minors should be no longer than what is absolutely necessary to determine their identification and health status (see paragraphs 31 and 36 above). An issue may however arise, inter alia, in respect of a State’s good faith, in so far as the determination of age may take an unreasonable length of time - indeed, a lapse of various months may also result in an individual reaching his or her majority pending an official determination (ibid.).145. The Court is, on the one hand, sensitive to the Government’s argument that younger looking individuals are fast tracked, and that the procedure is lengthier only in cases of persons close to adulthood, as well as their statement that in 2013 out of 567 individuals, only 274 were ruled to be minors (in 2012 only forty-six turned out to be minors out of seventyfive see Mahamed Jama, cited above, § 148). The Court observes that, as noted in Mahamed Jama, cited above, less than 10% of arrivals claimed to be minors in 2012 (that is when the applicants started their ageassessment procedure). In this connection, the Court considers that despite the fact that “borderline” cases may require further assessment, the numbers of alleged minors per year put forward by the Government cannot justify a duration of more than seven months to determine the applicants’ claims. Indeed, the Government have not explained why it was necessary for the first applicant in the present case to wait for a few weeks for his first age-assessment interview (see paragraph 18 above) and to wait for around seven months to have a decision following a standard medical test. The Court notes that during this time the first applicant remained in detention, despite having been told orally that he had been found to be a minor six months before (see paragraph 18). Similarly the Government have not explained why, following his interview, the second applicant had to wait for five months to have the FAV test and to wait for another two and a half months for such a decision, and therefore for his release under a care order. Indeed, in the present case it transpires that in October 2012 the authorities were already aware that the first applicant was a minor, and yet he remained in detention until a care order was issued on 19 April 2013, while the second applicant remained in detention for at least another month after his age was determined. In this connection the Court notes that Government policy clearly states that vulnerable people are exempt from detention and that unaccompanied minors are considered as a vulnerable category (see paragraphs 30 and 31 above).146. It follows that, even accepting that the detention was closely connected to the ground of detention relied on, namely to prevent an unauthorised entry, and in practice to allow for the applicants’ asylum claim to be processed with the required prior age assessment, the delays in the present case, particularly those subsequent to the determination of the applicants’ age, raise serious doubts as to the authorities’ good faith. A situation rendered even more serious by the fact that the applicants lacked any procedural safeguards (as shown by the finding of a violation of Article 5 § 4, at paragraph 124 above), as well as the fact that at no stage did the authorities ascertain whether the placement in immigration detention of the applicants was a measure of last resort for which no alternative was available (see, mutatis mutandis, Popov, cited above, § 119).147. Moreover, as to the place and conditions of detention, the Court has already found that the situation endured by the applicants as minors, for a duration of eight months, was in breach of Article 3 of the Convention.148. In conclusion, bearing in mind all the above, the Court considers that in the present case the applicants’ detention was not in compliance with Article 5 § 1. Accordingly, there has been a violation of that provision. |

[**Nabil and Others v. Hungary**](http://hudoc.echr.coe.int/eng?i=001-157392), Application No. 62116/12, Judgment of 22 September 2015

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| 38. As regards the applicants’ further detention, the Court emphasises that detention “with a view to deportation” can only be justified as long as the deportation is in progress and there is a true prospect of executing it (see paragraph 29 above). It notes that the applicants applied for asylum on 9 November 2011, formal asylum proceedings started on 10 November 2011, and the case was admitted to the “in-merit” phase on 12 December 2011. For the Court, the pending asylum case does not as such imply that the detention was no longer “with a view to deportation” – since an eventual dismissal of the asylum applications could have opened the way to the execution of the deportation orders. The detention nevertheless had to be in compliance with the national law and free of arbitrariness.(…) 40. For the Court, the period until the prolongation of 3 March 2012 raises a serious question of lawfulness in terms of compliance with the relevant rules of the domestic law. Under sections 54(1)(b), 54(2) and 54(6)(b) of the Immigration Act (see paragraph 15 above) – read in conjunction and in the light of the circumstances of the case – to validly prolong the applicants’ detention, the domestic authorities had to verify that they were indeed frustrating the enforcement of the expulsion; that alternative, less stringent measures were not applicable, and whether or not the expulsion could eventually be enforced.41. Instead of these criteria having been addressed, the applicants’ continuing detention was in essence based on the reasons contained in the first detention order by the Csongrád County Police Department, that is, the risk that they might frustrate their expulsion. However, very little reasons, if any, were adduced to show that the applicants were actually a flight risk. Moreover, none of these decisions dealt with the possibility of alternative measures or the impact of the on-going asylum procedure. The extension decision of 1 February 2012 was indeed the first one to state that the expulsion had been suspended due to the asylum application, but the court drew no inference from this fact as to the chances to enforce, at one point in time, the expulsion.42. For the Court, it does not transpire from the reasoning of the decisions given between 8 November 2011 and 1 February 2012 that the domestic courts duly assessed whether the conditions under the national law for the prolongation of the applicants’ detention were met, with regard to the specific circumstances of the case and the applicants’ situation.43. Since the requisite scrutiny as prescribed by the law was not carried out on these occasions of prolonging the applicants’ detention, the Court considers that it is not warranted to examine the applicants’ other arguments or whether the detention could otherwise be characterised as arbitrary, for example, because the actual progress of the expulsion process was not demonstrated.44.The above considerations enable the Court to conclude that there has been a violation of Article 5 § 1 of the Convention in the period between 8 November 2011 and 3 March 2012. In view of this finding, it is not necessary to address the additional question whether the subsequent period of detention was justified under that provision. |

[**Mahamad Jama v. Malta**](http://hudoc.echr.coe.int/eng?i=001-158877), Application No. [10290/13](http://hudoc.echr.coe.int/eng#%257B%2522appno%2522:%255B%252210290/13%2522%255D%257D), Judgment of 2 May 2016

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| *(a) General principles*136. Article 5 enshrines a fundamental human right, namely the protection of the individual against arbitrary interference by the State with his or her right to liberty. The text of Article 5 makes it clear that the guarantees it contains apply to “everyone” (see Nada v. Switzerland [GC], no. [10593/08](http://hudoc.echr.coe.int/eng#%257B%2522appno%2522:%255B%252210593/08%2522%255D%257D), § 224, ECHR 2012). Sub-paragraphs (a) to (f) of Article 5 § 1 contain an exhaustive list of permissible grounds on which persons may be deprived of their liberty and no deprivation of liberty will be lawful unless it falls within one of those grounds (see Saadi v. the United Kingdom [GC], no. [13229/03](http://hudoc.echr.coe.int/eng#%257B%2522appno%2522:%255B%252213229/03%2522%255D%257D), § 43, ECHR 2008). One of the exceptions, contained in subparagraph (f), permits the State to control the liberty of aliens in an immigration context.137. In Saadi (cited above, §§ 64-66) the Grand Chamber interpreted for the first time the meaning of the first limb of Article 5 § 1 (f), namely, “to prevent his effecting an unauthorised entry into the country”. It considered that until a State had “authorised” entry to the country, any entry was “unauthorised” and the detention of a person who wished to effect entry and who needed but did not yet have authorisation to do so, could be, without any distortion of language, to “prevent his effecting an unauthorised entry” (§ 65). However, detention had to be compatible with the overall purpose of Article 5, which was to safeguard the right to liberty and ensure that noone should be dispossessed of his or her liberty in an arbitrary fashion (ibid., § 66).138. The question as to when the first limb of Article 5 ceases to apply, because the individual has been granted formal authorisation to enter or stay, is largely dependent on national law (see Suso Musa, cited above, § 97).139. Under the sub-paragraphs of Article 5 § 1 any deprivation of liberty must, in addition to falling within one of the exceptions set out in subparagraphs (a)(f), be “lawful”. Where the “lawfulness” of detention is at 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 (see Saadi, cited above, § 67).140. 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, bearing in mind that “the measure is applicable not to those who have committed criminal offences but to aliens who, often fearing for their lives, have fled from their own country”; and the length of the detention should not exceed that reasonably required for the purpose pursued (ibid., § 74; see also A. and Others v. the United Kingdom [GC], no. [3455/05](http://hudoc.echr.coe.int/eng#%257B%2522appno%2522:%255B%25223455/05%2522%255D%257D), § 164, ECHR 2009, and Louled Massoud, cited above, § 62).*(b) Application to the present case**(ii) Following the acceptance of her asylum claim (2-7 February 2013)*154. The Court observes that the applicant remained in detention for five days following a decision granting her subsidiary protection. It reiterates that no deprivation of liberty will be lawful unless it falls within one of the grounds announced in Article 5 § 1.155. Indeed the Government did not rely on any of the listed grounds, and thus, in principle, the detention during this period cannot be considered in compliance with the relevant provision.156. Nevertheless, the Court observes that, in the criminal detention context, for the purposes of Article 5 § 1 (c), detention ceases to be justified “on the day on which the charge is determined” and that, consequently, detention after acquittal is no longer covered by that provision. However, “some delay in carrying out a decision to release a detainee is often inevitable, although it must be kept to a minimum” (see Labita v. Italy [GC], no. [26772/95](http://hudoc.echr.coe.int/eng#%257B%2522appno%2522:%255B%252226772/95%2522%255D%257D), § 171, ECHR 2000IV).157. Applying these principles mutatis mutandis to the immigration context, the Court could accept that the original detention falling under Article 5 § 1 (f), some delay may be envisaged in informing the applicant, as an immigration detainee, that she was granted subsidiary protection status and in actualising her release. However, in the present case the applicant was detained for five more days following that decision, and the reasons advanced by the Government cannot justify such duration. It has not been suggested that the applicant would have been homeless and destitute in those five days had it not been for the lodging proposed by the Government, nor can it be accepted that an individual is detained for five days, without any lawful ground, pending a medical clearance based on a simple X-ray.158. Thus, this supplementary period of detention did not come within subparagraph 1 (f), or any other sub-paragraph, of Article 5.159. It follows that there has been a violation of Article 5 § 1 concerning the applicant’s detention following the determination of her asylum claim. |

[**O.M. v. Hungary**](http://hudoc.echr.coe.int/eng?i=001-164466), Application No. 9912/15, Judgment of 5 July 2016

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| 53. Lastly, the Court considers that, in the course of placement of asylum seekers who claim to be a part of a vulnerable group in the country which they had to leave, the authorities should exercise particular care in order to avoid situations which may reproduce the plight that forced these persons to flee in the first place. In the present case, the authorities failed to do so when they ordered the applicant’s detention without considering the extent to which vulnerable individuals – for instance, LGBT people like the applicant – were safe or unsafe in custody among other detained persons, many of whom had come from countries with widespread cultural or religious prejudice against such persons. Again, the decisions of the authorities did not contain any adequate reflection on the individual circumstances of the applicant, member of a vulnerable group by virtue of belonging to a sexual minority in Iran (see, *mutatis mutandis*, *Alajos Kiss v. Hungary*, no. [38832/06](http://hudoc.echr.coe.int/eng#%257B%2522appno%2522:%255B%252238832/06%2522%255D%257D), § 42, 20 May 2010).54. As a consequence, in the absence of a specific and concrete legal obligation which the applicant failed to satisfy, Article 5 § 1 (b) of the Convention cannot convincingly serve as a legal basis for his asylum detention. The foregoing considerations, demonstrating that the applicant’s detention verged on arbitrariness, enable the Court to conclude that there was a violation of Article 5 § 1 of the Convention in the period from 7 p.m. on 25 June to 22 August 2014 (see, *mutatis mutandis*, *Blokhin v. Russia* [GC], no. [47152/06](http://hudoc.echr.coe.int/eng#%257B%2522appno%2522:%255B%252247152/06%2522%255D%257D), § 172, ECHR 2016) |

CJEU

Case C-528/15, [*Policie ČR, Krajské ředitelství policie Ústeckého kraje, odbor cizinecké policie* ***v. Al Chodor***](http://curia.europa.eu/juris/document/document.jsf?text=&docid=188907&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=835567), 15 March 2017

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| The case relates to an Iraqi male and his two minor children who were detained by the Czech police in May 2015 pending their transfer to Hungary pursuant to the [Dublin Regulation](http://bit.ly/12eTk71) and Article 129(1) of the Czech Aliens Act. They appealed to the Regional Court in Usti nad Labem which found their detention unlawful and ordered their release. The court held that the Czech legislation contained no objective criteria defining “risk of absconding” as required by Article 2 (n) of the Dublin Regulation. Therefore, the legislation under Article 28 of the Dublin Regulation was not applicable in the Czech Republic, and the decision to detain the applicants was unlawful. The court referred in its reasoning to similar judgments of the German and Austrian highest courts. The police appealed against the judgment.On 7 October 2015, the Czech Supreme Administrative Court [requested](http://bit.ly/2g3AGZT) a preliminary ruling from the CJEU, referring the following question: “*Does the sole fact that a law has not defined objective criteria for assessment of a significant risk that a foreign national may abscond (Article 2(n) of Regulation No 604/2013) render detention under Article 28(2) of that regulation inapplicable?”*The CJEU ruled on 15 March 2017 as follows:48. (…) Article 2(n) and Article 28(2) 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, read in conjunction, must be interpreted as requiring Member States to establish, in a binding provision of general application, objective criteria underlying the reasons for believing that an applicant for international protection who is subject to a transfer procedure may abscond. The absence of such a provision leads to the inapplicability of Article 28(2) of that regulation. |

Case C601/15 PPU, [**J. N. v. Staatssecretaris voor Veiligheid en Justitie**](http://curia.europa.eu/juris/document/document.jsf?text=&docid=174342&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=1045024), 15 February 2016

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| 55      In this regard, the detention of an applicant where the protection of national security or public order so requires is, by its very nature, an appropriate measure for protecting the public from the threat which the conduct of such a person represents and is thus suitable for attaining the objective pursued by point (e) of the first subparagraph of Article 8(3) of Directive 2013/33.67      Thus, placing or keeping an applicant in detention under point (e) of the first subparagraph of Article 8(3) of Directive 2013/33 is, in view of the requirement of necessity, justified on the ground of a threat to national security or public order only if the applicant’s individual conduct represents a genuine, present and sufficiently serious threat, affecting a fundamental interest of society or the internal or external security of the Member State concerned (…).69      Such a provision cannot form the basis for measures ordering detention without the competent national authorities having previously determined, on a case-by-case basis, whether the threat that the persons concerned represent to national security or public order corresponds at least to the gravity of the interference with the liberty of those persons that such measures entail.Consideration of point (e) of the first subparagraph of Article 8(3) of 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 has disclosed no factor of such a kind as to affect the validity of that provision in the light of Articles 6 and 52(1) and (3) of the Charter of Fundamental Rights of the European Union |

1. The legal term for “detention” is “deprivation of liberty”, the term “detention” is used in these training materials as shorthand. Detention is otherwise a narrower concept than deprivation of liberty - since deprivation of liberty it can take place anywhere in situations not usually thought of as “detention”. [↑](#footnote-ref-2)
2. [*Saadi v. United Kingdom*](https://hudoc.echr.coe.int/eng#{"fulltext":["saadi"],"documentcollectionid2":["GRANDCHAMBER","CHAMBER","DECISIONS"],"itemid":["001-85276"]}), ECtHR, Application No. 13229/03, Judgment of 29 January 2008, paras. 70-74. [↑](#footnote-ref-3)
3. Human Rights Committee, [General Comment 35](http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhsrdB0H1l5979OVGGB%2bWPAXjdnG1mwFFfPYGIlNfb%2f6T%2fqwtc77%2fKU9JkoeDcTWWPIpCoePGBcMsRmFtoMu58pgnmzjyiyRGkPQekcPKtaaTG), para. 18; [*A.* v. *Australia*](http://hrlibrary.umn.edu/undocs/html/vws560.html), HRC, Communication No. 560/1993, Views of 3 April 1997, UN Doc. CCPR/C/59/D/560/1993, paras. 9.3–9.4; [*Samba Jalloh v. Netherlands*](http://hrlibrary.umn.edu/undocs/794-1998.html), HRC, Communication No. 794/1998, Views of 26 March 2002, UN Doc. CCPR/C/74/D/794/1998, para. 8.2; [*Nystrom* v. *Australia*](http://www.worldcourts.com/hrc/eng/decisions/2011.07.18_Nystrom_v_Australia.pdf), HRC, Communication 1557/2007, Views of 18 July 2011, UN Doc. CCPR/C/102/D/1557/2007, paras. 7.2 and 7.3. [↑](#footnote-ref-4)
4. Human Rights Committee, General Comment 35, para 18; [*Baban* v. *Australia*](http://www.refworld.org/cases%2CHRC%2C404887ee3.html), HRC, Communication 1014/2001, Views of 18 September 2003, UN Doc. CCPR/C/78/D/1014/2001, para. 7.2; [*Bakhtiyari* v. *Australia*](http://hrlibrary.umn.edu/undocs/1069-2002.html), HRC, Communication 1069/2002, Views of 6 November 2003, UN Doc. CCPR/C/79/D/1069/2002, paras. 9.2–9.3; UNHCR, [Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention](http://www.unhcr.org/publications/legal/505b10ee9/unhcr-detention-guidelines.html) (2012), guideline 4.3 and annex A (describing alternatives to detention). [↑](#footnote-ref-5)
5. *Geneva Convention Relating to the Status of Refugees* of 1951, and its *Protocol Related to the Status of Refugees* of 1967 (altogether, the [*Geneva Refugee Convention*](http://www.unhcr.org/3b66c2aa10.pdf)); and UNHCR Guidelines. [↑](#footnote-ref-6)
6. Human Rights Committee, General Comment 35, para 18; [*González del Río* v. *Peru*](http://hrlibrary.umn.edu/undocs/html/dec263.htm), HRC, Communication No. 263/1987, Views of 28 October 1992, UN Doc. CCPR/C/46/D/263/1987, para. 5.1; [*Karker* v. *France*](http://hrlibrary.umn.edu/undocs/833-1998.html), HRC, Communication No. 833/1998, Views of 26 October 2006, UN Doc. CCPR/C/70/D/833/1998, para. 8.5. [↑](#footnote-ref-7)
7. Report of the WGAD, A/HRC/22/44, 24 December 2012, para 82(b). [↑](#footnote-ref-8)
8. [*Amuur v. France*](https://hudoc.echr.coe.int/eng#{"fulltext":["amuur"],"documentcollectionid2":["GRANDCHAMBER","CHAMBER","DECISIONS"],"itemid":["001-57988"]}), ECtHR, Application No. 19776/92, Judgment of 25 June 1996, para. 48. [↑](#footnote-ref-9)
9. UNHCR Guidelines on the applicable criteria and standards relating to the detention of asylum-seekers and alternatives to detention, 2012, Terminology, para. 7. [↑](#footnote-ref-10)
10. See [*O.M. v. Hungary*](https://hudoc.echr.coe.int/eng#{"fulltext":["9912"],"documentcollectionid2":["GRANDCHAMBER","CHAMBER","DECISIONS"],"itemid":["001-164466"]}), ECtHR, Application No. [9912/15](http://hudoc.echr.coe.int/eng%22%20%5Cl%20%22%7B%22appno%22%3A%5B%229912/15%22%5D%7D%22%20%5Ct%20%22_blank), Judgment of 5 July 2016, paras. 42–44 and 48. [↑](#footnote-ref-11)
11. 560/1993, *A.* v. *Australia*,*.,* paras. 9.3–9.4; 794/1998, *Jalloh* v. *Netherlands*, *op. cit.,*para. 8.2; 1557/2007, *Nystrom* v. *Australia*, *op. cit.* paras. 7.2–7.3. [↑](#footnote-ref-12)
12. *Bakhtiyari* v. *Australia*, *op. cit.,* paras. 9.2–9.3. [↑](#footnote-ref-13)
13. [*Tarlue* v. *Canada*](http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhstcNDCvDan1pXU7dsZDBaDVEBkdeaT5Sx9X%2b351DL0Sti%2bR9yBZSaZN3UGoT9S9ICJC%2b6RZeVqbkgjtN3gKrnADv76XzJZoPXfYNZ1hKhAcHpZzAnrM2%2fZDDIj2DzQg369hkjW0ipTDQiGejCxzE5S8%3d), HRC, Communication No. 1551/2007, Views of 27 March 2009, UN Doc. CCPR/C/95/D/1551/2007, paras. 3.3 and 7.6; [*Ahani* v. *Canada*](http://hrlibrary.umn.edu/undocs/html/1051-2002.html), Communication No. 1051/2002, Views of 15 June 2004, UN Doc. CCPR/C/80/D/1051/2002, para. 10.2. [↑](#footnote-ref-14)
14. *Baban* v. *Australia*, *op. cit.,* para. 7.2; *Bakhtiyari* v. *Australia*, *op. cit.,* paras. 9.2–9.3; see also UNHCR, Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention (2012), guideline 4.3 and annex A (describing alternatives to detention). [↑](#footnote-ref-15)
15. [*Shafiq* v. *Australia*](http://hrlibrary.umn.edu/undocs/1324-2004.html), Communication No. 1324/2004, Views of 13 November 2006, UN Doc. CCPR/C/88/D/1324/2005, para. 7.3; [*C.* v. *Australia*](http://www.refworld.org/cases%2CHRC%2C3f588ef00.html), Communication No. 900/1999, Views of 28 October 2002, UN Doc. CCPR/C/76/D/900/1999, paras. 8.2 and 8.4. [↑](#footnote-ref-16)
16. 2094/2011, *F.K.A.G.* v. *Australia*, para. 9.3. [↑](#footnote-ref-17)
17. [*D. and E. and their two children* v. *Australia*](http://hrlibrary.umn.edu/undocs/1050-2002.html), Communication No. 1050/2002, Views of 9 August 2006, UN Doc. CCPR/C/87/D/1050/2022, para. 7.2; *Jalloh* v. *Netherlands*, *op. cit.,* paras. 8.2–8.3; see also Convention on the Rights of the Child, article. 3.1 and 37(b). [↑](#footnote-ref-18)
18. [Report of the Working Group on Arbitrary Detention](http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session22/A.HRC.22.44_en.pdf), UN DOC A/HRC/22/44 (24 December 2012), para. 80. [↑](#footnote-ref-19)
19. [*Policie ČR, Krajské ředitelství policie Ústeckého kraje, odbor cizinecké policie v. Salah Al Chodor, Ajlin Al Chodor, Ajvar Al Chodor*](http://www.refworld.org/cases%2CEU_CFI%2C58cc04014.html), CJEU, Judgment of 15 March 2017, para. 48. See the EDAL summary: <http://bit.ly/2icyi5y> and the Annex of this paper. [↑](#footnote-ref-20)
20. Human Rights Committee, General Comment 35, para 18; *Baban* v. *Australia*, *op. cit.,* para. 7.2; *Bakhtiyari* v. *Australia*, *op. cit.,* paras. 9.2–9.3; see UNHCR, Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention (2012), guideline 4.3 and annex A (describing alternatives to detention). [↑](#footnote-ref-21)
21. *C. v. Australia*, *op. cit*. [↑](#footnote-ref-22)
22. [*M.S.S. v Belgium and Greece*](https://hudoc.echr.coe.int/eng#{"fulltext":["30696"],"documentcollectionid2":["GRANDCHAMBER","CHAMBER","DECISIONS"],"itemid":["001-103050"]}), ECtHR, Application No. 30696/09, 21 January 2011, para. 232. [↑](#footnote-ref-23)
23. *C. v. Australia, op. cit.* [↑](#footnote-ref-24)
24. *UNHCR Guidelines on Detention*, *op. cit,* guideline 9. [↑](#footnote-ref-25)
25. [*Rahimi v. Greece*](https://hudoc.echr.coe.int/eng#{"itemid":["001-104366"]}), ECtHR, Application No. 8687/08, Judgment of 5 April 2011; [*Popov v. France*](https://hudoc.echr.coe.int/eng#{"fulltext":["popov"],"documentcollectionid2":["GRANDCHAMBER","CHAMBER","DECISIONS"],"itemid":["001-108710"]}), ECtHR, Applications Nos. 39472/07 and 39474/07, Judgment of 19 January 2012. [↑](#footnote-ref-26)
26. [*Farbtuhs v. Latvia*](https://hudoc.echr.coe.int/eng#{"itemid":["001-67652"]}), ECtHR, Application No. 4672/02, Judgment of 2 December 2004. [↑](#footnote-ref-27)
27. PACE resolution 2020(2014), para 9.4 [↑](#footnote-ref-28)
28. Article 37(b) CRC, UN Human Rights Committee, General Comment 35, para. 18 expresses this principle in the context of immigration detention of a child; Article 11(2) of the EU Reception Directive; Article 17 (1) EU Returns Directive [↑](#footnote-ref-29)
29. [Joint general comment No. 3 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 22 (2017) of the Committee on the Rights of the Child on the general principles regarding the human rights of children in the context of international migration](http://tbinternet.ohchr.org/Treaties/CMW/Shared%20Documents/1_Global/INT_CMW_INF_8219_E.pdf), para 32(e) [↑](#footnote-ref-30)
30. Statement of 16 May 2016. [↑](#footnote-ref-31)
31. Resolutions 1707(2010), 1810(2011) [↑](#footnote-ref-32)
32. PACE resolution 2020(2014), para 9.1. [↑](#footnote-ref-33)
33. CRC, [General Comment No. 6](http://www2.ohchr.org/english/bodies/crc/docs/GC6.pdf), para. 63. [↑](#footnote-ref-34)
34. [*Muskhadzhiyeva and Others v. Belgium*](http://hudoc.echr.coe.int/eng?i=002-1144), ECtHR,Application No. 41442/07, Judgment of 19 January 2010. [↑](#footnote-ref-35)
35. *Popov v. France,* *op. cit.* [↑](#footnote-ref-36)
36. [*Kanagaratnam v. Belgium,* ECtHR](http://hudoc.echr.coe.int/eng?i=001-107895),Application No. 15297/09, Judgment of 13 March 2012. [↑](#footnote-ref-37)
37. [*Agraw v. Switzerland*](http://hudoc.echr.coe.int/eng?i=001-100122)*,* ECtHR*,* Application No. 3295/06, Judgment of 29 October 2010. [↑](#footnote-ref-38)
38. [*Charter of Fundamental Rights of the European Union*](http://www.europarl.europa.eu/charter/pdf/text_en.pdf)*.* [↑](#footnote-ref-39)
39. [ICJ Practitioners Guide on Migration and International human rights law](https://www.icj.org/wp-content/uploads/2014/10/Universal-MigrationHRlaw-PG-no-6-Publications-PractitionersGuide-2014-eng.pdf), p. 152. [↑](#footnote-ref-40)
40. [*Yoh-Ekale Mwanje v. Belgium*](http://hudoc.echr.coe.int/eng?i=001-108155), ECtHR, Application No. 10486/10, Judgment of 20 March 2012. [↑](#footnote-ref-41)
41. [*Asalya v. Turkey*](https://hudoc.echr.coe.int/eng#{"fulltext":["43875"],"documentcollectionid2":["GRANDCHAMBER","CHAMBER","DECISIONS"],"itemid":["001-142399"]}), ECtHR, Application No. 43875/09, Judgment of 15 April 2014; [*Price v. United Kingdom*](https://hudoc.echr.coe.int/eng#{"fulltext":["33394"],"documentcollectionid2":["GRANDCHAMBER","CHAMBER","DECISIONS"],"itemid":["001-59565"]}), ECtHR, Application No. 33394/96, Judgment of 10 July 2001, paras. 25-30; *Farbtuhs v. Latvia*, *op. cit.*, para. 56; [*Hamilton v. Jamaica*](http://hrlibrary.umn.edu/undocs/html/vws333.htm), HRC, Communication No. 616/1995, Views of 23 July 1999, UN Doc. CCPR/C/50/D/333/1988. [↑](#footnote-ref-42)
42. Council of Europe CoM recommendation R(1998) Guideline 10(i). [↑](#footnote-ref-43)
43. Jesuit Refugee Service, Becoming Vulnerable in Detention (the DEVAS Project), June 2010 [http://www.europarl.europa.eu/document/activities/cont/201110/20111014ATT29338/20111014ATT29338EN.pdf](http://www.europarl.europa.eu/document/activities/cont/201110/20111014att29338/20111014att29338en.pdf), FRA, <http://bit.ly/1RxJAsc> and Odysseus, <http://bit.ly/1JX4hMm>. [↑](#footnote-ref-44)
44. [Mahmundi and others v. Greece](https://hudoc.echr.coe.int/eng#{"itemid":["001-112526"]}), Application No. 14902/10, Judgment of 31 July 2012. [↑](#footnote-ref-45)
45. Working Group on Arbitrary Detention, *Annual Report 1998*, para. 69, Guarantee 10. [↑](#footnote-ref-46)
46. HRC, General Comment 35, para. 15. [↑](#footnote-ref-47)
47. HRC, General Comment 35, para. 18. [↑](#footnote-ref-48)
48. 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 (recast). [↑](#footnote-ref-49)
49. [*Abdolkhani and Karimnia v. Turkey*](https://hudoc.echr.coe.int/eng#{"fulltext":["30471"],"documentcollectionid2":["GRANDCHAMBER","CHAMBER","DECISIONS"],"itemid":["001-94127"]}), ECtHR, Application No. 30471/08, Judgment of 22 September 2009, paras. 136 and 137; [*Shamayev and Others v. Georgia and Russia*](https://hudoc.echr.coe.int/eng#{"fulltext":["36378"],"documentcollectionid2":["GRANDCHAMBER","CHAMBER","DECISIONS"],"itemid":["001-68790"]}), ECtHR, Application No. 36378/02, Judgment of 12 April 2005, paras. 413 and 414. [↑](#footnote-ref-50)
50. HRC, General Comment No 35, para 24. [↑](#footnote-ref-51)
51. HRC, General Comment No 35, para 28; [General comment No. 32](http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhsrdB0H1l5979OVGGB%2bWPAXhRj0XNTTvKgFHbxAcZSvX1OsJj%2fiyRmVA4IiMvUt2NlGKqqg2nh1qOE2hX5xoGtKE2v2YSQVV1Rv5NitNbSYwp), para. 42; [*Krasnov* v. *Kyrgyzstan*](http://www.worldcourts.com/hrc/eng/decisions/2011.03.29_Krasnov_v_Kyrgystan.pdf), HRC, Communication No. 1402/2005, Views of 29 March 2011, UN Doc. CCPR/C/101/D/1402/2005, para. 8.5; Committee on the Rights of the Child, [General comment No. 10](http://www2.ohchr.org/english/bodies/crc/docs/CRC.C.GC.10.pdf), para. 48. [↑](#footnote-ref-52)
52. HRC, General Comment 35, para. 27; [*Hill and Hill* v. *Spain*](http://hrlibrary.umn.edu/undocs/html/VWS526.HTM), HRC, Communication No. 526/1993, Views of 2 April 1997, UN Doc. CCPR/C/59/D/526/1993, para. 12.2. [↑](#footnote-ref-53)
53. [*Fox, Campbell and Hartley v. United Kingdom*](https://hudoc.echr.coe.int/eng#{"fulltext":["fox"],"documentcollectionid2":["GRANDCHAMBER","CHAMBER","DECISIONS"],"itemid":["001-57721"]}), ECtHR, Applications Nos. 12244/86, 12245/86 and 12383/86, Judgment of 30 August 1990, para. 41. [↑](#footnote-ref-54)
54. *Shamayev and others v. Georgia and Russia*, *op. cit.*, para. 425. [↑](#footnote-ref-55)
55. HRC, General Comment 35, para 45; [*Rameka* v. *New Zealand*](http://www.worldcourts.com/hrc/eng/decisions/2003.11.06_Rameka_v_New_Zealand.htm), HRC, Communication No. 1090/2002, Views of 6 November 2003, UN Doc. CCPR/C/79/D/1090/2002, para. 7.4. [↑](#footnote-ref-56)
56. *A. v. Australia, op. cit.,* para. 8.3. [↑](#footnote-ref-57)
57. HRC, General Comment 35, para 41. [↑](#footnote-ref-58)
58. *Ibid.*, para 47 [↑](#footnote-ref-59)
59. [*Bouamar v. Belgium*](https://hudoc.echr.coe.int/eng#{"fulltext":["bouamar"],"documentcollectionid2":["GRANDCHAMBER","CHAMBER","DECISIONS"],"itemid":["001-62002"]}), ECtHR, Application No. 9106/80, Judgment of 27 June 1988, para. 60. [↑](#footnote-ref-60)
60. HRC General Comment 35, para 43. [↑](#footnote-ref-61)
61. *Ibid.*, para 42. [↑](#footnote-ref-62)
62. [*Shakurov v. Russia*](https://hudoc.echr.coe.int/eng#{"fulltext":["55822"],"documentcollectionid2":["GRANDCHAMBER","CHAMBER","DECISIONS"],"itemid":["001-111177"]}), ECtHR, Application No. 55822/10, Judgment of 5 June 2012. [↑](#footnote-ref-63)
63. [*Brogan and Others v. United Kingdom*](https://hudoc.echr.coe.int/eng#{"fulltext":["brogan"],"documentcollectionid2":["GRANDCHAMBER","CHAMBER","DECISIONS"],"itemid":["001-57450"]}), ECtHR, Application no. 11209/84; 11234/84; 11266/84; [11386/85](https://hudoc.echr.coe.int/eng%22%20%5Cl%20%22%7B%5C%22appno%5C%22%3A%5B%5C%2211386/85%5C%22%5D%7D%22%20%5Ct%20%22_blank), Judgment of 29 November 1988, para. 67. [↑](#footnote-ref-64)
64. HRC, [General comment No. 31](http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPPRiCAqhKb7yhsjYoiCfMKoIRv2FVaVzRkMjTnjRO%2Bfud3cPVrcM9YR0iW6Txaxgp3f9kUFpWoq%2FhW%2FTpKi2tPhZsbEJw%2FGeZRASjdFuuJQRnbJEaUhby31WiQPl2mLFDe6ZSwMMvmQGVHA%3D%3D), paras. 16 and 18; [*Bolaños* v. *Ecuador*](http://hrlibrary.umn.edu/undocs/session44/238-1987.htm), HRC, Communication No. 238/1987, Views of 26 July 1989, UN Doc. Supp. No. 40 (A/44/40) para. 10; [*Mulezi* v.*Democratic Republic of the Congo*](http://hrlibrary.umn.edu/undocs/html/962-2001.html), Communication No. 962/2001, Views of 23 July 2004, UN Doc. CCPR/C/81/D/962/2001, para. 7. [↑](#footnote-ref-65)
65. See concluding observations: Cameroon (CCPR/C/CMR/CO/4, 2010), para. 19; Guyana (CCPR/C/79/Add.121, 2000), para. 15; United States of America (A/50/40, 1995), para. 299; Argentina (A/50/40, 1995), para. 153; 1885/2009, *Horvath* v. *Australia*, para. 8.7 (discussing effectiveness of remedy); 1432/2005, *Gunaratna* v. *Sri Lanka*, para. 7.4; general comment No. 32, para. 52 (requirement of compensation for wrongful convictions). [↑](#footnote-ref-66)
66. [*Mika Miha* v. *Equatorial Guinea*](http://hrlibrary.umn.edu/undocs/html/vws414.htm), Communication No. 414/1990, Views of 10 August 1994, UN Doc. CCPR/C/51/D/414/1990, para. 6.5; *Mulezi* v. *Democratic Republic of the Congo*, *op. cit.,* para. 5.2. [↑](#footnote-ref-67)
67. *A.* v. *New Zealand*, *op. cit.,* paras. 6.7 and 7.4; [*Martínez Portorreal* v. *Dominican Republic*](http://hrlibrary.umn.edu/undocs/session43/188-1984.htm), Communication No. 188/1984, Views of 5 November 1987, UN Doc. Supp. No. 40 (A/43/40), para. 11; *Mulezi* v. *Democratic Republic of the Congo*, *op. cit.,* para. 5.2. [↑](#footnote-ref-68)
68. [*Marques de Morais* v. *Angola*](http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhsuXfSngwAQecUmCVwpZQk3OQc9czkMjsa2zWuRwvRwPHo8ZXxHYEpQnaLBew813yfFWUHHE1hXX5qRB%2fNM6D8qxTlB7A8MG%2fNW6ik3T3ddRJzu9AgM790jK8%2fEtg7LY15w%3d%3d), HRC, Communication No. 1128/2002, para. 6.6; see also 328/1988, *Zelaya Blanco* v. *Nicaragua*, para. 10.3 (arbitrary detention); [*Sahadeo* v. *Guyana*](http://www.bayefsky.com/html/guyana_t5_iccpr_728_1996.php), HRC, Communication No. 728/1996, Views of 1 November 2001, UN Doc. CCPR/C/73/D/728/1996, para. 11 (violation of article 9.3); [*Santullo Valcada* v. *Uruguay*](http://www.worldcourts.com/hrc/eng/decisions/1979.10.26_Valcada_v_Uruguay.htm), HRC, Communication No. 9/1977, Views of 26 October 1979, UN Doc. CCPR/C/8/D/9/1977, para. 12 (violation of art. 9. 4). [↑](#footnote-ref-69)
69. [*W.B.E.* v. *Netherlands*](http://hrlibrary.umn.edu/undocs/html/dec432.htm), Communication 432/1990, Views of 1 December 1992, UN Doc. CCPR/C/46/D/432/1990, para. 6.5; [*Übergang* v. *Australia*](http://www.bayefsky.com/html/118_australia963.php), Communication No. 963/2001, Views of 22 March 2001, UN Doc. CCPR/C/71/D/963/2001, para. 4.4. [↑](#footnote-ref-70)
70. [*Coleman* v. *Australia*](http://hrlibrary.umn.edu/undocs/1157-2003.html), Communication No. 1157/2003, Views of 10 August 2006, UN Doc. CCPR/C/87/D/1157/2003, para. 6.3. [↑](#footnote-ref-71)
71. *Ibid.,* para. 9; *Marques de Morais* v. *Angola*, para. 8; HRC, General comment No. 31, para. 16. [↑](#footnote-ref-72)
72. Joined Cases C-6/90 and C-9/90, [*Francovich and Bonifaci v. Italian Republic*](http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:61990CJ0006&from=EN)*,* Judgment of 19 November 1991. [↑](#footnote-ref-73)
73. See: *Concluding Observations on Australia*, CCPR, Report of the UN Human Rights Committee to the General Assembly, 55th Session, Vol. I, UN Doc. A/55/40 (2000), para. 526, where the Committee expressed concern “at the State Party’s policy, in this context of mandatory detention, of not informing the detainees of their right to seek legal advice and of not allowing access of non-governmental human rights organisations to the detainees in order to inform them of this right.” See also, Article 17.2(d), CPED; *UNHCR Guidelines on Detention*, Guideline 7(ii): “Free legal assistance should be provided where it is also available to nationals similarly situated, and should be available as soon as possible after arrest or detention to help the detainee understand his/her rights”; *Body of Principles for the Protection of all persons deprived of their liberty*, Principle 18. Principle 1 of the UN Basic Principles on the Role of Lawyers “All persons are entitled to call upon the assistance of a lawyer of their choice to protect and establish their rights….” See also: WGAD, *Annual Report 1998*, para. 69, Guarantees 6 and 7; WGAD, *Annual Report 1999*, Principle 2; *European Guidelines on Accelerated Asylum Procedures*, CMCE,Guideline XI.5 and 6; Report of the WGAD, A/HRC/22/44, 24 December 2012, para 84. [↑](#footnote-ref-74)
74. [*Öcalan v. Turkey*](https://hudoc.echr.coe.int/eng#{"fulltext":["46221"],"documentcollectionid2":["GRANDCHAMBER","CHAMBER","DECISIONS"],"itemid":["001-69022"]}), ECtHR, Application No. 46221/99, Judgment of 12 May 2005, para. 70. [↑](#footnote-ref-75)
75. [*Istratii v. Moldova*](https://hudoc.echr.coe.int/eng#{"fulltext":["8721"],"documentcollectionid2":["GRANDCHAMBER","CHAMBER","DECISIONS"],"itemid":["001-79910"]}), ECtHR, Applications Nos. 8721/05, 8705/05 and 8742/05, Judgment of 27 March 2007, paras. 87-101. [↑](#footnote-ref-76)
76. [*Algür v. Turkey*](https://hudoc.echr.coe.int/eng#{"itemid":["001-65259"]}), ECtHR, Application No. 32574/96, Judgment of 22 October 2002, para. 44. *Second General Report on the CPT’s activities covering the period 1 January to 31 December 1991*, CPT, CoE Doc. Ref.: CPT/Inf (92) 3, 13 April 1992, para. 36; *Body of Principles for the Protection of all persons deprived of their liberty*, Principle 24: “A proper medical examination shall be offered to a detained or imprisoned person as promptly as possible after his admission to the place of detention or imprisonment, and thereafter medical care and treatment shall be provided whenever necessary. This care and treatment shall be provided free of charge.” See also, *European Guidelines on accelerated asylum procedures*, CMCE, Guideline XI.5. [↑](#footnote-ref-77)
77. “All prisoners shall be treated with the respect due to their inherent dignity and value as human beings. No prisoner shall be subjected to, and all prisoners shall be protected from, torture and other cruel, inhuman or degrading treatment or punishment, for which no circumstances whatsoever may be invoked as a justification. The safety and security of prisoners, staff, service providers and visitors shall be ensured at all times.” Rule 1 United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules). See: <https://www.unodc.org/documents/justice-and-prison-reform/GA-RESOLUTION/E_ebook.pdf> [↑](#footnote-ref-78)
78. Article 3 *Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* (OPCAT). [↑](#footnote-ref-79)
79. European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (*CPT) Standards*, CPT/Inf/E (2002) 1 – Rev. 2010, page 54. [↑](#footnote-ref-80)
80. [*Dougoz v. Greece*](https://hudoc.echr.coe.int/eng#{"fulltext":["40907"],"documentcollectionid2":["GRANDCHAMBER","CHAMBER"],"itemid":["001-59338"]})*,* ECtHR, Application No. 40907/98, Judgment of 6 March 2001*; Z.N.S. v. Turkey*; *M.S.S. v. Belgium and Greece*, paras. 230-233. [↑](#footnote-ref-81)
81. [*Riad and Idiab v. Belgium*](https://hudoc.echr.coe.int/eng#{"fulltext":["29787"],"documentcollectionid2":["GRANDCHAMBER","CHAMBER"],"itemid":["001-108395"]}), ECtHR, Applications Nos. 29787/03 and 29810/03, 24 January 2008, para. 107 [↑](#footnote-ref-82)
82. The CPT Standards, European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), CoE Doc. CPT/Inf/E (2002) 1—Rev. 2010, Strasbourg, December 2010 (“CPT Standards”) [↑](#footnote-ref-83)
83. Rule 42, United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules). See:

<https://www.unodc.org/documents/justice-and-prison-reform/GA-RESOLUTION/E_ebook.pdf> [↑](#footnote-ref-84)
84. *M.S.S. v. Belgium and Greece*, paras. 231-233 [↑](#footnote-ref-85)
85. Aden Ahmed v. Malta, ECtHR, Application no. 55352/12, Judgment of 23 July 2013. [↑](#footnote-ref-86)
86. [*Keenan v. United Kingdom*](https://hudoc.echr.coe.int/eng#{"fulltext":["55352"],"documentcollectionid2":["GRANDCHAMBER","CHAMBER"],"itemid":["001-122894"]}), ECtHR, Application No. [27229/95](http://hudoc.echr.coe.int/eng#%7B%22appno%22:%5B%2227229/95%22%5D%7D), 3 April 2001, para. 111. [↑](#footnote-ref-87)
87. Rule 24, United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules). See:

<https://www.unodc.org/documents/justice-and-prison-reform/GA-RESOLUTION/E_ebook.pdf>

See also *The CPT Standards,* European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), CoE Doc. CPT/Inf/E (2002) 1—Rev. 2010, Strasbourg, December 2010 (“CPT Standards”), p.27, para. 31. [↑](#footnote-ref-88)
88. [*Osman v. United Kingdom*](https://hudoc.echr.coe.int/eng#{"fulltext":["23452"],"documentcollectionid2":["GRANDCHAMBER","CHAMBER"],"itemid":["001-58257"]})*,* ECtHR, Application No. 23452/94, Judgment of 28 October 1998. [↑](#footnote-ref-89)
89. [*Rodić and 3 others v. Bosnia-Herzegovina*](https://hudoc.echr.coe.int/eng#{"fulltext":["22893"],"documentcollectionid2":["GRANDCHAMBER","CHAMBER"],"itemid":["001-86533"]})*,* ECtHR, Application No. 22893/05 1 December 2008. [↑](#footnote-ref-90)
90. [*Aydin v. Turkey*](https://hudoc.echr.coe.int/eng#{"fulltext":["aydin"],"documentcollectionid2":["GRANDCHAMBER","CHAMBER"],"itemid":["001-58371"]}), ECtHR, (57/1996/676/866), Judgment of 25 September 1997, paras. 83-86. [↑](#footnote-ref-91)
91. See also: <http://www.asylumlawdatabase.eu/en/content/abdullahi-elmi-and-aweys-abubakar-v-malta-nos-2579413-and-2815113-articles-3-and-5-22> [↑](#footnote-ref-92)