



Hungarian Helsinki Committee

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Application No. 11247/18

R.M. and Others v. Poland

Third party intervention on behalf of the Hungarian Helsinki Committee

pursuant to the Registrar's notification dated 17 September 2019 that the President of the Section has granted leave, under Rule 44(3) of the Rules of the European Court of Human Rights.

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A. The best interest of the child as a primary consideration

1. Based on Article 53 of the Convention, the Court has previously held that the Convention ‘*must be applied in accordance with the rules of international law, in particular those concerning the international protection of human rights.*’¹

2. The best interest of the child is one of the fundamental values of the UN Convention on the Rights of the Child (CRC).² To this end, in line with Article 3(1) of the CRC ‘*[i]n all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.*’

3. The best interest principle is enshrined also in Article 24(2) of the Charter of Fundamental Rights of the European Union (the EU Charter) and as such it is also part of primary EU law.³ Given that it is based on the CRC, the content and scope of the best interest principle shall also be interpreted as deriving from the CRC.⁴ It shall thus be regarded as a complex, threefold concept: a substantive right, a fundamental, interpretative legal principle and a rule of procedure.⁵ In the case of *MA, BT, DA*,⁶ the Court of Justice of the European Union (CJEU) refers to the best interests of a child as a fundamental right and not as a general principle of law and therefore the limitation applied to the principles (they shall be judicially cognisable only in the interpretation of acts in the ruling on their legality)⁷ does not apply.

4. Based on the above, this Court noted 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...*’⁸ Based on the consistent case law of this Court, the protection of rights as guaranteed by the Convention must be real and effective.⁹ To this end, States must enact measures that are capable of reaching that requirement, otherwise the exercise of these rights would be rendered illusory.

5. The CRC Committee also held that all the rights enshrined by the CRC are part of the best interest of the child.¹⁰ The best interest principle must be assessed on an individual basis for each child who comes under a State’s jurisdiction, bearing in mind her or his special needs and background. In this regard, States must be reminded that children are not merely objects of protection, but holders of fundamental rights. Their age and inherent vulnerability therefore require States to take special protection measures with regard to children because it is a necessary prerequisite for the effective exercise of their rights.

6. By virtue of Article 53 of the Convention therefore, States are bound to carry out an extensive and individual assessment¹¹ of the best interest of the child in all proceedings that affect them in order to guarantee the *effective enjoyment* of their fundamental rights. According to UNHCR and UNICEF, this assessment is not a sole administrative act, but rather a continuous and careful consideration of the child’s situation, taking into account all circumstances. States may be encouraged to draw on the non-exhaustive list published by UNHCR and UNICEF and weigh the elements listed there appropriately.¹²

¹ Pini and Others v. Romania, no. 78028/01, 22 June 2004, §138.

² Committee on the Rights of the Child General Comment No. 14 (2013) on the right of the child to have his or her best interest taken as primary consideration (Article 3(1)) (CRC GC No. 14) I. A.

³ Article 6(1) of the Treaty on the European Union.

⁴ Article 53 of the EU Charter.

⁵ Explanations Relating to the Charter of Fundamental Rights (2007/C 303/02), Explanation on Article 24 – The rights of the child.

⁶ C-648/11 *MA, BT, DA*, §§57, 58.

⁷ Article 52(5) of the EU Charter.

⁸ *Neulinger and Shuruk v. Switzerland*, no. 41615/07, §135.

⁹ *Airey v. Ireland*, no. 6289/76. §24.

¹⁰ CRC GC No. 14. IV. A. 4.

¹¹ CRC GC No. 14 (2013) IV. A. 4.

¹² UNHCR, UNICEF: Safe and Sound, page 42, <https://www.refworld.org/docid/5423da264.html>.

7. Having thus assessed the best interest of the child, States shall be obliged to transfer the result of that assessment in practice by recognising the entirety of the case at hand. That is when the *primary consideration* principle must be given due weight. According to the CRC Committee, the phrase requires that the interest of the child *'may not be considered on the same level as all other considerations'*.¹³ Failure to attach a heightened importance to the best interest principle tends to result in the best interest of the child being overlooked.¹⁴ It may therefore be deduced that in order to avoid rendering the rights guaranteed by the Convention illusory, States must consider the best interest of the child as a *base* for any action they take with regard to the child.

8. The best interest of the child cannot be duly considered without *hearing* the child. By virtue of Article 12(1) CRC, children have the right to be heard in all matters affecting them (including reception conditions) and their views need to be considered according to their age and maturity. The right to be heard is enshrined in the EU Charter too and it is one of the general principles of EU law.¹⁵ When hearing the child, States shall conduct proceedings in a sensitive and child-friendly manner which enable children to express their views freely. In this context, the use of child friendly language is crucial. It does not only mean that children should be addressed with words and phrases they understand, but that the adults hearing them should also be able to understand the child to the fullest extent possible. To this end, States must take into account the subtle ways in which children express their feelings and tell their stories. That should include non-verbal communication as well (e.g. children's drawings.)

9. An effective individual assessment shall mean that all relevant aspects of the child's case are duly considered. It then logically follows that such assessment must be interdisciplinary in nature, drawing on the expertise of professionals from relevant fields in each individual case and the parents or other family members who are responsible for the child, except when the family proved particularly unfit.¹⁶ The list of professionals may include the child's legal guardian, lawyer or provider of legal assistance, case worker at the relevant administrative authority, social worker, doctor or other medical professional, psychologist or therapist, teacher or other educator and intercultural mediators.¹⁷

10. The Hungarian Helsinki Committee (HHC) is therefore of the opinion that the best interest of the child shall be a frame that limits the scope of State actions regarding children – especially when those will have a direct impact on them – to an area where the primary consideration of these interests is a binding substantive and procedural right as well as an interpretive legal principle. State actions falling outside of this frame cannot be considered lawful and within a State's margin of appreciation and therefore are in breach of the Convention. Even when the competent authorities duly assessed the best interest of the child, their conduct will not be in line with the requirements flowing from the Convention if the best interest of the child was not given a heightened importance, as it shall be by virtue of the principle of primary consideration.

B. Reception of asylum-seeking families and the inherently unlawful nature of detaining asylum-seeking children

I. *The inherently detrimental effects of detention*¹⁸

11. Besides the clear legal basis set forth in EU law in the Reception Conditions Directive¹⁹ and the Return Directive,²⁰ the Parliamentary Assembly of the Council of Europe held in 2014 that in order to

¹³ CRC GC No. 14 (2013) IV. A. 4.

¹⁴ CRC GC No. 14 (2013) IV. A. 4.

¹⁵ Explanations relating to the Charter of Fundamental Rights.

¹⁶ Neulinger and Shuruk v. Switzerland, no. 41615/07. § 136.

¹⁷ EuroChild and SOS Children's Villages International, Let Children Be Children, November 2017, <http://bit.ly/2HjyOKn>.

¹⁸ This section is based on the HHC's publication Best interest behind bars https://www.helsinki.hu/wp-content/uploads/2_best_interest_behind_bars_en-1.pdf

¹⁹ Directive 2013/33/EU of the European Parliament and the Council laying down standards for the reception of applicants for international protection (recast).

²⁰ Article 8 of the Reception Conditions Directive and Article 15 of the Return Directive.

avoid the harmful effects of detention, alternatives should be explored instead of detention and children should be treated first and foremost as children.²¹ 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.*’²²

12. Reacting to the practice of the United States of America to separate 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.²³

13. The International Detention Coalition emphasized that based on research, children in detention demonstrated alarmingly high rates of depression, PTSD, anxiety and suicidal thoughts.²⁴

14. UNHCR is also of the position that ‘[t]here is indeed strong evidence that detention has a profound and negative impact on children’s health and development, regardless of the conditions in which children are held, and even when detained for short periods of time or with their families.’²⁵ UNHCR echoes and embraces the views of the UN Special Rapporteur on Torture who in 2015 held that the detention of children based on 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.’²⁶

15. **The HHC is therefore of the view that detention, irrespective of the conditions of detention and its purpose, has an inherently negative impact on children and can therefore not be considered as being in their best interest, but rather the opposite: the best interest principle imposes a duty on States to not detain children in a migration context.**

II. *The breach of Article 3 of the Convention*

16. This Court established that the extreme vulnerability of children is a decisive factor, one that takes precedence over their status as illegal immigrants.²⁷ States therefore have a duty as part of their positive obligations under Article 3 of the Convention to protect them and take appropriate measures to this end.²⁸

17. In this context, it must be stressed that ‘*Article 3 makes no provisions for exceptions.*’²⁹ States therefore are obliged to attribute extreme care and due consideration to the best interest of children in a migratory context, owing to their inherent vulnerability.

18. Regarding the assessment of the threshold beyond which treatment is in breach of Article 3 for children, special importance must be attached to the fact that ‘*[c]hildren have specific needs that are*

²¹ Resolution 2020 (2014) <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=21295&lang=en>.

²² 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.

²³ 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/>.

²⁴ International Detention Coalition: Captured Childhood <https://idcoalition.org/wp-content/uploads/2016/01/Captured-Childhood.pdf>.

²⁵ UNHCR’s position regarding the detention of refugee and migrant children in the migration context, January 2017, <https://www.refworld.org/pdfid/5885c2434.pdf>.

²⁶ UN Special Rapporteur on Torture, Thematic Report on torture and ill-treatment of children deprived of their liberty, 5 March 2015, <https://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session28/Pages/ListReports.aspx>.

²⁷ Mubilanzila Mayeka and Kaniki Mitunga v. Belgium, no. 13178/03, §55; Abdullahi Elmi and Aweys Abubakar v. Malta, nos. 25794/13 and 28151/13, §103; Popov v. France, nos. 39472/07 and 39474/07, §91.

²⁸ Popov v. France, nos. 39472/07 and 39474/07, §91.

²⁹ Mubilanzila Mayeka and Kaniki Mitunga v. Belgium, no. 13178/03, §48; Soering v. the United Kingdom, no. 14038/88, §88.

*related in particular to their age and lack of independence, but also to their asylum-seeker status.*³⁰ This means that asylum seeking children, whether accompanied or not, are likely to be the most vulnerable among asylum seekers, *'a particularly underprivileged and vulnerable population group in need of special protection.'*³¹

19. A careful assessment of the best interest of the child as set out in Section I. is therefore a necessary prerequisite for a State to avoid breaching its positive obligations under Article 3. The absolute lack of a best interest assessment and the evident neglect of this legally binding obligation may easily give rise to treatment in breach of Article 3. In this, special importance must be attributed to the rights and needs of the child³² as set forth in the CRC both in a material and procedural sense.³³

20. As cited above, detention is *per se* not in the best interest of the child. However, the sole fact that a State fails to assess the best interest of the child correctly does not, as a rule, provide sufficient ground to find that Article 3 of the Convention was also breached. The Court consistently held that a *'minimum level of severity'*³⁴ must be reached to establish that there has been a violation of Article 3 of the Convention. In view of the HHC however, the cited traumatic experiences of detention – paired with a child's conception of time, as referred to in the Popov case³⁵ – will undoubtedly reach this minimum severity.

21. In the Popov case, this Court found that even a short period of detention can reach the minimum level of severity due to the *'anxiety, psychological disturbance and degradation of the parental image'*³⁶ experienced by the children. In this context, the HHC wishes to respectfully direct the Court's attention to the concept of the degradation of the parental image, as a source of long-lasting trauma, which will be discussed under the right to family life as well.

22. Detention, especially when paired with substandard conditions, may easily render the enjoyment of these rights illusory. No child can make use of her or his rights guaranteed by the CRC as elements of their best interest in an environment that is a constant source of anxiety, psychological disturbance and one that brings about the degradation of the parental image in the eyes of the children, an especially traumatic experience. Being confined in a guarded institution, where the level of surveillance is high and the elements of everyday life are strictly controlled can be perceived by children as a never-ending state of despair, which may in itself reach the severity necessary to constitute a breach of Article 3.³⁷

III. The breach of Article 5(1) of the Convention

23. The interveners believe that Contracting States have an obligation **to justify the detention of asylum-seekers with genuine and objectively justified reasoning, taking into account personal circumstances** that proves that **detention is necessary and that no other less coercive measures may be applied.**

24. With regard to detention of an asylum-seeker based on the Article 8(3)(b) of the Reception Conditions Directive: *'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 the applicant absconding'*, it is important to clarify what are the procedural actions that would fall under the first limb of this provision (*'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 order to avoid situations, when asylum applicants are only interviewed once at the

³⁰ Tarakhel v. Switzerland, no. 29217/12, §99.

³¹ M.S.S. v. Belgium and Greece, no. 30696/09, §251.

³² CRC GC No. 14 I.A.

³³ Articles 8, 19, 22, 37, 31, 28 CRC.

³⁴ M.S.S. v. Belgium and Greece, no. 30696/09. § 219.

³⁵ Popov v. France, nos. 39472/07 and 39474/07., §100.

³⁶ Popov v. France, nos. 39472/09 and 39474/07, § 101.

³⁷ See mutatis mutandis Popov v. France, nos. 39472/07 and 39474/07, §101.

beginning of the procedure, but remain detain long after that, without any additional procedural steps of gathering necessary evidence, for which their presence is required. Second, the application of the second limb of this detention ground ('the risk of absconding') also merits further clarification, in order to avoid situations, where citing the risk of absconding becomes part of an automated and standardised process by administrative authorities. Even when 'objective criteria' are set in national legislation, the general presumption of the existence of the risk of absconding is not sufficient and individual situations and individual circumstances must additionally be taken into consideration.

25. Regarding the first limb of the above detention ground, the interveners would like to draw the Court's attention to the UNHCR Detention Guidelines, which in Guideline 4.1 para. 28 state that *'It is permissible to detain an asylum-seeker for a limited initial period for the purpose of recording, within the context of a preliminary interview, the elements of their claim to international protection. However, such detention can only be justified where that information could not be obtained in the absence of detention. This would involve obtaining essential facts from the asylum seeker as to why asylum is being sought but would not ordinarily extend to a determination of the full merits of the claim. This exception to the general principle — that detention of asylum seekers is a measure of last resort — cannot be used to justify detention for the entire status determination procedure, or for an unlimited period of time.'*

26. The interveners would like to refer to the good practice adopted by the Slovenian Administrative court, when reviewing the legality of detention based on a national provision that transposes Article 8(3)(b) of the Reception Conditions Directive. The court required that the competent authority has to include in the detention order a sufficient factual basis for detention of the applicant also with regard to the first limb of the Article 8(3)(b) and not just the reasons for justifying the risk of absconding, as risk of absconding is only one of the conditions for detention based on this provision. For correct application of this detention ground, all conditions need to be justified as they are cumulative. Thus, it has to be clear in the reasoning of the detention order what are the facts on which the applicant's request is based and which the asylum authority intends to establish, or what are the facts which could not be obtained without detention.³⁸

27. Regarding the criteria of the risk of absconding, the requirement of individual assessment guarantees that if in a given dispute the objective criteria for the risk of absconding are ascertained by the administrative authority or by the court, this does not provide sufficient grounds for the detention order. In addition, the individual situation and individual circumstances must be taken into consideration. The assessment whether a less coercive alternative measure may be effectively applied in a particular case is a specific element of the requirement of individual assessment and of the principle of proportionality under EU law.³⁹ The assessment whether a less coercive alternative measure cannot be effectively applied in a particular case is a specific element of the requirement of individual assessment and principle of proportionality, since the text of Article 8(2) of the Reception Conditions Directive says *'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'*. The above was confirmed in the JN case, where the CJEU explicitly stated that *'detention is to be used only as a last resort, when it is determined to be necessary, reasonable and proportionate to a legitimate purpose.'*⁴⁰

28. The objective (legal) criteria for the risk of absconding is directly related to the criteria set out in Article 5 of the ECHR in terms of the assessment of the quality of legal provisions which prescribe detention. The assessment of legality under Article 5 of the ECHR means that the legal basis satisfies

³⁸ Slovenian Administrative court judgment I U 959/2018-13, 3 May 2018.

³⁹ Statement of the European Law Institute: Detention of Asylum Seekers and Irregular Migrants and the Rule of Law.

⁴⁰ C-601/15 (PPU) J.N., para. 61.

the requirements of legal certainty and predictability in the sense that the provision is accessible and sufficiently precise, predictable and that it prevents arbitrariness.⁴¹

29. It may therefore be concluded that detention for the whole duration of asylum procedure, without specification regarding the exact procedural actions for which the presence of the applicant is needed and what are the facts that could not be obtained without detention, falls short of the individualisation requirement prescribed in the Reception Conditions Directive. Further on, the individual situation needs to be taken into account also when applying the objectively determined criteria for justifying the risk of absconding.

30. It follows that if the Contracting States are resorting to detention without explicitly elaborating upon the less coercive measures they have considered before detaining an individual, and upon the precise reasons why these less coercive measures were insufficient, they are not only violating EU law, but also Article 5 of the Convention, because this provision makes compliance with domestic (and thus EU law) a requirement for any lawful deprivation of liberty.⁴²

31. With regard to children, as set forth in Section I., their best interest shall be taken into account as primary consideration when deciding about the limitation of their liberty. While there is no ban on the detention of children *per se* in international or EU law, the latter provides for this possibility only as a measure of last resort, in the absence of other viable alternatives,⁴³ while laying down that nobody shall be held in detention for the sole reason of being an asylum seeker.⁴⁴

32. Recently there have been signs of a ‘*rising consensus*’⁴⁵ on the necessity of a ban on the detention of asylum seeking children. According to the CRC Committee, ‘*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.*’⁴⁶ The United Nations Network on Migration just recently reiterated its position that child immigration detention must be ended in every region of the world. Detention of children for immigration purposes - whether they are traveling alone or with their families – has been recognized as a child rights violation and can be highly damaging to their physical and psychological health and wellbeing. Detention of children based on their migratory status is thus never in their best interests.⁴⁷

33. The right to liberty of asylum seekers may only be restricted when it is necessary, and restriction has to be proportionate to the aim pursued.⁴⁸ In a migratory context, Article 5(1)(f) can be relied upon, which may constitute a legitimate aim – the protection of public order and national security, which are undeniably in the interest of society.⁴⁹ States however have a duty to carefully balance competing interests and they shall not disregard the best interest of the child, which must be a primary consideration. This primary nature entails that when ‘*different interests are being considered in order*

⁴¹ Amuur v. France, no. 19776/92, §50; Abdolkhani and Karimnia v. Turkey, no. 30471/08, §130; Nasrulloev v. Russia, no. 656/06, §71.

⁴² Rusu v. Austria, no. 34082/02, Witold Litwa v. Poland, no. 26629/95, §79, Enhorn v. Sweden, no. 56529/00 §§49 and 55.

⁴³ Reception Conditions Directive Recitals (18), (20), Articles 8(2) – (4), 11.

⁴⁴ Reception Conditions Directive Recital (15), Article 8(1); Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast) Article 26(1) [2013] OJ L 180/60.

⁴⁵ Written submissions on behalf of the AIRE Centre, the Dutch Refugee Council, the European Council on Refugees and Exiles and the International Commission of Jurists in the case of Trawalli and Others v. Italy, no. 47287/17, §§15, 17, 18; UNHCR’s position regarding the detention of refugee and migrant children in the migration context, <http://www.unhcr.org/protection/detention/58a458eb4/unhcrs-position-regarding-detention-refugee-migrant-children-migration.html>.

⁴⁶ 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, §10.

⁴⁷ Child Immigration Detention is Not Only Wrong, It Is Ineffective, United Nations Network on Migration, 16 September 2019, <https://www.iom.int/news/child-immigration-detention-not-only-wrong-it-ineffective>.

⁴⁸ Abdullahi Elmi and Aweys Abubakar v. Malta, nos. 25794/13 and 28151/13, §§111, 144, 146.

⁴⁹ See *mutatis mutandis* Mubilanzila Mayeka and Kaniki Mitunga v. Belgium, no. 13178/03, §§ 96, 102.

to reach a decision on the issue at stake', the child's interests need to be given priority. Where a 'legal provision is open to more than one interpretation, the interpretation which most effectively serves the child's best interests should be chosen.'⁵⁰

34. This Court attaches special importance not only to the existence of domestic law *per se*, but to the 'quality of the law, requiring it to be compatible with the rule of law, a concept inherent in all Articles of the Convention',⁵¹ which must be read in accordance with State's other obligations under international law. In this regard the particular harm of detention to vulnerable groups must also be considered.⁵² This Court considered the detention of migrant minors to be in breach of Article 5(1) when 'the children's particular situation was not examined and the authorities did not verify that (...) detention was a measure of last resort for which no alternative was available.'⁵³

35. **It may therefore be concluded that domestic law allowing for the detention of asylum seeking children is in breach of Article 5(1), owing to the fact that detention as an institution, especially when other alternatives are available is never in the best interest of the child and therefore is unnecessary and immensely disproportionate to the aim pursued.**

IV. The breach of Article 8 of the Convention⁵⁴

The right to private life

36. The inherent detrimental effects of detention may interfere with the rights of children as set forth in both limbs of Article 8. The Court pointed out that when judging the lawfulness of restriction under Article 8(2), 'the decisive issue is whether a fair balance between the competing interests at stake – those of the child (...) and of public order – has been struck, within the margin of appreciation afforded to States in such matters (...), bearing in mind, however, that the child's best interests must be the primary consideration...'.⁵⁵ In this context, the HHC wishes to direct the Court's attention to the above-presented analysis on the primary nature of the best interest of the child and the margin of appreciation afforded to a State in light of this principle.

37. This 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.⁵⁶ 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 beings⁵⁷ and secures a sphere in which they can freely pursue the development and fulfilment of their personality.⁵⁸ The preservation of mental stability is an indispensable precondition to the effective enjoyment of private life.⁵⁹ A child's ability to grow freely, to take the first steps to fulfilling their human potential to the fullest possible extent is naturally in their best interest.

38. Children, who are still in the process of establishing and formulating their individual identity, need a high level of protection to be able to do that 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 rights guaranteed by the CRC 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 was violated.

⁵⁰ CRC GC 14. I.A.

⁵¹ *Khlaifia and Others v. Italy*, no. 16483/12, §91.

⁵² *Rahimi v. Greece*, no. 8687/08, §86.

⁵³ *Popov v. France*, nos. 39472/07 and 39474/07, §119.

⁵⁴ This section is based on the HHC's publication *Best interest behind bars* https://www.helsinki.hu/wp-content/uploads/2_best_interest_behind_bars_en-1.pdf.

⁵⁵ *Mutatis mutandis Neulinger and Shuruk v. Switzerland*, no. 41615/07, §134.

⁵⁶ *Niemietz v. Germany*, no. 13710/88, § 29.

⁵⁷ *Von Hannover v. Germany* (no. 2.) nos. 440660/08 and 440661/08, §95.

⁵⁸ *A-M. V. v. Finland*, no. 53251/13, §76.

⁵⁹ *Bensaid v. the United Kingdom*, no. 44599/98, §47.

39. States are therefore bound to ensure that children who are under their control and supervision are in a *safe and sound environment*. The inherent anxiety and trauma, as detailed in Section B.I. prevent children from effectively exercising their right to private life through the rights enshrined in the CRC, such as the right to play, the right to education and the right to be free of arbitrary detention.

40. In this context, two questions must be examined; whether the detention of asylum-seeking children be necessary in a democratic society and whether a fair balance has been struck between the various competing interests when asylum-seeking children are held in detention.

41. 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 was proportionate to the legitimate aim pursued.⁶⁰ The Court had previously held that ‘*protection of fundamental rights and the constraints imposed by a State’s immigration policy must (...) be reconciled*’⁶¹ with the child’s best interest being a primary consideration.⁶² In this context, reference must be made to Section A., where it was shown that the principle of primary consideration means that the best interest of the child should carry a heightened importance.

42. The anxiety, humiliation and psychological burden (especially when paired with inadequate reception conditions) felt by children in detention⁶³ necessarily have a negative impact on the development of their personality and therefore trigger the 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.⁶⁴

43. Based on the professional consensus presented in Section B.I., the HHC is of the view that the detention of asylum-seeking children violates their right to private life. The delayed cognitive development and the traumatic experience of being confined when viable alternatives would exist but were not explored and duly taken into account while assessing the best interest of the child necessarily entail the breach of the private life limb of Article 8. Detention, and the consequences of being deprived of their personal liberty seriously endanger children’s ability to strive towards fulfilling their human potential.

*The right to family life*⁶⁵

44. 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.*’⁶⁶

45. 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. It is logical that being in the company of their parents is within the child’s best interest, unless the family proved to be particularly unfit.⁶⁷ 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.

⁶⁰ Dudgeon v. the United Kingdom, no. 7526/76, §§51 – 53.

⁶¹ Popov v. France, nos. 39472/07 and 39474/07, §139.

⁶² Neulinger and Shuruk v. Switzerland [GC], no. 41615/07, §134.

⁶³ S.F. and Others v. Bulgaria, no. 8138/16. §89 and the case law cited in §§78 – 83.

⁶⁴ 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>.

⁶⁵ This section is based on the HHC’s publication Best interest behind bars https://www.helsinki.hu/wp-content/uploads/2_best_interest_behind_bars_en-1.pdf.

⁶⁶ Monory v. Romania and Hungary, no. 71099/01. §70.

⁶⁷ Neulinger and Shuruk v. Switzerland, no. 41615/07. §136 [GC].

46. This is purely a 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 enables parents to raise and educate their children freely.

47. On the other hand, when asylum-seeking families are detained, and are therefore under the full control of the State, positive obligations also arise to create such circumstances under which the effective enjoyment of family life can be guaranteed.⁶⁸

48. 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.*’⁶⁹

49. This, however, leads to the question whether family life *can at all be effectively* exercised where asylum-seeking families are detained.

50. As discussed above, detention breaches a child’s right to private life because of its inherently negative and traumatic effects. It then follows that when a child is faced with such an adversary situation, they would naturally turn to their parents for protection. A child’s primary connection is to her or his parents. Where that primary connection is damaged, it will have long-lasting effects on the child’s development.⁷⁰ In the Popov and Bistieva cases, the Court held that custodial living conditions did not allow for the effective exercise of family life.⁷¹

51. Through the inherent anxiety and trauma detention triggers in children, the right to a mutual enjoyment of each other’s company for children and their parents is violated. Children cannot engage in meaningful activities protected by the CRC, such as play and education with their parents when they are under immense stress stemming from detention.

52. 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 trust between them and their children. The Court held in the Popov case that such conduct is in breach of Article 3 of the Convention regarding the children. From the above, it should follow that it violates the family life limb of Article 8 as well.

53. As for the parents, they are not only tasked with keeping their children safe and away from harm, but it is their right to spend meaningful time with them. The parent-child bond, while being necessary for a child for adequate psychological development, also engages the parent through her or his deep affection and connection to the child. Being deprived of their liberty leaves parents powerless to ease the adversary effects of detention on their children – especially when detention is not compatible with Article 5(1) or 5(4) of the Convention. Having to watch their children suffer without being in a position to help them in any meaningful way shatters the trust that is one of cornerstones of the mutual enjoyment of each other’s company for parents and children.

54. It then logically follows that the arbitrary and unlawful restriction of an asylum-seeking child’s right to private life through detention will inevitably lead to the breach of her or his right to family life as well.

55. The HHC is therefore of the view that the detention of asylum-seeking families with children will have an inevitably negative impact on the mutual enjoyment of each other’s company. Owing to the circumstances of detention and its inherently detrimental impact on children, and the parents’ powerlessness to ease their children’s suffering, their right to family life will be violated.

⁶⁸ Bistieva and Others v. Poland, no. 75157/14, §72.

⁶⁹ Bistieva and Others v. Poland, no. 75157/14, §85.

⁷⁰ International Detention Coalition: Captured Childhood, p. 49, <https://idcoalition.org/wp-content/uploads/2012/03/Captured-Childhood-FINAL-June-2012.pdf>.

⁷¹ Bistieva and Others v. Poland, no. 75157/14, §84; Popov v. France, nos. 39472/07 and 39474/07, §134.