



**Third party intervention in the case of
A. A. v. Poland (application number: 47888/19)**

The Hungarian Helsinki Committee (HHC) and Women with Women Together Against Violence (NANE) submitted the below third party intervention to the European Court of Human Rights on 20 July 2020.

The **Hungarian Helsinki Committee** is one of the leading human rights non-governmental organisations in Hungary. In recent years, it has gained considerable experience in litigation before the European Court of Human Rights, challenging the systemic human rights violations of the Hungarian asylum system.

Women with Women Together Against Violence is a non-governmental organisation in Hungary, which is working to provide counselling, capacity-building and training for women and children who had become victims of violence. It has gained considerable first-hand experience in the support and psychological rehabilitation of women victims of violence.

Through their third party intervention, the HHC and NANE wish to direct the Court's attention to the inherently detrimental effect of detention on survivors of violence, and show how this renders detention unlawful.

The HHC has successfully litigated against the arbitrary detention, starvation and inhuman, degrading treatment of asylum-seekers in the past years, while being subjected to increasing pressure and intimidation by the Hungarian Government.

The HHC therefore considers it essential to provide professional support, based on its own extensive experience, to non-governmental organisations and lawyers who bring cases to the Court.



A. The inherently detrimental effects of detention on women survivors of violence

Detention of vulnerable persons:

1. Where asylum seekers are detained, it must be underlined that they are “*a particularly underprivileged and vulnerable population group in need of special protection.*”¹ The Court held that “*account should be taken of the fact that the measure is applicable not to those who have committed criminal offences but to aliens who, often fearing for their lives, have fled from their own country.*”²

2. Persons who have been subjected to rape or other serious forms of psychological, physical or sexual violence are considered as vulnerable applicants under the EU acquis. According to the Victims’ Rights Directive,³ women victims of gender-based violence often require special support, care and protection.⁴ The Reception Conditions Directives⁵ sets out special provisions for vulnerable persons and apart from the general principle on special reception needs, Article 25 establishes the duty to provide necessary treatment for victims of rape, namely appropriate medical and psychological treatment or care.

3. According to the Council of Europe Parliamentary Assembly’s Resolution on Detention of asylum seekers and irregular migrants in Europe, vulnerable people should not, as a rule, be placed in detention.⁶

4. Based on the UNHCR’s Detention Guidelines⁷ victims of sexual violence need special attention and should generally not be detained. The Guidelines underline the risks posed by detention on mental health, as it can and has been shown to aggravate and even cause mental illnesses and symptoms; even in cases where individuals do not present symptoms at the time of detention. Additionally, the Guidelines require initial and periodic assessments of detainees’ physical and mental state, carried out by qualified medical practitioners.⁸

5. UNWGAD Revised Deliberation No. 5 on deprivation of liberty of migrants⁹ states that detention of migrants in other situations of vulnerability or at risk, such as for example survivors of torture and/or other serious violent crimes, must not take place.¹⁰

6. According to International Rehabilitation Council for Torture Victims, the detention of torture victims/traumatised asylum seekers is fundamentally incompatible with their right to rehabilitation as enshrined in international law and is irreconcilable with the requirements

¹ M.S.S. v. Belgium and Greece, Appl. no. 30696/09. §251.

² Amuur v. France, Appl. no. 19776/92. §43.

³ Directive 2012/29/EU of the European Parliament and the Council on establishing minimum standards on the rights, support and and protection of victims of crime.

⁴ Paras. 17 and 57 of the preamble and Articles 8 and 9 of the Victims’ Rights Directive.

⁵ Directive 2013/33/EU of the European Parliament and the Council on laying down standards for the reception of applicants for international protection.

⁶ Article 9.1.9. of CoE Parliamentary Assembly Resolution 1707 (2010).

⁷ UNHCR. (2012). *Detention Guidelines – Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-seekers and Alternatives to Detention*, <https://www.refworld.org/pd/fid/503489533b8.pdf>.

⁸ Ibid. paras. 49 and 50.

⁹ Working Group on Arbitrary Detention Revised Deliberation No. 5 on deprivation of liberty of migrants, 7 February 2018, para. 41.

¹⁰ For example, A/HRC/13/30/Add.2, para. 79 (f); and A/HRC/16/47/Add.2, para. 119.



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under the Reception Conditions Directive to provide vulnerable asylum seekers with adequate support and necessary treatment for torture victims.¹¹

Gender based violence in armed conflicts:

7. Violence against women¹² in conflict results from power imbalances rather than sexual motives,¹³ and it is rooted in the unequal position of women and men in society. Women and girls experience all forms of physical, emotional and sexual violence, including torture, rape, mass rape, sexual slavery, enforced prostitution, forced sterilization, the forced termination of pregnancies, and mutilations. Evidence indicates that women, adolescent girls and, to a lesser extent, girl children, are specifically targeted during armed conflicts.¹⁴ Sexual violence can be understood as a method of establishing control over another person, based upon the infliction of psychological trauma,¹⁵ and as a method of domination in armed conflict.¹⁶

8. UN Resolution 1820 (2008) noted that women and girls are particularly targeted by the use of sexual violence during armed conflict and that sexual violence may in some instances persist after the cessation of hostilities. The relationship between violence against women and the concentration of weapons in the hands of ordinary men has been well documented during the Yugoslav war.¹⁷ The prolonged exposure to factors typical in conflict situations, for example exposure to violence, experiencing rape, torture, often contributes to severe mental and social stress. Victims of sexual violence face additional adverse health and social consequences such as social rejection, ostracism and blame for being a victim of sexual violence, which reinforces already present feelings of shame, guilt, isolation and depression.¹⁸

Mental health consequences and recovery:

9. Any form of violence may inflict trauma on the victim. Research indicates that sexual assault triggers post-traumatic stress disorder (PTSD)¹⁹ in at least 40%²⁰ to 50%²¹ of the

¹¹ IRCT, *Falling Through the Cracks*, Asylum Procedures and Reception Conditions for Torture Victims in the European Union, 2016, https://issuu.com/irct/docs/falling_through_the_cracks.

¹² UN Declaration on the Elimination of Violence against Women, 1993, Article 1: “For the purposes of this Declaration, the term “violence against women” means any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life.”

¹³ Nikolic-Ristanovic, V. (1996), War and violence against women. In J. Turpin & L. Lorentzen (Eds.), *The gendered new world order: Militarism, development and environment*. p. 197. New York: Routledge.

¹⁴ UN. (2002). *Women, Peace and Security*. (2002). United Nations Publications. p. 58.

¹⁵ Herman, J. (2015). *Trauma and Recovery: The Aftermath of Violence*. New York: Basic Books. p. 90.

¹⁶ Bastick, M.; Grimm, K.; Kunz, R. (2007). *Sexual Violence in Armed Conflict – A Global Overview and Implications for the Security Sector*. Geneva Centre for the Democratic Control of Armed Forces.

¹⁷ Nikolic-Ristanovic, V., *Ibid.* p. 204.

¹⁸ UN. (2002). *Ibid.* pp. 70, 79.

¹⁹ American Psychiatric Association. (2013). *Diagnostic and Statistical Manual of Mental Disorders*. 5th ed. (DSM-5) American Psychiatric Association; Arlington, VA, USA.; WHO. (1990). *International Classification of Diseases–10*. (ICD-10) WHO.

²⁰ Bryant, R. A. (2019). Post-traumatic stress disorder: a state-of-the-art review of evidence and challenges. *World Psychiatry*. 18(3), Doi: <https://onlinelibrary.wiley.com/doi/full/10.1002/wps.20656>.

²¹ Chivers-Wilson K. A. (2006). Sexual assault and posttraumatic stress disorder: a review of the biological, psychological and sociological factors and treatments. *McGill journal of medicine*, 9(2), 111–118.



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cases. Interpersonal violence typically leads to higher rates of PTSD,²² and organized violence also increases the risk.²³ Even a single traumatic event may have adverse health consequences, but more than one may show a cumulative effect. Mental health diagnostic manuals used worldwide (DSM-5 and ICD-10) define PTSD as a mental state caused by exposure to “*actual or threatened death, serious injury, or sexual violence*” (DSM-5), or “*sexual assault, warfare, traffic collisions, terrorism or other threats on a person’s life*” (ICD-10). The onset of PTSD after the traumatic event can be diagnosed if symptoms persist after 1-3 month and is considered chronic if they remain or even intensify beyond this period. PTSD can stay with the victim until s/he receives adequate support.

10. For the survivor of sexual violence, fear may become a part of daily life. Therefore, even events remotely connected with violence may provoke intense fear.²⁴ Victims need psychosocial care which can help them deal with the psychological trauma caused by the assault and assistance to ensure their safety and protection. Furthermore, some groups like migrant women have particular service needs.²⁵ Trauma inflicts a sense of powerlessness in the victim and a sense of loss of control over her life and emotions. These are complemented by the memory of losing control over their own body. Thus survivors feel unsafe in their bodies and unsafe in relation to other people. These consequences of sexual violence, especially in conflict situations or in intimate or family situations, where the fears of recurrence are objectively justified, are widespread and therefore mostly do not depend on individual perceptions or psychological setup.

11. A serious implication of detaining a highly vulnerable person was that it worsened her prognosis for recovery.²⁶ Trauma recovery is an indispensable, key process towards safety and health recovery. In the cases of asylum seekers, it is key to receive adequate evaluation and thus, protection, during the asylum process in order to be able to fully expose the history that led to the asylum-request. Until then the chances for positive evaluation, safety and health recovery are compromised. Recovery work has the potential to ensure that the victim can tell her/his story by overcoming shame,²⁷ by correctly connecting the potential symptoms with their real causes,²⁸ and by re-establishing trust in human beings. Recent neuroscientific research on trauma confirms that trauma affects neural pathways. Research also showed that it is neuroplasticity²⁹ (the brain’s capacity to form new neural connections and thus heal past

²² Forbes, D.; Fletcher, S.; Parslow, R.; et al. (2012). Trauma at the hands of another: longitudinal study of differences in the posttraumatic stress disorder symptom profile following interpersonal compared with noninterpersonal trauma. *Journal of Clinical Psychiatry*, 73(3), 372-376.

²³ Liu, H.; Petukhova, M. V.; Sampson, N. A. et al. (2017) Association of DSM-IV posttraumatic stress disorder with traumatic experience type and history in the World Health Organization World Mental Health Surveys. *JAMA Psychiatry*, 74(3), 270-81. Doi: 10.1001/jamapsychiatry.2016.3783.

²⁴ Herman. Ibid., p. 110.

²⁵ Ibid 15.

²⁶ Ibid. 15.

²⁷ Norman, S., Allard, C.; Browne, K.; Capone, C.; Davis, B., Kubany E. (2019) Trauma Informed Guilt Reduction Therapy: Treating Guilt and Shame Resulting from Trauma and Moral Injury. Elsevier: Academic Press.

²⁸ Bailey, T.D., Brown, L.S. (2020) Complex Trauma: Missed and Misdiagnosis in Forensic Evaluations. (2020), *Psychological Injury and Law*, 13, 109-123. Doi: <https://doi.org/10.1007/s12207-020-09383-w>; and Manpreet, B.; Shortall, C.; Manzuangani, T.; Katona, C.; Russell, K. (2018). Identifying post-traumatic stress disorder in forced migrants. *BMJ* 2018;361:k1608. Doi: <https://doi.org/10.1136/bmj.k1608>.

²⁹ van der Kolk, B. (2014). *The Body Keeps the Score: Brain, Mind, and Body in the Healing of Trauma*. New York: Viking.



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traumas) that enables trauma survivors to heal and learn to trust new, safe environments and people. With especially serious traumas, this change is best enhanced by adequate, trauma-informed and trauma-focused professional approaches that pay enough attention to the traumatic effects of violence, including sexual and gender-based violence. This care is often a prerequisite to even learning about the real experiences of the victim of trauma.

12. Therefore, **the first step of trauma recovery is to establish the survivor's safety.** According to the literature on trauma treatment, installing safety begins with **regaining control of the body** and gradually moves towards **safety of the immediate environment of the survivor.** Focusing on needs of bodily integrity at this stage include attention to basic health needs, regulation of bodily functions, whereas environmental issues include, among others, the establishment of a safe living situation, mobility, and a plan for self-protection.³⁰ Since trauma deprives the victim of a sense of power and control, the main purpose of recovery is **to restore power and control to the survivor over herself.** The therapeutic process may be disrupted by intrusions outside of the survivor's control (e.g. legal proceedings),³¹ these intrusive factors therefore need to be reduced to a minimum level to support recovery.

Conclusion:

13. The conditions for establishing adequate safety are extremely limited within the context of detention. Rape destroys the victim's sense of autonomy. **This autonomy can hardly be granted in detention;** under these circumstances no sense of power and control can be adequately restored. **Even if therapeutic services would be provided in detention,** they most certainly cannot be successful since **the trauma victim remains in a state of powerlessness and dependent on detention staff members even in provision of her basic needs.** This effect even increases if the survivor encounters a hostile or unprotective environment.³²

14. **The interveners are therefore of the opinion that detention of victims of sexual assault in general is not in line with the EU *acquis*, the relevant provisions and professional recommendations, thus it imposes danger on the survivor's health, well-being and recovery.**

B. Contracting States' obligations regarding detention of vulnerable asylum seekers to avoid arbitrariness within the meaning of Article 5(1)(f) of the Convention

15. In determining lawfulness of detention, it has to be assessed whether detention was imposed in accordance with a procedure prescribed by law and has a legal basis in domestic law. Further on, any deprivation of liberty should be in keeping with the purpose of Article 5(1), namely to protect the individual from arbitrariness.³³ When assessing the lawfulness of detention of asylum seekers, the Court will have regard to their individual circumstances.³⁴

³⁰ Herman. Ibid., p. 193-194.

³¹ Herman. Ibid., p. 199.

³² Herman. Ibid., p. 199.

³³ Saadi v. the United Kingdom, Appl. no. 13229/03. §§68 – 74; James, Wells and Lee v. the United Kingdom, Appl. nos. 25119/09, 57715/09, 57877/09, §191.

³⁴ Kanagaratnam and Others v. Belgium, application no. 15297/09. §80.



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Detention will be arbitrary when there is no proportionality between the ground of detention relied on and the detention in question,³⁵ and detention shall last no longer than what is reasonably required for the purpose pursued.³⁶

16. 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 prove that **detention is necessary and that no other less coercive measures may be applied**.

17. 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”*), to avoid situations, when asylum applicants are only interviewed once at the beginning of the procedure, but remain detained long after that, without any additional procedural steps of gathering necessary evidence for which their presence is required.

18. 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.”*

19. 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.³⁷

20. The application of the second limb of the above mentioned 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

³⁵ James, Wells and Lee v. the United Kingdom, §195.

³⁶ Saadi v. The United Kingdom.

³⁷ Slovenian Administrative court judgment I U 959/2018-13, 3 May 2018.



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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. Vulnerability of a person established after an individualised assessment has to be taken into account when ordering detention as specific vulnerability would render detention arbitrary in breach of Article 5(1)(f).

21. Being a victim sexual assault/rape is a personal circumstance which has to be taken into account, when examining the necessity of detention. Above mentioned findings in part A of this intervention, such as for example the lost of their sense of autonomy, the need to regain the control over their body and ensure the safety of their immediate environment are elements which form part of the assessment of individual circumstances.

22. 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.³⁸ 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.*”³⁹

23. According to the UNHCR Detention Guidelines, “*to guard against arbitrariness, any detention needs to be necessary in the individual case; reasonable in all the circumstances and proportionate to a legitimate purpose (see Guidelines 4.1 and 4.2). Further, failure to consider less coercive or intrusive means could also render detention arbitrary (Guideline 4.3).*”

24. According to the UNWGAD Revised Deliberation No. 5 on deprivation of liberty of migrants,⁴⁰ detention in the course of migration proceedings must be justified as reasonable, necessary and proportionate in the light of the circumstances specific to the individual case. Such detention is permissible only for the shortest period of time, it must not be punitive in nature and must be periodically reviewed as it extends in time.⁴¹ Alternatives to detention must be sought to ensure that the detention is resorted to as an exceptional measure.⁴² The need to detain should be assessed on an individual basis and not based on a formal assessment of the migrant’s current migration status.⁴³ The detention must comply with the principle of proportionality⁴⁴ and as such, automatic and/or mandatory detention in the context of migration is arbitrary.⁴⁵ The element of necessity requires that the detention be absolutely

³⁸ Statement of the European Law Institute: Detention of Asylum Seekers and Irregular Migrants and the Rule of Law.

³⁹ C-601/15 (PPU) J.N., para. 61.

⁴⁰ Working Group on Arbitrary Detention Revised Deliberation No. 5 on deprivation of liberty of migrants, 7 February 2018, paras. 14, 16, 19, 20.

⁴¹ A/HRC/30/37, para. 45; E/CN.4/2006/7, para. 85; and A/HRC/10/21, para. 75. See also opinions No. 42/2017 and No. 28/2017; A/HRC/27/48/Add.4, para. 130(h); A/HRC/30/36/Add.3, para. 73; A/HRC/30/36/Add.1, para. 81; A/HRC/36/37/Add.1, para. 99(a); and general comment No. 35, para. 18.

⁴² A/HRC/13/30, para. 59; E/CN.4/1999/63/Add.3, para. 33; A/HRC/19/57/Add.3, para. 68(e); A/HRC/27/48/Add.2, para. 124; and A/HRC/30/36/Add.1, para. 81.

⁴³ A/HRC/30/37, para. 115.

⁴⁴ A/HRC/19/57/Add.3, para. 68(f), (g); A/HRC/30/36/Add.1, para. 88; and A/HRC/36/37/Add.1, para. 99(a).

⁴⁵ A/HRC/36/37/Add.2, para. 92(a); and opinion No. 42/2017.



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indispensable for achieving the intended purpose and that no other measure less onerous exists in the individual circumstances of the person who is in an irregular migration situation.⁴⁶

25. When striking a balance, that is, assessing whether the deprivation of liberty would be a proportionate measure to secure the interest of the State, with no ‘milder means’ available as a viable option, States shall have special regard to the conditions of detention.⁴⁷ The grammatical interpretation of the word ‘condition’⁴⁸ suggests that it covers a wider spectrum than the physical surroundings of a place where an asylum seeker is deprived of his or her liberty. **There is a clear interplay between the fact that an asylum seeker who a victim of sexual assault is under close surveillance and the mental health of that person, as it was clearly shown in section A.** Detention environment worsens prognosis for recovery, as regaining autonomy cannot be guaranteed in detention, even if therapeutic services would be available, as a victim remains dependant on staff in detention even for her most basic needs. The question is therefore if these detrimental effects that will have a long-term impact on survivors of sexual assault/rape are so serious that detention would no longer be proportionate to the aim pursued.

26. At this point the interveners would like to express their opinion that an obligation of the Member States to assess medical and psychological evidence when assessing international protection claims exist also when assessing the proportionality of a detention measure and its necessity.

27. In Case C-578/16 PPU, the CJEU stated that “*where an asylum seeker provides an objective evidence, such as medical certificates concerning his person, capable of showing the particular seriousness of his state of health and the significant and irreversible consequences to which his transfer might lead, the authorities of the Member State concerned, including its courts, cannot ignore that evidence. They are, on the contrary, under an obligation to assess the risk that such consequences could occur when they decide to transfer the person concerned or, in the case of a court, the legality of a decision to transfer, since the execution of that decision may lead to inhuman or degrading treatment of that person [...]*”.⁴⁹ The ECtHR also emphasised the importance of considering medical evidence in decisions assessing whether the expulsion of a foreigner entails the risk of torture, inhuman or degrading treatment. For example, in Grand Chamber judgment in *Paposhvili v. Belgium*, the ECtHR criticised that “although the Aliens Office’s medical adviser had issued several opinions regarding the applicant’s state of health based on the medical certificates provided by the applicant [...], these were not examined either by the Aliens Office or by the Aliens Appeals Board from the perspective of Article 3 of the Convention”, and “[n]or was the applicant’s medical situation examined in the context of the proceedings concerning his removal”.⁵⁰ The interveners believe that the ECtHR and CJEU findings above, regarding the medical reports should be applied by analogy to the detention cases as well.

28. **It may therefore be concluded that detention for the whole duration of asylum procedure, without specification regarding the exact procedural actions for which the**

⁴⁶ A/HRC/7/4, para. 46; E/CN.4/1999/63/Add.3, para. 34; and E/CN.4/1999/63/Add.3, paras. 29, 34.

⁴⁷ Saadi v. the United Kingdom, §74.

⁴⁸ As defined by the Cambridge Dictionary - Condition [noun]: 1) The particular state that someone or something is in (2) The physical situation that someone or something is in and affected by.

⁴⁹ CK, HF, AS v. Slovenia, C-578/16 PPU, 16 February 2017, para. 75.

⁵⁰ *Paposhvili v. Belgium* (GC), Appl. no. 41738/10, 13 December 2016, paras. 200, 201.



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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.

29. It follows that the Contracting States have an obligation to conduct a proportionality test before ordering detention, and in case of a person victim of sexual assaults, the scientifically proven facts that detention environment does not present sufficient safety for a victim to recover, must be given adequate weight. The authorities also have an obligation to take medical and psychological opinions into account.

30. It must therefore be established that where i) the restriction of the right to liberty results in a serious deterioration of the detainee's mental health that renders the chances of recovery nearly non-existent, and thus ii) the effects of that detention disproportionately exceed the inherent suffering experienced in situations of deprivation of liberty⁵¹ and is therefore iii) disproportionate, it must be held arbitrary and in violation of the very purpose of Article 5.

31. 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 law (and thus EU law) a requirement for any lawful deprivation of liberty.⁵² Alternatives to detention should be applied from the moment when the authorities find out that the detainee/potential detainee is a survivor of sexual violence/rape.

C. Right to a hearing and requirement of speediness of the judicial review of detention, within the meaning of Article 5(4) of the Convention.

Requirement of speediness:

32. Under Article 9(3) of the Reception Conditions Directive, 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 for international protection. According to recital 16 of the Reception Conditions Directive, the judicial review of the lawfulness of detention obliges Member States **to take concrete and meaningful steps to ensure** that the time needed to verify the grounds for detention is **as short as possible** and that there is a real prospect that such verification can be carried out successfully in **the shortest possible time**.

33. Article 5(4) of ECHR also proclaims the right to a **speedy** judicial decision concerning the lawfulness of detention, which must be terminated if proved unlawful.⁵³ Any exceptions to the requirement of 'speedy' review of the lawfulness of a measure of detention call for '**strict interpretation**'. The question whether the principle of speedy proceedings has been observed

⁵¹ Kudła v. Poland, Appl. No. 30210/96, 26 October 2000, §94.

⁵² Rusu v. Austria, Appl. no. 34082/02; Witold Litwa v. Poland, Appl. no. 26629/95, §79; Enhorn v. Sweden, Appl. no. 56529/00, §§49, 55.

⁵³ Saliyev v. Russia, Appl. No. 39093/13, 17 April 2014, §76.



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has to take into account **the circumstances and the complexity of the case, any specificities of the domestic procedure and the applicant's behaviour in the course of the proceedings.**⁵⁴ The relevant questions arise as to whether an applicant or his/her counsel had in some way contributed to the length of the appeals proceedings and if the Government provided some justification for the delay.⁵⁵ Further on, 'speediness' is in itself a virtue to be protected regardless of the outcome of the proceedings in question.⁵⁶ There could be a breach of Article 5(4) of the ECHR even if the applicant has not been prejudiced by the failure to conduct a 'speedy' review (for example, if his/her detention was at all times lawful).⁵⁷

34. For example, the following periods were considered excessive for deciding on the lawfulness of the applicant's detention: 13 and 20 days,⁵⁸ 17 days,⁵⁹ 26 days,⁶⁰ 26, 29 and 36 days,⁶¹ 13 and 34 days,⁶² and the Court established a violation of Article 5(4). Neither an excessive workload nor a vacation period can justify a period of inactivity on the part of the judicial authorities.⁶³

Right to be heard in procedures regarding immigration detention:

35. The right to be heard guarantees every person the opportunity to make known his/her views effectively during a procedure on the adoption of a decision liable to affect his/her interests adversely.⁶⁴ The addressee of an adverse decision must be given the opportunity to make his/her views known *before* a decision is taken. The purpose of this rule is to enable the competent authority to duly take into account all relevant information. The individual concerned shall be able to correct errors or to submit information relating to personal circumstances that will argue in favour of the adoption or non-adoption of the decision, or in favour of it having a specific content.⁶⁵ The right to be heard must be respected even when no requirement to do so is expressly stipulated by law.⁶⁶

36. The right to be heard is in principle *not absolute* and is subject to certain limitations. In order to be deemed lawful, any such limitations must correspond to objectives of general interest pursued by the measure in question and must not constitute, with regard to the

⁵⁴ *Khlaifia and others v. Italy*, §131.

⁵⁵ *Karimov v. Russia*, Appl. No. 54219/08, 29 July 2010, §§125-126.

⁵⁶ *Doherty v. the United Kingdom*, Appl. No. 76874/11, 18 February 2016, §80.

⁵⁷ Statement of the European Law Institute: Detention of Asylum Seekers and Irregular Migrants and the Rule of Law.

⁵⁸ *Karimov v. Russia*, §127.

⁵⁹ *Kadem v. Malta*, Appl. No. 55263/00, §§44-45.

⁶⁰ *Rehbock v. Slovenia*, Appl. No. 29462/95, 28 November 2000, §§82-86 and *Mamedova v. Russia*, Appl. No. 7064/05, 1 June 2006, §96.

⁶¹ *Molotchko v. Ukraine*, Appl. No. 12275/10, 26 April 2012.

⁶² *Shakurov v. Russia*, Appl. No. 55822/10, 5 June 2012.

⁶³ *E. v. Norway*, Appl. No. 11701/85, 29 August 1990, §66; *Bezicheri v. Italy*, Appl. No. 11400/85, 25 October 1989, §25.

⁶⁴ View of the Advocate General M. Wathelet, submitted on 23 August 2013 in Case C-383/13 PPU, para. 44.

⁶⁵ *Sopropé*, C-349/07, 18 December 2008, para. 49; *Mukarubega*, C-166/13, 5 November 2014, paras. 46-48.

⁶⁶ *M.*, C-277/11, 22 November 2012, para. 86; *G. and R.*, C-383/13, para. 32.



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objectives pursued, a disproportionate and intolerable interference,⁶⁷ which infringes upon the very substance of the rights guaranteed.⁶⁸

37. When the decision taken by the public authorities concerns immigration detention, proper account must be taken of the fact that *the right to liberty* is one of the most fundamental human rights and that, as such, it requires effective protection. Measures, which entail depriving asylum seekers of their liberty, clearly affect them adversely.⁶⁹ The interveners are of the opinion that with regard to the effectiveness of the judicial remedy, the procedural guarantees for the exercise of the right to be heard in the administrative procedure apply *mutatis mutandi* in the procedure before the court conducting a judicial review of detention. As the detention order shall be based on consideration of the personal conduct of the asylum seeker, hearing becomes very important, in order to carefully and impartially examine all circumstances of the case.

38. In accordance with the requirements for effectiveness of remedies under Article 5(4) of the ECHR and Article 47 of the Charter of Fundamental Rights, court proceedings shall be adversarial and ensure equality of the parties. To that end, the immigrant detained shall be heard directly by the court, with the assistance of an interpreter and legal aid by a counsel.⁷⁰ Article 5(4) of the ECHR does not require that a detained person is heard every time he/she lodges an appeal against a decision extending his/her detention, but it should be possible to exercise the right to be heard at reasonable intervals.⁷¹

39. The rigorousness of the lawfulness review, exercised by the court, shall increase naturally in proportion to the length of detention. The longer an individual has been deprived of his/her fundamental right to liberty, the more solid the basis for this decision must be and the burden of proof placed on the detaining authority to demonstrate that the detention is in line with the legitimate aim increases. In this regard, the right to be heard plays an extremely important role in establishing all relevant facts.⁷²

40. **It follows that any judicial review of asylum seekers' detention needs to be conducted as fast as possible, taking into account the circumstances and the complexity of the case, any specificities of the domestic procedure and the applicant's behaviour in the course of the proceedings.**

41. **The interveners are of the opinion that in order for the judicial review of detention to meet the requirements of an effective remedy and a fair trial, and to ensure the equality of arms, asylum seekers have to be heard at least at the beginning and then at a reasonable intervals.**

⁶⁷ *Dokter and Others*, C-28/05, 15 June 2006, para. 75; *France/People's Mujahidin Organization of Iran*, C-27/09, 21 December 2011, paras. 61—67, *Kadi*, C-402/05 and C-415/05, 3 September 2008.

⁶⁸ *G. and R.*, C-383/13 PPU, para. 33.

⁶⁹ View of the Advocate General M. Wathelet, 23 August 2013 in Case C-383/13 PPU, para. 53.

⁷⁰ *Černák v. Slovakia*, Appl. No. 36997/08, 17 December 2013.

⁷¹ *Çatal v. Turkey*, Appl. No. 26808/08, 17 March 2012, §33; *Altınok v. Turkey*, Appl. No. 31610/08, 29 November 2011, §46; *Molotchko v. Ukraine*, §148.

⁷² Foundation for Access to Rights – FAR, Handbook on the right of immigration detainees to be heard (HEAR), <http://hear.farbg.eu/handbook/>.