

BEST INTEREST BEHIND BARS

Leaflet for practicing lawyers on the possible breach of Article 8 of the European Convention on Human Rights when asylum seeking families with minor children are detained

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This leaflet provides an overview of the content and scope of Article 8 of the European Convention on Human Rights (ECHR, Convention) and the jurisdiction of the European Court of Human Rights (ECtHR, Court) based upon that article, and discusses the circumstances under which the detention of asylum seeking families with minor children is in breach of that article.

/ INTRODUCTION

Children consistently make up a large proportion of all new applicants for international protection. They are, by definition, a vulnerable group in society. However, they are not only objects of special protection measures but also holders of basic rights, some tailored to their status as children under the UN Convention on the Rights of the Child (CRC). Although those children who arrive with their family members may seem less vulnerable than unaccompanied minors, this is often only an illusion: their 'good luck' in being accompanied may constitute the legal basis for their detention, while unaccompanied minors can avoid being confined.

Even when they are with their parents or other family members, detention can inflict long-lasting harm on children, which has the potential to seriously endanger their moral and psychological well-being and healthy development. Being deprived of their liberty at such a young age may also, through its inherently detrimental effects, shatter the connection children have with their family members, which also has long lasting consequences, especially when these family members are their parents.¹

/ WHY ARTICLE 8?

Detention may therefore rarely – if ever – be lawful, and can violate more than one article of the Convention. Why then challenge violations of Article 8 when other, more 'serious' violations take place, such as the violation of the prohibition of torture and inhuman or degrading treatment, or the prohibition of arbitrary detention?

Article 3 guarantees absolute protection to all people within a State's jurisdiction. Torture, inhuman, degrading treatment or punishment (such as unacceptable detention conditions, or serious psychological distress) constitute violations of Article 3. As will be shown below in Section IV. B., one State action (or lack thereof) may constitute a violation of both Articles, and Article 8 may be violated even if the action in question does not reach the high threshold which the Court established as constituting a violation of Article 3.

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.'² Detention can only be lawful if it meets the criteria set out in the exhaustive list of Article 5 (1) a) – f). It can therefore be seen that the effects of detention on the individual do not carry a decisive weight when establishing whether it was in breach of Article 5, whereas it is a central question when carrying out an examination of the compatibility of detention with Article 8.

As explained below, '[c]hildren are holders of rights, rather than just objects of protection'³. While they are recipients of basic human rights, they, as children 'have specific needs that are related in particular to their age and lack of independence, but also to their asylum-seeker status.'⁴ While this principle was set out in connection with Article 3, there is nothing to suggest that it can be disregarded when examining whether Article 8 was violated. Quite the opposite: children's lack of independence and inherent vulnerability renders the effective enjoyment of family life essential.

1 International Detention Coalition: Captured Childhood <https://idcoalition.org/wp-content/uploads/2016/01/Captured-Childhood.pdf>

2 Khlaifia and Others v. Italy, no. 16483/12, 15 December 2016, § 88.

3 European Union Agency for Fundamental Rights and Council of Europe: Handbook on European law relating to the rights of the child, 2015, p. 17.

4 Tarakhel v. Switzerland, no. 29217/12, 4 November 2014, § 99.

I. CHILDREN, AS HOLDERS OF FUNDAMENTAL RIGHTS

The Court held that by virtue of Article 53, the Convention ‘*must be applied in accordance with the rules of international law, in particular those concerning the international protection of human rights.*’⁵

The best interest of the child is one of the fundamental values of the CRC, which stipulates in Article 3 that ‘*in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interest of the child shall be a primary consideration.*’ The Court also held that ‘*there is currently a broad consensus – including in international law – in support of the idea that in all decisions concerning children, their best interests must be paramount.*’⁶

Currently, there is no ban on the detention of children per se, however, according to the CRC, it may only be applied as a measure of last resort and for the shortest appropriate period of time.⁷ The legal possibility of detaining children in asylum proceedings is granted in the EU asylum acquis as well, but only ‘*as a measure of last resort and after it having been established that other less coercive alternative measures cannot be applied effectively.*’⁸

In light of current developments, the UN Committee on the Rights of the Child (CRC Committee) held that ‘*the possibility of detaining children as a measure of last resort (...) is not applicable in immigration proceedings as it would conflict with the principle of the best interest of the child and the right to development.*’⁹

The best interest principle shall apply to all matters concerning children, and it should be a primary consideration. The Court of Justice of the EU held that the best interest of the child is a fundamental right and not just a general principle of law,¹⁰ meaning that it can be relied upon in legal proceedings as a source of substantive rights, rather than simply being invoked as a frame for interpretation.

Should detention be justified with the obligation to comply with the *acquis*, Member States must be reminded that EU law cannot be used to breach human rights obligations set forth in other conventions and treaties they are parties to, especially the ECHR.¹¹

Therefore, **alternatives to detention must always be explored** before turning to detention. If a State cannot give objectively justified reasons as to why less coercive measures could not be applied, the detention of a child will be unlawful. In the absence of a carefully and professionally explored factual basis that leads to the logical conclusion that no viable alternative could be identified, detention will therefore very likely be in violation of the Convention.¹²

It must also be noted that carrying out such an assessment once is not sufficient. The lawfulness and continued necessity of detention must be regularly monitored and re-assessed, and detainees must be released at once if their detention can no longer be justified.¹³ However, it will also be shown that even detention has an inherently detrimental impact on children that will limit their ability to freely develop their personality and establish and maintain connections with other human beings. Therefore, even if detention meets the formal requirements set out above, its effects will be such that would certainly be in breach of Article 8.

5 Pini and Others v. Romania, no. 78028/01, 22 June 2004, § 138.

6 Neulinger and Shuruk v. Switzerland, no. 41615/07, § 135.

7 Article 37 b) CRC

8 Article 11 (2) Reception Conditions Directive

9 Joint general comment No. 4 (2017) of the Committee on the Protection 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 and return, § 10.

10 C-648/11 MA, BT, DA, EU:C:2013_367, §§ 57, 58.

11 Article 53 Charter of Fundamental Rights of the EU; further, see section IV of M.S.S. v. Belgium and Greece, no. 30696/09. [GC]

12 Mubilanzila Mayeka and Kaniki Mitunga v. Belgium, no. 13178/03. § 83. *mutatis mutandis*

13 Article 9 (3) Reception Conditions Directive

II. THE STRUCTURE AND NATURE OF ARTICLE 8

Article 8 of the Convention reads as follows:

- ‘1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.’

Negative and positive obligations and the margin of appreciation

The purpose of Article 8 is to protect individuals from arbitrary intervention. In this regard, Article 8 is a classic negative obligation on the part of the State, requiring it to ‘stay away’.¹⁴

However, States are bound by certain positive obligations as well. This means that simply restraining from arbitrary action will not necessarily satisfy the requirements which flow from Article 8. The Court held that *‘the principles applicable to assessing a State’s positive and negative obligations under the Convention are similar. Regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole, the aims in the second paragraph of Article 8 being of a certain relevance.’*¹⁵ States enjoy a certain margin of appreciation when implementing their positive obligations under Article 8. The exact breadth of this margin depends on many factors that must be taken into account. When *‘a particularly important facet of an individual’s existence or identity is at stake, the margin allowed to the State will be restricted.’*¹⁶

This margin may be wide in cases where a fair balance needs to be struck between private and public interests. However, the best interest of the child shall be taken into account as a primary consideration, meaning that it *‘may not be considered on the same level as other considerations.’*¹⁷

The Court held that a wide margin may be afforded in cases where there is no consensus between the Contracting States of the Council of Europe on a particular issue.¹⁸ However, the Court also held that there seems to be a broad consensus in international law regarding the fact that the best interest of the child shall be a primary consideration.¹⁹

It may therefore be deduced that States have positive obligations to ensure the sound development of children in an environment that actively assists them in fulfilling their human potential to the fullest possible extent. This obligation is necessarily breached when children are detained, given the inherent negative impacts which detention has on their identity and development.

Assessing whether Article 8 was violated – the Court’s test

The Court established a three-step test to measure whether an applicant’s private or family life has been violated. In examining this, the Court assesses whether

The complaint falls under the scope of Article 8

For this to be the case, one of the protected elements need to be engaged. Protected elements are the concepts constituting one’s private and family life as set out below. When families are detained in the context of immigration, it is most often their private and family life that is at risk of being violated.

14 Kroon and Others v. the Netherlands, no. 18535/91. § 31.

15 Hämäläinen v. Finland, no. 37359/09. § 66.

16 *ibid.* § 67.

17 General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration, IV. A. 4.; see also Bistieva and Others v. Poland, no. 75157/14. § 78.

18 Hämäläinen v. Finland, no. 37359/09. § 67.

19 Neulinger and Shuruk, see above.

There was interference

To be declared admissible, it is not enough for an action (or lack thereof)²⁰ to fall under the scope of Article 8, it must also interfere with the enjoyment of the right to a private and family life.

The restriction is in line with Article 8 (2), namely if

- **It was adopted by, or is in accordance with, the law**

Although they are not absolute, the rights contained in Article 8 cannot be restricted by anything other than clear criteria laid down in national legislation. Restrictions cannot lawfully exist in other forms, since it flows from the basic principles of constitutionality (and the hierarchy of laws) that measures that limit fundamental rights must be set out in law. Restrictive measures therefore cannot lawfully be set forth in other instruments such as ordinances, standard operating procedures and other non-legal sources.²¹ The law must be clear, adequately accessible and foreseeable.²² The latter means that the law must be accessible to the persons concerned, and must be formulated in a manner which enables them to foresee, to a degree that is reasonable in the circumstances, the consequences which their actions may entail.²³ The fact that the law can be understood only with the help of a legal counsel is not, in itself, a violation of this criterion: depending on their individual circumstances, persons affected can be expected to seek legal advice.²⁴

- **It pursues a legitimate aim**

The interference will be lawful only if it pursues one of the reasons listed in Article 8 (2). In the context of migration, measures that bring about interference are most often justified either by national security or public safety. The Court has consistently held that the Convention does not guarantee a right for an alien to enter or stay in the territory of a State of which he or she is not a national. Similarly, States are under a duty to maintain public order and, as part of that, have the right to regulate the entry and residence of aliens. This, however, does not excuse States from complying with their obligations under the Convention and international human rights law.²⁵

- **It is necessary in a democratic society**

The term '*necessary*' should, by definition mean more than '*useful*', '*reasonable*' or '*desirable*'; it should be a reaction to a '*pressing social need*' that ought to be assessed on a case-by-case basis by national authorities. However, the restriction of the right to private and family life will only be regarded as '*necessary in a democratic society*' if it is proportionate to the legitimate aim pursued.²⁶ When determining whether the measures were indeed '*necessary in a democratic society*', the Court will look at the measure as a whole and assess whether the reasons presented were relevant and sufficient. The Court will consider the margin of appreciation afforded to national authorities; however, it will carry out an assessment on the existence of a pressing social need, and determine whether a fair balance has been struck between the various competing interests at stake.²⁷ In this context, the '*protection of fundamental rights and the constraints imposed by a State's immigration policy must (...) be reconciled*'²⁸ with the child's best interest being a primary consideration.²⁹

20 See negative and positive obligations.

21 For an overview of the hierarchy of laws, see Michael Clegg, Katherine Ellena, David Ennis, Chad Vickery: The Hierarchy of Laws – Understanding and Implementing the Legal Framework that Govern Elections https://www.ifes.org/sites/default/files/2016_ifes_hierarchy_of_laws.pdf page 3

22 Silver and Others v. the United Kingdom, nos. 5947/72; 6205/73; 7052/75; 7061/75; 7107/75; 7113/75; 7136/75, §§ 87 – 88.

23 Ibid.

24 Slivenko v. Latvia, no. 48321/99, § 107.

25 Mubilanzila Mayeka and Kaniki Mitunga v. Belgium, no. 13178/03, § 81.

26 Dudgeon v. the United Kingdom, no. 7526/76, §§ 51 – 53.

27 Paradiso and Campanelli v. Italy, no. 25358/12, §§ 179 – 182.

28 Popov v. France, nos. 39472/07 and 39474/07, § 139.

29 Neulinger and Shuruk v. Switzerland [GC], no. 41615/07, § 134.

III. THE DETRIMENTAL EFFECTS OF DETENTION AND ALTERNATIVES TO DETENTION

Bearing in mind that the mere fact that someone has been adversely affected by a State action does not automatically mean that Article 8 was violated,³⁰ adequate evidence should be shown to demonstrate that children seeking asylum are in need of special protection, and that detention has such detrimental effects on them that is incompatible with their best interests.

Besides clear legal basis set forth in EU law in the Reception Conditions Directive and the Return Directive³¹, the Parliamentary Assembly of the Council of Europe held in 2014 that in order to avoid the harmful effects of detention, alternatives should be explored, and children should be treated first and foremost as children.³² In their joint general comment, the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and the Committee on the Rights of the Child stated that *'every child, at all times, has a fundamental right to liberty and freedom from immigration detention.'*³³

Reacting to the practice of the United States of separating children from their family members on its southern border and detaining families, Save the Children published a concise summary of the effects of detention on children. They emphasize that detention harms family relationships and stability, damages psycho-social development and well-being, leads to worsened school performance, poor sleep quality and exposes children to a risk of exploitation and abuse.

The International Detention Coalition emphasized that based on research, children in detention demonstrated alarmingly high rates of depression, PTSD, anxiety and suicidal thoughts.³⁵

The delayed cognitive development and the traumatic experience of being confined undoubtedly fall within the ambit of Article 8. The question is whether States can justify detaining children under paragraph (2). The section below will provide a summary and analysis of the contents of the right to private and family life and argue why detaining children will breach these Convention rights.

30 *Bensaid v. the United Kingdom*, no. 44599/98. § 46. *mutatis mutandis*.

31 Article 8 of the Reception Conditions Directive and Article 15 of the Return Directive

32 Resolution 2020 (2014) <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=21295&lang=en>.

33 Joint general comment No. 4 (2017) of the Committee on the Protection 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 and return, § 5

34 Save the Children Action Network – 5 Harmful Long-term Effects of Family Detention of Children, 3 July 2018 <https://savethechildrenactionnetwork.org/5-harmful-long-term-effects-of-family-detention-on-children/>.

35 International Detention Coalition: Captured Childhood <https://idcoalition.org/wp-content/uploads/2016/01/Captured-Childhood.pdf>

IV. THE CONCEPT OF PRIVATE AND FAMILY LIFE

It can be seen from the above that Article 8 does not guarantee absolute rights such as Article 3. However, the Court carries out a strict assessment to examine whether the restrictions applied were in line with the exhaustive list presented above. The exhaustive nature of the list means that if the right to private or family life has been restricted for reasons not included in the list, it will be in breach of the Convention.

A. Private life

The Court did not provide a final list of the elements that make up the concept of 'private life' because it is a broad concept incapable of exhaustive definition.³⁶ The protection afforded by Article 8 in the sphere of private life is meant to guarantee the free development of one's personality in her or his relations with other human beings³⁷ and secures a sphere in which they can freely pursue the development and fulfilment of their personality.³⁸ The preservation of mental stability is an indispensable precondition to the effective enjoyment of private life.⁴⁰

The CRC Committee held that all the rights set forth in the CRC are in the best interest of the child. There is therefore no hierarchy between these rights. Instead, they together form the basic rights of all children that ought to be respected by States. Certain rights enshrined in the CRC are mirrored in the asylum *acquis* as well.

It then logically follows from the above that children, who are still in the process of establishing and formulating their individual identity, need a high level of protection in order to develop without unnecessary (and therefore arbitrary) interference. Though the intensity and ways in which a child's personality evolves may vary depending on their age and individual circumstances, the following are all important factors that enable the child to establish her or his individual identity. They should therefore be taken into account when assessing whether a child's right to private life has been violated.

Right	CRC	Returns directive ⁴¹	Recast Reception Conditions Directive ⁴²
The best interest of the child as primary consideration	Art. 3 (1)	Art. 5 a) Art. 17 (5)	Art. 23 (1) – (2)
Express opinion in matters concerning the child	Art. 12 (1)		Art. 23 (2) d)
Right to be heard	Art. 12 (2)		
Protection from physical and mental violence	Art. 19 (1)		
Conditions ensuring dignity for children with disabilities	Art. 23 (1)		
Highest attainable standard of health	Art. 24 (1)		Art. 11 (1)
Standard of living adequate to the child's physical, mental, spiritual, moral and social development	Art. 27 (1)		Art. 17 (2) Art. 23 (1)
Right to education	Art. 28 (1)	Art. 17 (3) Art. 14 (1) c)	Art. 14
Right to rest and leisure, play and recreational activities appropriate to the age of the child	Art. 31 (1)	Art. 17 (3)	Art. 11 (2) Art. 23 (3)
Participate fully and cultural and artistic life	Art. 31 (2)		
Protection from narcotic drugs	Art. 33		
Protection from sexual exploitation	Art. 34		Art. 18 (4)
Freedom for torture and cruel, degrading treatment	Art. 37 a)		
Freedom of arbitrary detention	Art. 37 b)		Art. 8
Right to recovery from abuse	Art. 39		Art. 23 (4)

36 Niemietz v. Germany, no. 13710/88, § 29.

37 Von Hannover v. Germany (no. 2.) nos. 440660/08 and 440661/08, § 95.

38 A-M. V. v. Finland, no. 53251/13, § 76.

39 Bensaid v. the United Kingdom, no. 44599/98. § 47.

40 Mostly in Directive 2008/115/EC of the European Parliament and the Council of 16 December 2003 on common standards and procedures in Member States for returning illegally staying third-country nationals (Returns Directive) and Directive 2013/33/EU of the European Parliament and Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast) (Reception Conditions Directive).

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

42 Directive 2013/33/EU of the European Parliament and the Council on laying down standards for the reception of applicants for international protection (recast).

The above table highlights that certain elements of the best interest of the child can be found in many sources of law, and can constitute parts of the right to private life that must be interpreted in a flexible way, taking into account the specific situation, age and maturity of the child.

The above clearly demonstrate that although the CRC provides more particular rights that are in place to ensure the well-being of children, the Return and Recast Reception Conditions Directives also recognise certain rights that, in view of the CRC Committee's opinion, should all be regarded as being in the best interest of the child.

The above-listed factors that can help a child develop her or his identity and personality, and come under the ambit of Article 8, are protected not only by this article but also by the obligation to have the best interest of the child considered primarily.

This is highly relevant when assessing whether a child's right to private life was violated. Even if the deprivation of liberty was prescribed by law and fell under one of the criteria listed in Article 8 (2), it will not be lawful in the absence of a relevant factor that makes it necessary in a democratic society.

As explained above, the best interest of the child should be given priority when a balance must be struck between various competing interests. The anxiety, humiliation and psychological burden (especially when paired with inadequate reception conditions) felt by children in detention⁴³ necessarily have a negative impact on the development of their personality, and therefore constitute a violation of Article 8. Even if educational and recreational activities are provided, and premises are designed to look child-friendly, the enjoyment of these services is illusory because of the overwhelmingly negative impact detention has on the mental health of children.⁴⁴

Therefore, when assessing the impact of detention on the private life of a child, the following elements should be considered:

- Are living conditions adequate to the child's physical, mental, spiritual, moral and social development?
- Is the child detained in an arbitrary manner which is not in line with the law?
- Can the child benefit from playtime, adequate play areas (including outdoors) without intimidation and in a non-threatening environment?

- Does the child have access to education?
- Can the child express her or his opinion on placement and the conditions of detention, and will these opinions be heard and taken into account by the authorities?
- Is the child in a place where the authorities can ensure that she or he will be protected from abuse and exploitation, including sexual exploitation?⁴⁵
- Can the child benefit from services and attention that will enable her or him to recover from previous traumatic experiences and abuse?

An examination of these questions can help determine whether there has been a violation of the right to private life. The long-lasting effects of the violation of Article 8 may render it even more severe. Factors that can be relied on are the length of the recovery from the negative effects stemming from detention and the degree of professional help needed. The involvement of psychologists, social workers and other child welfare professionals is highly recommended, not only because a multidisciplinary approach can better explore the consequences of detention, but also because a varied approach is useful in determining the best interest of the child.

B. Family life

Mutual enjoyment of each other's company

The Court consistently held that *'the mutual enjoyment by parent and child of each other's company constitutes a fundamental element of family life and domestic measures hindering such enjoyment amount to an interference with the right protected by Article 8.'*⁴⁶

The case law of the Court does not provide a list of elements that are part of the mutual enjoyment of each other's company between parents and children. However, the rights contained in the CRC can be interpreted as elements of this concept. It is logical that being in the company of their parents is in a child's best interest, unless the family is proven to be particularly unfit.⁴⁷

Although crucial, physical proximity does not in itself satisfy the principle of mutual enjoyment. Given the child's inherent dependency on her or his parents, a certain sphere of life must be left untouched by the State in order to guarantee the effective enjoyment of each other's company.

43 S.F. and Others v. Bulgaria, no. 8138/16. § 89. and the case law cited in §§ 78 – 83.

44 Third party intervention on behalf of the Hungarian Helsinki Committee in the case of M.H. and Others v. Croatia, no. 15670/18, §§ 1 – 19. <https://www.helsinki.hu/wp-content/uploads/3rd-party-intervention-in-MH-v-Croatia.pdf>

45 In this regard, reports from the Lanzarote Committee of the Council of Europe should prove useful. <https://www.coe.int/en/web/children/lanzarote-committee#{%2212441908%22:2}>

46 Monory v. Romania and Hungary, no. 71099/01. § 70.

47 Neulinger and Shuruk v. Switzerland, no. 41615/07. § 136. [GC].

This is a purely negative obligation: States cannot overreach and impose rules and restrictions on families that strip them of the chance to practice family life in a way that is within the best interest of the child, while also enabling parents to raise and educate their children freely.

On the other hand, when asylum-seeking families are detained, and therefore fall under the full control of the State, positive obligations also arise to create the circumstances under which the effective enjoyment of family life can be guaranteed.⁴⁸

In the Popov case, the Court held that the authorities had a duty as part of their positive obligations under Article 3 to take appropriate measures to protect the children. While the length of their detention – fifteen days – was not excessive per se, it may have been perceived by the children as never-ending. The Court also reiterated that children’s extreme vulnerability takes precedence over their status as illegal immigrants.⁴⁹

In this context, the Court is consistently ‘of the view that the child’s best interests cannot be confined to keeping the family together and that the authorities have to take all the necessary steps to limit, as far as possible, the detention of families accompanied by children and effectively preserve the right to family life.’⁵⁰

This, however, leads to the question of whether family life can be effectively exercised at all when asylum-seeking families are detained. In the Popov and Bistieva cases, the Court held that custodial living conditions did not allow for the effective exercise of family life.⁵¹ In both cases, the authorities did not do everything in their power to identify and apply alternatives to detention, and therefore failed to act in the best interest of the children. In the Popov case the Court found that while the detention measures served a legitimate aim, it was not necessary in a democratic society because it failed to take into account the best interest of the children in a due manner.

It is important to note that in the case of Bistieva, the very fact that the family was detained triggered the violation of the right to family life, even if the conditions of detention were not inhuman and there was a genuine risk of absconding.⁵² This is a clear sign of the Court’s shifting attitude on the right of asylum-seeking children in detention to a family life.⁵³

However, the Court has not yet ruled that the derogation of the quality of the relationship between children and their parents violates the Convention *per se*.

In the case of Popov, this aspect was analysed as part of the alleged violation of Article 3, where the Court ruled that it ‘does not doubt that this situation created anxiety, psychological disturbance and **degradation of the parental image in the eyes of the children**.’⁵⁴ In this regard, the Court found a violation of Article 3 with respect to the children but not the parents.

It should be logical that the parents’ inability to effectively care for their children and shield them from the negative impacts of detention seriously harms the bond of trust between them and their children. This could in fact reach the threshold of Article 3, since losing a close and essential primary human connection in involuntary and coercive circumstances leads to very high levels of stress and anxiety. However even if Article 3 is found not to have been breached this does not preclude the violation of Article 8 and a violation not reaching the threshold if the prohibition of torture and inhuman or degrading treatment may still violate the right to private and family life.”

Given the Court’s gradual shift referred to above, it would not be surprising to see it ruling in the future that detention prevents parents and children from the mutual enjoyment of each other’s company because the level of stress and anxiety experienced in detention makes it impossible to effectively function as a family.

48 Bistieva and Others v. Poland, no. 75157/14, § 72.

49 Popov v. France, § 91.

50 Bistieva and Others v. Poland, no. 75157/14, § 85.

51 Bistieva and Others v. Poland § 84.; Popov v. France § 134.

52 Bistieva and Others v. Poland §§ 84., 88.

53 Popov v. France, § 147.

54 Popov v. France, § 101.

V. CONCLUSION

The Court holds that children's vulnerability takes precedence over their status as illegal migrants. The best interest of the child is a legal principle that is taken into account by the Court when analysing the compatibility of State actions with the Convention.

Detention is inherently detrimental to children. It negatively influences their mental health and the development of their identity. Custodial living conditions hinder the effective enjoyment of family life. Failure to assess whether less coercive measures are suitable will entail the breach of Article 8.

Where families with children are held in detention because of their migratory status, the breach of the right to private and family life can effectively be argued before national courts, as well as the European Court of Human Rights. The Court's evolving case law is proof that it does not shy away from holding States accountable for breaches of human rights.