

Statement  
of the European Law Institute:

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Detention of Asylum Seekers and  
Irregular Migrants and the Rule of Law

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The views set out in this Statement should not be taken as representing the views of those bodies, on whose behalf individual members of the working party and advisory group were also acting.

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## Section 1. Introduction: Purpose and Methodology of the Project

### **Section 1. Introduction: Purpose and Methodology of the Project**

The Treaty on European Union establishes that the rule of law is one of the values on which the EU is founded and one of the principles which the EU is bound to promote in its relations with third countries. Specifically in the field of migration, the Commission adopted the European Agenda on Migration (COM (2015) 240 final) in May 2015, which sets several policy tools in the field of asylum, later complemented by its Communication (COM (2016) 197 final) of April 2016 presenting options for the reform of the Common European Asylum System. The sources of EU secondary law in this field (Recast Reception Conditions Directive 2013/33/EU, Return Directive 2008/115/EC and Dublin III Regulation) provide the rules on detention of asylum seekers and third country nationals (TCN).

While the deadline for the transposition of the Return Directive (2008/115) expired already in December 2010, several recent projects, resolutions and empirical data on administrative detention of third-country nationals (irregular migrants and/or asylum seekers) that are mentioned in section 2 of this Statement show that courts and tribunals of the Member States still face important and difficult challenges concerning a harmonised approach to common standards and effective implementation of the rule of law in detention cases with respect to EU law and CJEU case-law, and with respect to case-law of the European Court of Human Rights (ECtHR).

Additionally, detention of asylum seekers has been very poorly defined in the Reception Directive (2003/9) and in the Procedures Directive (2005/85). The Recast Reception Directive (2013/33) changed this by regulating much more detailed rules on detention of asylum seekers. The deadline for the transposition of the Recast Procedures Directive expired on 20 July 2015. The third EU legal source, which constitutes a focus of the project carried out under the auspices of the European Law Institute (ELI), is the Dublin III Regulation (604/2013), which became directly applicable in early 2014. The case-law of the ECtHR on detention of asylum seekers and irregular migrants is extensive and very detailed in respect of the rule of law, while the case-law of the Court of Justice of the EU (CJEU) based on preliminary ruling procedures is more extensive for detention of irregular migrants as for asylum seekers.

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In line with the first indent of Article 3(2) of the ELI Articles of the Association, the ELI Statement on *“Detention of Asylum Seekers and Irregular Migrants and the Rule of Law”* aims at contributing to an effective implementation of due process standards and material law, including conditions of detention, based on an integrated approach in respect of EU secondary law, case-law of the CJEU and case-law of the ECtHR in judicial practices of the Member States. Its EU policy context can be linked to documents such as *“A New EU Framework to Strengthen the Rule of Law”* (COM(2014) 158 final/2) and the *“European Agenda on Migration,”* which sets several policy tools for immediate actions for an effective return system that would go hand in hand with a humane and dignified treatment of returnees and a proportionate use of coercive measures in line with fundamental rights and for a coherent implementation of the Common European Asylum System (CEAS), paying particular attention to the needs of vulnerable groups (COM(2015) 240 final).

Section 2 of this Statement presents an introductory link between the rule of law and detention and illustrates it with statistical and empirical data on detention of asylum seekers and irregular migrants in Europe. Section 3 is entitled *“Interplay of EU law, the ECHR and national law in the context the protection of human rights”*. Here, the complex interplay between the three aforementioned protective systems is described from the standpoints of case-law of the CJEU, ECtHR and some national supreme or constitutional courts. This section serves to support the correct use of the three check-lists (sections 4-6), which constitute the major outputs of the ELI Statement. The check-list for each of the three secondary EU law instruments on detention (Dublin III Regulation, Return Directive and Recast Reception Directive) consists of approximately 40 basic standards or rules that might be relevant in judicial review of detention cases. In the check-lists, basic standards are formulated as briefly as possible, with the legal sources for the basic standards and rules in footnotes. Any additional explanations, more detailed arguments or more extensive comparison between case-law of the CJEU and the ECtHR are provided in the explanatory notes attached to each check-list.

Such structure is a consequence of the initial group of addressees of the Statement, primarily judges of the courts and tribunals of EU Member States dealing with effective

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judicial protection (control) in detention cases. It could also serve as a useful tool for decision makers in administrative procedures on detention and legislators in EU Member States in regards to the transposition of relevant EU rules and standards into national law and practice. Finally, this work might also be a contribution to a convergent use of case-law of the CJEU and the ECtHR in the subject matter.

The first step in the development of the project was to identify and compile all due process standards and material law on detention, including conditions of detention, from the following sources:

- relevant case-law of the CJEU; Article 28 of the Dublin III Regulation (EU) 604/2013; Articles 7-11 of the Recast Reception Directive 2013/33 in conjunction with Article 26 of the Recast Procedures Directive 2013/32; Articles 15-18 of the Return Directive 2008/115/EC;
- case-law of the ECtHR in relation to Article 5 and Article 3 of the ECHR.

Particular standards and safeguards for children and other vulnerable persons and eventual differences in due process standards and material law between EU law (including case-law of the CJEU) and case-law of the ECtHR were also identified.

This work also took into account some completed and ongoing projects or research materials on detention of asylum seekers and irregular migrants, such as the UNHCR Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention (2012)<sup>1</sup>; UNHCR Global Strategy “Beyond Detention” (2014-2019)<sup>2</sup>; Equal Rights Trust “Guidelines to Protect Stateless Persons from Arbitrary Detention” (2012)<sup>3</sup>; Safeguarding Principles “Immigration Detention and the Rule of Law” by the Bingham Centre for the Rule of law (2013)<sup>4</sup>; the projects “Contention”<sup>5</sup> and “Redial”<sup>6</sup> of

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<sup>1</sup>United Nations High Commissioner for Refugees (UNHCR) 'Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention' (2012).

<sup>2</sup>UN High Commissioner for Refugees (UNHCR) 'Beyond Detention: A Global Strategy to support governments to end the detention of asylum-seeker and refugees 2014-2019' (2014).

<sup>3</sup>Equal Rights Trust 'Guidelines to Protect Stateless Persons from Arbitrary Detention' (Equal Rights Trust 2012)

<sup>4</sup>Michael Fordham QC, Justine N Stefanelli, Sophie Eser 'The Bingham Centre for the Rule of Law: Immigration, Detention and the Rule of Law Safeguarding Principles' (British Institute of International and Comparative Law 2013).

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the European University Institute (2014-2016); the FRA and ECtHR “Handbook on European Law in Relation to Asylum, Borders and Immigration” (section 6, Edition 2014)<sup>7</sup>, the FRA report on “Detention of Third Country National's in Return Procedures” (September 2010)<sup>8</sup>; and Recommendation 1900 (2010) of the Parliamentary Assembly of the Council of Europe (of 28 January) on 10 guiding principles governing the circumstances in which the detention of asylum seekers and irregular migrants may be legally permissible and 15 European rules governing minimum standards of conditions of detention for migrants and asylum seekers<sup>9</sup>.

As the second step, the Project Team:

- identified the challenges and problems that judges may face when applying the selected due process standards and material law on detention included in each of the three aforementioned legal sources of EU law (Dublin III Regulation, Recast Reception Directive and Return Directive) in conjunction with the case-law of the ECtHR on Article 5 and Article 3 of the ECHR;
- provided a user-friendly check-list with indications or recommendations on how to apply those standards in an integrated manner. For this purpose, protective standards of EU law and case-law of the ECtHR were merged in the three check-lists (sections 4-6), while general approaches regarding complex inter-relationships between EU law, ECHR and national (constitutional) law are described in section 3 of this Statement. This was done through a methodological question on how national judges can bring together those standards from two distinct European protection systems, in conjunction with constitutional law standards of the Member States, into a coherent legal structure in individual

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<sup>5</sup>European University Institute, Project ‘Contention’ (Migration Policy Centre at the Robert Schuman Centre for Advanced Studies and Odysseus Network (ULB) <<http://contention.eu/>>.

<sup>6</sup>European University Institute, Project ‘Redial’ (Migration Policy Centre, Centre for Judicial Cooperation (CJC), Odysseus Academic Network) <<http://euredial.eu/>>.

<sup>7</sup>European Union Agency for Fundamental Rights (FRA), the European Court of Human Rights ‘Handbook on European law relating to asylum, borders and immigration’ (European Union Agency for Fundamental Rights, Council of Europe 2014) <<http://fra.europa.eu/en/publication/2013/handbook-european-law-relating-asylum-borders-and-immigration>>.

<sup>8</sup>FRA ‘Detention of third-country nationals in return procedures’ (FRA – European Union Agency for Fundamental Rights, 2010) <<http://fra.europa.eu/en/publication/2010/detention-third-country-nationals-return-procedures-0>>.

<sup>9</sup>Council of Europe, Parliamentary Assembly ‘Recommendation 1900 (2010) Final version’ (Council of Europe 2010) <<http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17815&lang=en>>.



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cases.

The Project Team held two meetings (21 April 2016 and 6 June 2016, Vienna) to discuss the draft sections 2 to 4 of the document. Consultations between the members of the Project Team also took place through an electronic exchange of views until August 2016, when the draft sections 1-4 were submitted for comments, remarks and suggestions for improvement to the members of the Advisory Committee. The check-list on the Dublin III Regulation was also tested in the context of a workshop for judges and lawyers titled “ACTIONES” (Active Charter Training through Interaction of National Experiences), which was organised on 27-28 June 2016 by the Centre for Judicial Cooperation of the European University Institute in Florence. The Project Team received concrete and general comments and remarks from the members of the Advisory Committee or special adviser during the consultation in 2015-2016. Several concrete comments and remarks were submitted by three members of the Advisory Committee also in a second round of consultation concerning sections 5 to 6; in this respect, there was an electronic exchange of views between Members of the Project Team during the first half of 2017. Consultation with the Council took place during the Council meeting of 1 April 2017 when the draft Statement was presented. At this occasion, the Project Team received feedbacks from Council members.

The Project Team would like to express their special gratitude for the very concrete comments received from Adriano Silvestri, Michael Fordham QC, Professor Fabrizio Cafaggi and Professor Valsamis Mitsilegas.

## Section 2: Detention and the Rule of Law

The rule of law is a complex concept which has developed historically and takes different shapes in different democratic traditions. Generally, it refers to a system whereby all members of a society, including all structures of the State and its agents, conduct their affairs in the strict observance of the law and the judiciary acts as guarantor of such observance. The rule of law is grounded on the principle of legality and on the independence of the judiciary.

Historically, one of the earliest expressions of the rule of law is the principle of *habeas corpus*. Already in Roman law, we can find a primitive expression of this principle in the *Interdicto de Homine Libero Exhibendo*,<sup>10</sup> aimed at guaranteeing that a free person deprived from liberty be “exhibited” to the judge, so that he could determine the lawfulness of his imprisonment. *Exhibere* was there defined as the possibility to see and touch the person<sup>11</sup> and there was a requirement of celerity in its enforcement (execution).<sup>12</sup> Although this was a measure of civil law applying between private parties and therefore did not refer to the deprivation of liberty by the public authorities, it constitutes one of the earliest expressions of the legal protection of individual freedom against arbitrary deprivation of liberty.

In public law, the principle of *habeas corpus* appears in the *Magna Carta Libertarum*, issued by King John of England on 15 June 1215, which constitutes one of the earliest expressions of the rule of law, as it acknowledges that everyone, including the king, is subject to the law. Only three of its original 63 clauses remain part of English law today, one being the principle of *habeas corpus*:

*“No free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any other way, nor will we proceed with force against him, or send others to do so, except by the lawful judgement of his equals or by the law of the land.*

*To no one will we sell, to no one deny or delay right or justice.”*

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<sup>10</sup>Codified in the year 533 in the *Digesto*, Lib. XLIII, Tit. XXIX.

<sup>11</sup>*Ibid.* 3 § 8.

<sup>12</sup>*Ibid.* 4 § 2.

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Currently, the requirements of the rule of law in relation to the deprivation of liberty are enshrined in constitutional texts and legislation worldwide, applied and interpreted by the judiciary across different legal cultures and jurisdictions.

An expression of the rule of law applied to detention is established in the judicial test of “the most rigid scrutiny” introduced in some jurisdictions. In the US, the Supreme Court in the case of *Korematsu*,<sup>13</sup> found that the racial basis of the decision in question had to be subjected to “the most rigid scrutiny”. This case referred to the internment programme developed in the US for the detention of persons of Japanese descent, including American citizens. In his dissenting opinion, Justice Owen Roberts stressed the unconstitutional nature of the detention programme to which Mr Korematsu was expected to be subject: ‘it is the case of convicting a citizen as a punishment for not submitting him to imprisonment in a concentration camp, based on his ancestry, and solely because of his ancestry, without evidence or inquiry concerning his loyalty and good disposition towards the United States.’ Other examples of significant intervention of domestic courts for the purpose of the preservation of the rule of law in the detention of non-nationals include the *Belmarsh* case of the House of Lords, declaring unlawful the indefinite detention without charges of foreign terrorist suspects;<sup>14</sup> the judgments of the Federal High Court of Germany<sup>15</sup> and the High Administrative Court of Austria,<sup>16</sup> determining that there is no legal basis for detention within the Dublin procedure if alleged risk of absconding is not properly defined by objective criteria in national law; and the Judgment of the Court of Appeal of England and Wales, declaring that the Fast Track Rules, which establish the mandatory detention of asylum-seekers pending the fast-track procedure, are systemically unfair and unjust.<sup>17</sup>

The rule of law is one of the values on which the EU is founded and, accordingly, also one of the guiding principles of the EU’s external action. Article 2 of the Treaty on European Union

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<sup>13</sup>*Korematsu v United States (No 22)* 323 U.S. 214 (1944).

<sup>14</sup>*A v Secretary of State for the Home Department* [2004] UKHL 56.

<sup>15</sup>Bundesgerichtshof, 26 June 2014, V ZB 31/14.

<sup>16</sup>Verwaltungsgerichtshof, 19 February 2015, RO 2014/21/0075.

<sup>17</sup>*R (Detention Action) v First-tier Tribunal* [2015] EWCA Civ 840.

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(TEU)<sup>18</sup> reads:

*“The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.”*

While Article 21(1) TEU establishes that:

*“The Union’s action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law.”*

EU action in the field of asylum and migration -both within EU Member States, as well as in its agreements with third countries- must therefore have at its core the respect, advancement and promotion of the rule of law.

In order to ensure that the values on which the EU is founded are effectively observed, the TEU also establishes a sanctioning mechanism in Art 7, aimed at suspending certain rights of Member States in cases of ‘a serious breach by a Member State of the values referred to in Article 2.’

In 2014, the European Commission adopted a new Framework to strengthen the rule of law.<sup>19</sup> The Commission explained there that:

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<sup>18</sup>Treaty on European Union (TEU) Article 2.

<sup>19</sup>Communication from the Commission to the European Parliament and the Council ‘A new EU Framework to strengthen the Rule of Law’ COM(2014) 158 final/2, 19 March 2014.

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*“The principle of the rule of law has progressively become a dominant organisational model of modern constitutional law and international organisations (including the United Nations and the Council of Europe) to regulate the exercise of public powers. It makes sure that all public powers act within the constraints set out by law, in accordance with the values of democracy and fundamental rights, and under the control of independent and impartial courts.”<sup>20</sup>*

The Commission also recalled that the core meaning of the rule of law as a common value in the EU has been developed through the case-law of the Court of Justice of the EU (CJEU) and of the European Court of Human Rights (ECtHR), and that it includes the principles of legality, legal certainty, prohibition of arbitrariness of the executive powers, independent and impartial courts, effective judicial review including respect for fundamental rights and equality before the law.<sup>21</sup>

The CJEU has stressed that, when applying EU law, the EU institutions and its Member States are subject to judicial scrutiny of the compatibility of their acts with the Treaties and with the general principles of EU law, including fundamental rights.<sup>22</sup> Likewise, the ECtHR has consistently affirmed that the rule of law is a concept inherent in all articles of the ECHR, and that the lawfulness of detention is to be determined by reference ‘to the quality of the law, requiring it to be compatible with the rule of law, a concept inherent in all the Articles of the Convention. In addition, any deprivation of liberty should be in keeping with the purpose of Article 5, namely to protect the individual from arbitrariness’.<sup>23</sup>

In this regard, the European Parliament, in its resolution of 8 September 2015 on the situation of fundamental rights in the European Union (2013-2014)<sup>24</sup>, affirmed that *“the rule of law is the backbone of European liberal democracy, and is one of the founding principles*

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<sup>20</sup>*Ibid.* p 3-4.

<sup>21</sup>*Ibid.* p 4.

<sup>22</sup>C-402/05 P and C-415/05 *Kadi and Al Barakaat* (Grand Chamber) EU:C:2008:461, para 316.

<sup>23</sup> *Stafford v United Kingdom* (Grand Chamber) App no 46295/99 (ECtHR 28 May 2002), para 63; see also ECtHR, *Amuur v France* (1996) App no 19776/92 (ECtHR, 25 June 1996), para 50.

<sup>24</sup>Motion for a European Parliament Resolution on the situation of fundamental rights in the European Union (2013-2014) (2014/2254(INI)).

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*of the EU stemming from the common constitutional traditions of all Member States*<sup>25</sup>. It recalled that *“respecting the rule of law is a prerequisite for the protection of fundamental rights and that security measures should not compromise them, [and] recalls that under Article 6 of the Charter of Fundamental Rights of the EU everyone has the right to liberty and security of person”*.<sup>26</sup> The Parliament then:

*“Condemns the indiscriminate recourse to unlawful detention of irregular migrants, including asylum seekers, unaccompanied minors and stateless persons; [...] recalls that the detention of migrants must remain a measure of last resort and urges the Member States to implement alternative measures; condemns the appalling detention conditions in some Member States and urges the Commission to address them without delay; reiterates the need to ensure that irregular migrants are granted the right to an effective remedy in the event of violations of their rights.”*<sup>27</sup>

The Parliament also stressed *“the importance of democratic control of all forms of deprivation of liberty pursuant to the laws on immigration and asylum”*<sup>28</sup> and called *‘for closer monitoring of migrant reception and detention centres’*.<sup>29</sup>

At EU level, the protection of fundamental rights as one of the values of the EU is articulated in Article 6 TEU around three areas: the Charter of Fundamental Rights of the European Union (the Charter), the ECHR, and the recognition of fundamental rights as (legally binding) general principles of EU Law:

- The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties.

[...]

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<sup>25</sup>*Ibid.* recital 5.

<sup>26</sup>*Ibid.* para 18.

<sup>27</sup>*Ibid.* para 124.

<sup>28</sup>*Ibid.* para 126.

<sup>29</sup>*Ibid.* para 127.

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The rights, freedoms and principles in the Charter shall be interpreted [...] with due regard to the explanations referred to in the Charter that set out the sources of those provisions.

- The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms [...]
- Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.

Implementation of the EU's legal framework then requires transposition and/or application of EU law in the domestic legal orders of Member States, as well as the role of national judges when acting as EU courts in interpreting and applying EU law.

The right to liberty appears prominently in all three sources of fundamental rights at EU level: as a right enshrined in the Charter, as a right recognised in the ECHR which shall be binding directly on the EU itself if and when the EU accedes to the ECHR, and as a general principle of EU law through its recognition in the ECHR and in constitutional tradition common to the Member States.

Article 6 of the Charter establishes that 'Everyone has the right to liberty and security of person.' While Article 5(1) ECHR only allows deprivation of liberty, provided that such a measure is "in accordance with a procedure prescribed by law", in very specific cases, including:

*(Paragraph f) "the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition."*

*(Paragraph b) "the lawful detention in order to secure the fulfilment of any obligation prescribed by law."*

Article 5 of the ECHR further regulates procedural guarantees in four paragraphs as follows:

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2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.
3. Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.
4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.
5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation.

From the standpoint of EU law, Article 41 (right to good administration) and Article 47 (right to effective remedy and a fair trial) of the Charter are relevant. Although Article 41 of the Charter, which includes, *inter alia*, the right of every person to be heard before any individual measure which would affect him adversely is taken, is addressed solely to the institutions of the EU, such a right is nevertheless inherent in respect for the rights of the defence, which is a general principle of EU law and it binds Member States, too. The observance of those rights to defence and to be heard is required even where the applicable legislation does not expressly provide for such a procedural requirement (C-383/13 PPU, *M.G., N.R.*, 10 September 2013, para. 32<sup>30</sup>; C-166/13, *Mikarubega*, 5 November 2014, paras. 43, 45<sup>31</sup>; C-249/13, *Boudjlida*, 11 December 2014, paras. 30-31<sup>32</sup>).

The relationship between the ECHR and the EU legal order is a multifaceted one. In particular, Article 52 of the Charter (on the scope and interpretation of rights and principles) establishes in paragraph 3:

*“In so far as this Charter contains rights which correspond to rights guaranteed by the*

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<sup>30</sup>C-383/13 PPU *M.G. and N.R. v Staatssecretaris van Veiligheid en Justitie* EU:C:2013:533, para 32.

<sup>31</sup>C-166/13 *Mikarubega* EU:C:2014:2336, paras 43, 45.

<sup>32</sup>C-249/13 *Boudjlida* EU:C:2014:2431, paras 30-31.



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*Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.”*

The Explanations to the Charter<sup>33</sup> on Article 52, which are to be given due regard in the interpretation of the Charter provisions (as established by Article 6(1) TEU), identify Article 5 ECHR as the source of Article 6 of the Charter and explain that ‘the meaning and the scope of the guaranteed rights are determined not only by the text of those instruments, but also by the case-law of the European Court of Human Rights and by the Court of Justice of the European Union.’

To sum up, the content of the protection that the right to liberty enjoys in the EU legal order is given by the Charter, including the case-law of the CJEU and of the ECtHR on Article 5 ECHR; by general principles of EU law common to the constitutional traditions of Member States; and eventually, directly by Article 5 ECHR itself if and when the EU accedes to the ECHR.

It is important to stress that the ECHR (as outlined above) is the *minimum* standard that the Union must respect, but nothing prevents the Union from providing more extensive protection. In fact, when it comes to the interpretation of human rights, the scope and meaning of rights is constantly evolving and the “living nature” of international human rights instruments has been consistently reaffirmed by human rights monitoring bodies, such as the ECtHR. Interpreting international instruments in light of the evolving state of the law is a well-established rule of international law, as it has been recognised by the ECtHR when referring to the ECHR as a “living instrument”.<sup>34</sup> The rights enshrined in the law have to be interpreted in the light of present day conditions so as to be practical and effective and therefore the evolving standards in the field of human rights have to be considered when applying existing legislation. In this regard, the role of the national judge cannot be

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<sup>33</sup>EU Charter of Fundamental Rights Art 52.

<sup>34</sup>*Tyler v United Kingdom* App no 5856/72 (ECtHR 25 April 1978) para 31; *Austin v United Kingdom* App no 39692/09, 40713/09 and 41008/09 (ECtHR 15 March 2012), para 53.

## Section 2: Detention and the Rule of Law

underestimated. By interpreting the international obligations of Member States under relevant instruments, as well as national constitutional frameworks and, in particular, the right to liberty and the protection of non-nationals, the national judge is contributing to the process of law-making at EU level, shaping and developing the meaning and content of the right to liberty. Likewise, national courts, acting as EU courts when they interpret EU law, contribute to the interpretation and development of standards of EU law.

In the EU secondary law there is no mandatory rule or standard concerning reporting requirements of detention of asylum seekers and irregular migrants. In the document *„Beyond Detention: A Global Strategy to Support Governments to End the Detention of Asylum Seekers and Refugees 2014-2019“*, the UNHCR invites states to adopt national action plans which should among other aspects include accurate and up to date information on policies and practices, including statistical data. The UNHCR proposes to establish transparent mechanisms for requesting data, as well as for collecting and sharing such data. Official statistics and reports will need to be cross-checked with other sources available to ensure consistency and reliability.<sup>35</sup> The statistical information selected below on detention of immigrants serves only to provide a very rough picture on the scale of detention of the aforementioned group of immigration detention in Europe. This statistical information certainly does not allow a comprehensive and reliable overview of the scale of detention practices across Europe; in some cases, the selected information does not include detention in police or border guard facilities or it refers only to a particular unit of detention or to a particular period of time. Therefore, in most cases numbers of detention cannot be compared between Member States. For example, statistical information collected by Global Detention Project based on various sources, including non-governmental and official sources, may differ substantially. For the purpose of the ELI Statement, the Project Team has collected some information which is partly cross-checked and published by the Asylum Information Data Base (AIDA), ECRE (European Council on Refugee and Exiles), Global Detention Project,<sup>36</sup> Fundamental Rights Agency.<sup>37</sup>

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<sup>35</sup>UNHCR, 'Beyond Detention: A Global Strategy to Support Governments to End the Detention of Asylum Seekers and Refugees 2014-2019' 25 *International Journal of Refugee Law* 25, 383.

<sup>36</sup> Global Detention Project is a non-profit research centre based in Geneva that investigates the use of immigration related detention as a response to global migration. Its objectives are: to improve transparency in the treatment of detainees; to encourage adherence to fundamental norms; to reinforce advocacy aimed at

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In France, in 2016, **45,937** third-country nationals have been detained (27,947 in mainland France and 19,618 in overseas).<sup>38</sup> **4,822** of these detainees were children compared to 5,692 in 2014, which constitutes a decrease of 18%. This decline is mainly due to the decrease of detained children in Mayotte (from 5,582 to 4,706), which is an overseas island close to Madagascar, while in mainland France there was an increase of 57% (from 45 to 105 children detained).<sup>39</sup> According to Global Detention Project, in 2015, **5,100** minors have been detained. On average, in 2015, third country nationals remained in administrative detention centres for 12.3 days; in 2014, 323 third-country nationals were detained until the 45th day.<sup>40</sup> In 2015, the five NGOs working in administrative detention centres met 280 detained persons who declared themselves to be children; in 2014, there were **170** such cases. These were young persons whose age had been disputed by the authorities and who had been considered as adults as a result of a medical examination. 49% of these young persons were released after a judicial decision in 2015.<sup>41</sup>

In the United Kingdom, in 2016, a total of 13,230 people who had sought asylum had been detained and there were 1,626 in detention at the end of the year.<sup>42</sup> According to Global Detention Project the total number of immigration detainees in 2016 was **32,526**.<sup>43</sup> According to the report of AIDA and ECRE, in 2016, 45.8% of the total population subject to detention were asylum seekers.<sup>44</sup> In 2014, 3,865 people were detained in the detained fast track, but this procedure was suspended in July 2015<sup>45</sup> after the judgment of the Court of

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reforming detention practices; to promote scholarship and comparative analysis of immigration control regimes (Global Detention Project, July 2017 (<https://www.globaldetentionproject.org>)).

<sup>37</sup>For some information on detention of asylum seekers, refugees and migrants, see also website of International Detention Coalition, which is a global network of over 300 civil society organisations and individuals in more than 70 countries, which advocate for research and provide direct services to refugees, asylum seekers and migrants affected by immigration detention.

<sup>38</sup>Global Detention Project, Country Profiles, France, July 2017.

<https://www.globaldetentionproject.org/countries/europe/france>

<sup>39</sup>Assfam, Forum Réfugiés, France terre d'asile, La Cimade and Ordre de Malte, 'Centres et locaux de rétention administrative - Rapport 2015,' 28 June 2016, 4-5. Note that in the AIDA country report (p.99) that also cites this source, the number given is slightly different, which might be the result of a simple addition error.

<sup>40</sup>AIDA, Country Report: France, February 2017, 100.

<sup>41</sup>Assfam, Forum Réfugiés, France terre d'asile, La Cimade and Ordre de Malte, 'Centres et locaux de rétention administrative - Rapport 2015,' 28 June 2016, 18.

<sup>42</sup>AIDA, Country Report: United Kingdom, 31 December 2016, 77.

<sup>43</sup>Global Detention Project, Country Profiles, United Kingdom, July 2017.

<https://www.globaldetentionproject.org/countries/europe/united kingdom>.

<sup>44</sup>AIDA, ECRE, 'The Detention of Asylum Seekers in Europe Constructed on Shaky Ground?' June 2017, 3.

<sup>45</sup>AIDA, Country Report: United Kingdom, 31 December 2016, 77.

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Appeal. In 2016, **144 minors** were detained.<sup>46</sup> The instances of applicants detained as adults and found to be children has decreased since the case of AA in June 2016.<sup>47</sup> Periods of immigration detention including asylum seekers and other foreign nationals vary enormously from a few days to several years. In 2016, 29 people stayed detained at least 2 years, 179 from 1 to 2 years, 3,261 from 2 to 4 months.<sup>48</sup>

In Greece, there were 14,864 immigration detainees in 2016; 4,072 of them were asylum seekers.<sup>49</sup> However, AIDA reports that out of total **21,566** detention orders issued in 2016, as many as 18,114 detention orders (84%) were issued after the EU-Turkey statement on 20 March 2016.<sup>50</sup> As of 28 December 2016, out of 1,443 unaccompanied children, who were on the waiting list for an accommodation place, **309** unaccompanied children were detained in “closed reception facilities” and 15 were detained “in protective custody”. One month later, 317 were in closed reception facilities and 4 in protective custody.<sup>51</sup>

In Austria, in 2014, there were 1,920 immigration detainees and in 2013, 741 asylum seekers were detained (**175** minors).<sup>52</sup> However, in the first half of 2016, detention numbers have risen dramatically: there were **14,661** detentions for migration-related reasons.<sup>53</sup>

In Bulgaria, in 2016, there were **11,314** asylum seekers detained. The average duration of detention was 9 days.<sup>54</sup> In 2013, **667** minors were detained.<sup>55</sup>

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<sup>46</sup>Global Detention Project, Country Profiles, United Kingdom, July 2017, <[https://www.globaldetentionproject.org/countries/europe/united kingdom](https://www.globaldetentionproject.org/countries/europe/united%20kingdom)>. The U.K. Home Office reports of 71 minors out of 13,230 asylum seekers detained in 2016 (AIDA, ECRE, ‘The Detention of Asylum Seekers in Europe Constructed on Shaky Ground?’ June 2017, 3).

<sup>47</sup>AIDA, Country Report: United Kingdom, 31 December 2016, 81.

<sup>48</sup>*Ibid.* 83.

<sup>49</sup>Global Detention Project, Country Profiles, Greece, July 2017, <<https://www.globaldetentionproject.org/countries/europe/greece>>.

<sup>50</sup>AIDA, Country Report: Greece, 31 December 2016, 118.

<sup>51</sup>*Ibid.* 126.

<sup>52</sup>Global Detention Project, Country Profiles, Austria, July 2017, <<https://www.globaldetentionproject.org/countries/europe/austria>>.

<sup>53</sup>AIDA, Country Report: Austria, 31 December 2016, 83.

<sup>54</sup>AIDA, Country Report: Bulgaria, 31 December 2016, 52; Global Detention Project, Country Profiles, Bulgaria, July 2017 <<https://www.globaldetentionproject.org/countries/europe/bulgaria>>.

<sup>55</sup>Global Detention Project, Country Profiles, Bulgaria, July 2017, <<https://www.globaldetentionproject.org/countries/europe/bulgaria>>.

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In Hungary, the total number of asylum seekers detained in 2016 was 2,621.<sup>56</sup> The number of persons detained at the end of 2016 was 273<sup>57</sup>, thus exceeding the number of people accommodated in open reception centres (194).<sup>58</sup> The total number of immigration detainees in 2015 was **8,562**; of whom **190** were minors.<sup>59</sup>

In Spain, the total number of persons detained in 2016 was **7,597**; 1,240 were detained at the end of 2016.<sup>60</sup> In 2016, 769 asylum seekers were detained and in 2015 **19** minors were detained.<sup>61</sup> According to police records, the average stay in detention was 24 days in 2015.<sup>62</sup>

In Belgium, in 2015, there were **6,229** immigration detainees which constitutes an 11% increase compared to 2014. In 2015, 969 asylum seekers were detained. In 2014, the length of detention was approximately 44 days. From October 2008 to January 2014, 633 families with a total of 1,224 minors were accommodated in return houses for an average length of 24.1 days. Among these families, 18 were released after having reached the maximum detention length of four months. In 2014, 217 families were placed in return houses, with a total of 459 minor children. In 2015, 161 families were hosted in the return houses (580 persons including **328** children).<sup>63</sup>

For the Czech Republic, the Global Detention Project reports that in 2016 there were **5,261** immigration detainees and in 2013, **22** minors were detained. The average length of detention was 51 days in 2013, 77 days in 2012, 83 days in 2011.<sup>64</sup>

For Italy, the Global Detention Project reports that there were **5,242** immigration detainees

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<sup>56</sup>AIDA, ECRE, 'The Detention of asylum seekers in Europe Constructed on shaky ground?', June 2017, 2.

<sup>57</sup>AIDA, Country Report: Hungary, 31 December 2016, 68.

<sup>58</sup>AIDA, Country Report: Hungary, 31 December 2016, 68.

<sup>59</sup>Global Detention Project, Country Profiles, Hungary, July 2017, <<https://www.globaldetentionproject.org/countries/europe/hungary>>.

<sup>60</sup>AIDA, Country Report: Spain, 31 December 2016, 50; Global Detention Project, Country Profiles, Spain, July 2017 <<https://www.globaldetentionproject.org/countries/europe/spain>>.

<sup>61</sup>AIDA, Country Report: Spain, 31 December 2016, 50.

<sup>62</sup>Global Detention Project, Country Profiles, Spain, July 2017, <<https://www.globaldetentionproject.org/countries/europe/spain>>.

<sup>63</sup>Global Detention Project, Country Profiles, Belgium, July 2017, <<https://www.globaldetentionproject.org/countries/europe/belgium>>.

<sup>64</sup>Global Detention Project, Country Profiles, Czech-Republic, July 2017, <<https://www.globaldetentionproject.org/countries/europe/czech-republic>>.

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and 150 detained asylum seekers in 2013,<sup>65</sup> while AIDA reports that the total number of persons detained in Centres for Identification and Expulsion (CIE) was 1,968.<sup>66</sup> CIEs have detention capacities of 1,901. There are also “Welcome Centres” (CDA), with the capacity of 1,163 and Asylum Seekers Reception Centres” (CARA).<sup>67</sup> The number of persons in detention in CIE at the end of 2016 was 288.<sup>68</sup>

In Sweden, in 2016, there were **3,714** immigration detainees (**108** minors) compared to 3,524 in 2015. In 2012, 2,569 asylum seekers were detained. The average length of detention of all categories was 7 days in 2012 and 5 days in 2013, while the average duration of detention of asylum seekers was 10 days in 2012 and 8 days in 2013. In 2015, Caritas Sweden noted that asylum seekers are generally detained for up to two weeks.<sup>69</sup> According to the AIDA country report, the average period of detention for children in 2016 was 3.9 days. For adults, it was 27.3 days and for the whole group 26.6 days, compared to 18 days in 2015.<sup>70</sup>

In Slovenia, according to police statistics, out of **2,338** persons detained in 2015, 2,006 (86%) were in return proceedings or procedures establishing identity, 316 (13%) were subject to readmission based on bilateral agreements, and 16 were asylum seekers. As admitted by official sources, due to lack of adequate facilities, in practice unaccompanied children and families with children are systematically placed in detention. Unaccompanied children and families with children are placed in the same part of the detention centre, which is separate from other categories of detainees. In 2015, Slovenia detained **449** children, constituting 19 percent of all immigration detainees. According to the Interior Ministry, 34 unaccompanied minors were detained in 2013, 30 in 2012, 12 in 2011, 26 in 2010 and 29 in 2009. In September 2016, following the campaign by non-governmental organizations, including the Legal Centre for the Protection of Human Rights and Environment, the government issued a

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<sup>65</sup>Global Detention Project, Country Profiles, Italy, July 2017, <<https://www.globaldetentionproject.org/countries/europe/italy>>.

<sup>66</sup>AIDA, Country Report: Italy, 31 December 2016, 87.

<sup>67</sup>Global Detention Project, Country Profiles, Italy, July 2017, <<https://www.globaldetentionproject.org/countries/europe/italy>>.

<sup>68</sup>AIDA, Country Report: Italy, 31 December 2016, 87.

<sup>69</sup>Global Detention Project, Country Profiles, Sweden, July 2017, <<https://www.globaldetentionproject.org/countries/europe/sweden>>.

<sup>70</sup>AIDA, Country Report: Sweden, 31 December 2016, 55, 59.

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decree according to which all unaccompanied children, irrespective of whether they applied for asylum or not, shall not be placed in detention but rather accommodated in dormitories. Implementation of the decree has reportedly been slow. According to the official statistics, the average length of detention for all categories of immigration detainees was 17.8 days in 2013, while the average length of detention of asylum seekers was 47.2 days. The police reported that 16 asylum seekers were detained in 2015. According to data provided by the Interior Ministry to the European Migration Network, in 2013, 49 asylum seekers were detained, in 2012, 43 and in 2011 39 asylum seekers were detained.<sup>71</sup>

In the Netherlands, the number of immigration detainees has dropped from 6,104 in 2011 to **2,176** in 2015. According to some accounts this is due in part to the fact that the government takes the obligation to consider alternatives to detention more seriously than it did before the EU Return Directive was adopted and because of a ruling of the Council of State, which prohibits the mobile surveillance team of the Royal Military Constabulary to arrest irregular migrants at the border with other EU countries. In 2014, 261 asylum seekers were detained. In 2012, **402** detainees were minors. The average length of detention was 55 days in 2015, 67 days in 2014, 72 days in 2013 and 75 days in 2012. In 2010, out of 2,255 immigration detainees, 29% were detained two or three times and 9% were detained four times or more.<sup>72</sup>

In Malta, in 2013, there were **1,900** immigration detainees. In 2015, **11** minors were detained. In 2016, 20 asylum seekers were detained.<sup>73</sup>

In Germany, in 2016, 3,968 people were transferred following a Dublin procedure. In these cases, transfers are usually preceded by detention, but this often is only for a very short period of time. Exact statistics on the duration of custody and/or detention are not available. The number of deportations increased to 25,375 in 2016, in comparison to 20,888 in 2015

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<sup>71</sup>Global Detention Project, Country Profiles, Slovenia, July 2017, <<https://www.globaldetentionproject.org/countries/europe/slovenia>>.

<sup>72</sup>Global Detention Project, Country Profiles, Netherlands, July 2017, <<https://www.globaldetentionproject.org/countries/europe/netherlands>>.

<sup>73</sup>Global Detention Project, Country Profiles, Malta, July 2017, <<https://www.globaldetentionproject.org/countries/europe/malta>>.

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and the number of people in detention pending deportation seems to have risen as well.<sup>74</sup> According to Global Detention Project, there were **1,850** immigration detainees in 2014. In 2013, **15** minors were detained constituting a decrease from 55 in 2012, 61 in 2011, 114 in 2010 and 142 in 2009.<sup>75</sup> Based on media reports, in the first months of 2016, detainees (asylum seekers or former asylum seekers) at particular facilities were detained for an average period of 16 days or three weeks.<sup>76</sup>

In Poland, **292** children were detained in 2016.<sup>77</sup> The number of detained asylum seekers was 1,119 in 2013 and 603 in 2016. In 2014, there was a total of **1,322** immigration detainees 347 of these detainees were minors of whom 18 were unaccompanied, compared to 3 unaccompanied minors detained in 2013, 16 in 2012 and 14 in 2011. However, the Helsinki Foundation for Human Rights and the Association for Legal Intervention have observed a sharp increase in the percentage of detained children during the monitoring visits. During 2014 visits, children constituted 24 percent of detainee population (84 out of 347 detainees), while in 2012 they made up 9 percent (34 out of 391 detainees). Border Guard data shows a decrease in the number of detained children by more than 40% after the introduction of alternative measures in 2014, while according to the Ministry of Interior and the Border Guards, in 2011, 1,109 migrants were detained, the Polish National Contact Point to the European Migration Network reported that there were 1,823 detainees that year. In 2015, the average length of detention was 65.8 days. In 2013, the maximum period of detention was 363 days.<sup>78</sup>

In Slovakia, according to official sources, 1,058 people were placed in immigration detention in 2015. In 2016, there were **412** immigration detainees. In 2012, 47 asylum seekers were detained, among them **4** minors.<sup>79</sup>

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<sup>74</sup>AIDA, Country Report: Germany, 31 December 2016, 72.

<sup>75</sup>Global Detention Project, Country Profiles, Germany, July 2017, <<https://www.globaldetentionproject.org/countries/europe/germany>>.

<sup>76</sup>AIDA, Country Report: Germany, 31 December 2016, 77.

<sup>77</sup>AIDA, ECRE, The Detention of Asylum Seekers in Europe Constructed on Shaky Ground?, June 2017, 3.

<sup>78</sup>Global Detention Project, Country Profiles, Poland, July 2017, <<https://www.globaldetentionproject.org/countries/europe/poland>>.

<sup>79</sup>Global Detention Project, Country Profiles, Slovakia, July 2017, <<https://www.globaldetentionproject.org/countries/europe/slovakia>>.



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In Finland, detained persons include both asylum seekers whose identity is unclear and irregular migrants subject to deportation order. The latter group constitutes approximately 90 percent of detained persons. In 2013, there were **444** immigration detainees, and in 2012, there were 369 detained asylum seekers. In 2003, out of the total population of detained persons 11.5 percent were minors. 15 unaccompanied minors were detained in 2005.<sup>80</sup>

In Lithuania, in 2015, **353** persons were held in immigration detention; 292 in 2014; 363 in 2013 and 375 in 2012. In 2012, 60 asylum seekers were detained. According to official sources the average length of detention was 38 days in 2013; 40 days in 2012; 51 days in 2011; 61 days in 2010. However, in 2010, the Jesuit Refugee Service found the average length of detention to be much higher – nine and a half months. Unaccompanied children are generally not detained but placed in the Refugee Reception Centre. 9 unaccompanied children were placed in such reception centres in 2013; 81 in 2012; 4 in 2011; 8 in 2010. **5** children were detained in 2015 and 11 in 2014.<sup>81</sup>

In Latvia, according to information provided by the Office of Citizenship and Migration Affairs of the Interior Ministry, out of **273** non-nationals who were detained in 2011, 238 were asylum seekers. In 2013, 166 asylum seekers were detained and 127 asylum seekers were detained in 2012. The country places some 200 people annually in immigration detention. According to official sources, the average length of detention was 20 days in 2013; 18 days in 2012 and 20 days in 2011. The average length of detention of asylum seekers has decreased over the years from 25 days in 2011, 15 days in 2012, to 12 days in 2013.<sup>82</sup>

In Portugal, in 2012, there were **196** immigration detainees.<sup>83</sup>

In Romania, in 2012, there were **671** immigration detainees.<sup>84</sup>

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<sup>80</sup>Global Detention Project, Country Profiles, Finland, July 2017, <<https://www.globaldetentionproject.org/countries/europe/finland>>.

<sup>81</sup>Global Detention Project, Country Profiles, Lithuania, July 2017, <<https://www.globaldetentionproject.org/countries/europe/lithuania>>.

<sup>82</sup>Global Detention Project, Country Profiles, Latvia, July 2017, <<https://www.globaldetentionproject.org/countries/europe/latvia>>.

<sup>83</sup>Global Detention Project, Country Profiles, Portugal, July 2017, <<https://www.globaldetentionproject.org/countries/europe/portugal>>.

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In Ireland, according to the Irish Prison Service, there were **335** immigration detainees in 2015, down from **407** in 2014 and 374 in 2013. In 2014, the average daily number of migrant detainees was 6 and in 2015 it was 4.<sup>85</sup>

In Cyprus, it is reported that there are three categories of people detained on immigration related issues: those detained for a few days until their removal is arranged; those whose removal presents various difficulties (non-disclosure of their country of origin or their country of origin is unwilling to accept them); and third country nationals who had initially been declared illegal and who subsequently applied for international protection.<sup>86</sup>

Croatia placed **258** non-citizens in detention in 2015, of whom 41 were asylum seekers. In 2016, 50 asylum seekers were detained. By comparison, more than 1,500 people were detained in both, 2006 and 2007. In 2010, 39 minors (children under age of 14) were detained, constituting an increase from 25 in 2009 and 27 in 2008; older children are not included in these statistics.<sup>87</sup>

According to the Luxembourg Government, no more than two dozen people are detained at any one time in Luxembourg. In 2013, there were **243** immigration detainees. In 2012, 9 asylum seekers were detained. In 2012, **27** minors were detained.<sup>88</sup>

In Estonia, in 2013, **94** migrants were detained. The average length of immigration detention was 58 days in 2013, 80 days in 2012, 92 days in 2011. Between 2010 and 2012, 6 unaccompanied minors were detained. Since 2014, unaccompanied children have not been placed in detention; instead they are accommodated in »substitute homes«.<sup>89</sup>

For Denmark, the Global Detention Project was unable to learn the number of migrants

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<sup>84</sup>Global Detention Project, Country Profiles, Romania, July 2017, <<https://www.globaldetentionproject.org/countries/europe/romania>>.

<sup>85</sup>Irish Prison Service, Annual Report 2015, 23.

<sup>86</sup>Global Detention Project, Country Profiles, Cyprus, July 2017, <<https://www.globaldetentionproject.org/countries/europe/cyprus>>.

<sup>87</sup>Global Detention Project, Country Profiles, Croatia, July 2017, <<https://www.globaldetentionproject.org/countries/europe/croatia>>.

<sup>88</sup>Global Detention Project, Country Profiles, Luxembourg, July 2017, <<https://www.globaldetentionproject.org/countries/europe/luxembourg>>.

<sup>89</sup>Global Detention Project, Country Profiles, Estonia, July 2017, <<https://www.globaldetentionproject.org/countries/europe/estonia>>.

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detained on an annual basis. According to the annual report of the Danish Prison and Probation Service<sup>90</sup>, an average of 92 people were held on immigration-related charges in Denmark each day in 2014.<sup>91</sup>

For non EU Member States, who are signatories to the ECHR, the Global Detention Projects reports that there are (in different years) **37,522** immigration detainees in Russia, **10,922** in Ukraine, **2,939** in Norway (**330** detained minors), **389** in Macedonia (**22** detained minors), **5,732** in Switzerland.<sup>92</sup> However, AIDA reports a much higher number of administrative detentions in Switzerland: 7,540 asylum seekers were reportedly detained in 2011, 6,806 in 2012, 6,039 in 2013 and **5,417** asylum seekers were detained in 2015.<sup>93</sup> In 2016, Turkey has established capacities for **7,216** pre-removal or asylum detention.

Fundamental Rights Agency (FRA) also reports that there are no comparable and reliable data on how many children are detained for immigration related purposes in the EU. The numbers of children and unaccompanied children below reflect only the number of children in detention at a specific point in time. These figures exclude children temporarily confined to facilities other than formal detention centres, such as cells in police stations, border crossing points or airports.<sup>94</sup> It is reported that on the December 31<sup>st</sup>, 2015, 716 children were detained in 25 Member States, while for the other three Member States there were no data available. On the September 1<sup>st</sup>, 2016, 821 children were detained in 21 Member States, while for the remaining 7 Member States there were no data available. On November 15<sup>th</sup>, 2016, 180 children were detained in 14 Member States, while for the other 14 Member States no data was available.<sup>95</sup> The longest periods of detention of unaccompanied children were 195 days (15-year-old boy) and 151 days (16-year-old boy).<sup>96</sup>

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<sup>90</sup> Prison and Probation Service, The Danish Prison and Probation Service – in brief, 2014, [http://www.kriminalforsorgen.dk/Admin/Public/Download.aspx?file=Files%2FFiler%2FFoldere%2Fkort\\_og\\_godt\\_UK\\_juni+2015.pdf](http://www.kriminalforsorgen.dk/Admin/Public/Download.aspx?file=Files%2FFiler%2FFoldere%2Fkort_og_godt_UK_juni+2015.pdf).

<sup>91</sup> Global Detention Project, Country Profiles, Denmark, July 2017,

<<https://www.globaldetentionproject.org/countries/europe/denmark>>.

<sup>92</sup> Global Detention Project, July 2017 <<https://www.globaldetentionproject.org/regions-subregions/europe>>.

<sup>93</sup> AIDA, Country Report: Switzerland, 31 December 2016, 77.

<sup>94</sup> FRA, 'European legal and policy framework on immigration detention of children', 2017, 13.

<sup>95</sup> *Ibid.* 14.

<sup>96</sup> *Ibid.* 13.

## Section 3. Interplay of EU Law, the ECHR and National Law in the Context of the Protection of Human Rights

### Section 3. Interplay of EU Law, the ECHR and National Law in the Context of the Protection of Human Rights

(1) With every decision or judgment on administrative detention of asylum seekers or irregular migrants, Member States implement not only EU law<sup>97</sup> but most often also Article 5 of the European Convention on Human Rights (ECHR)<sup>98</sup> (possibly in conjunction with Article 3 of the ECHR)<sup>99</sup> and national constitutional and/or statutory provisions.<sup>100</sup> The interplay between the three major protection systems under EU law, ECHR and national law may evolve into very complex legal settings which must be taken into account by a judge in each particular case. In the five subsections, this interplay is described through general approaches used by the respective courts dealing with this interplay in practice.

(2) In cases of detention of minors, the principle of the best interests of the child of Article 3(1) of the 1989 United Nations Convention on the Rights of the Child applies.<sup>101</sup> This general principle of law, however, is already part of EU primary law and it is, therefore, covered by the protection system of EU law.<sup>102</sup>

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<sup>97</sup>See Article 28 of the Dublin III Regulation (604/2013), Articles 8-11 of the Recast Reception Directive (2013/33) and Articles 15-18 of the Return Directive (2008/115) in conjunction with Article 6 of the Charter of Fundamental Rights of the EU (Charter). According to the first sentence of Article 51(1) of the Charter, the provisions of the Charter are addressed to the Member States when they are implementing Union law. Article 6 of the Charter states that “*Everyone has the right to liberty and security of person*”.

<sup>98</sup>For a distinction between deprivation of liberty (Article 5 of the ECHR) and restriction of freedom of movement (Article 2(1) of Protocol 4 to the ECHR), see Chapter 4, point 4, of this Statement.

<sup>99</sup>Article 5 of the ECHR regulates the right to liberty and security of person, while Article 3 of the ECHR states that “*No one shall be subjected to torture or to inhuman or degrading treatment or punishment.*”

<sup>100</sup>From the standpoint of the ECHR, the relevance of national law in detention cases derives from the second sentence of Article 5 of the ECHR which says that “(…) no one shall be deprived of his liberty save in the cases” listed in Article 5 indents from a.) to f.) and “in accordance with a procedure prescribed by law”. The latter means national or EU law.

<sup>101</sup>This Article states 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.*” See also Article 37 of the 1989 UN Convention on the Rights of the Child.

<sup>102</sup>Article 24(2) of the Charter states that “*in all actions relating to children, whether taken by public authorities or private institutions, the child's best interest must be a primary consideration.*” Article 24(3) of the Charter states that “*every child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests.*” See, for example, references to the 1989 UN Convention on the Rights of a Child in recital 13 of the Dublin III Regulation (604/2013), in recitals 9 and 18 of the Recast Reception Directive (2013/33) and in recital 22 of the Return Directive (2008/115).

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(3) In cases of detention of asylum seekers, a relationship between EU law and Article 31 of the 1951 Convention Relating to the Status of Refugees and 1967 Protocol Relating to the Status of Refugees (hereinafter the Geneva Convention)<sup>103</sup> needs to be taken into account. Article 78 of the Treaty on the Functioning of the EU (TFEU) defines the relationship between EU law and the Geneva Convention. This Article provides that a common policy on asylum, subsidiary protection and temporary protection “*must be in accordance with the Geneva Convention, and other relevant treaties.*” Although the CJEU has referred to this provision, it has not yet defined which “*other relevant treaties*” it refers to.

### 3.1. The relationship between EU law and the ECHR from the standpoint of EU law and the CJEU case-law

(4) Prior to the entry into force of the Lisbon Treaty, the CJEU established a principle regarding the relationship between Community law and the ECHR in the *Nold* case (1974). The CJEU stated that “*international treaties for the protection of human rights, on which the Member States have collaborated or of which they are signatories, can supply guidelines which should be followed within the framework of Community law.*”<sup>104</sup> In the *Kremzow* case, the CJEU stated that the ECHR “*has a special significance in that respect.*”<sup>105</sup>

(5) After the entry into force of the Lisbon Treaty in December 2009, a legal link between EU law and the ECHR was established in Article 6(3) of the Treaty on European Union (TEU),

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<sup>103</sup>Article 31(1) of the Geneva Convention states that “*the Contracting States shall not impose penalties on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of Article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.*” Article 31(2) of the Geneva Convention among other things states that “*the Contracting States shall not apply to the movements of such refugees’ restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularized or they obtain admission into another country.*” See also recital 15 of the Recast Reception Directive (2013/33).

<sup>104</sup>C-4/73 *Nold* EU:C:1974:51, para 13.

<sup>105</sup>C-299/95 *Kremzow* EU:C:1997:254, para 14.

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providing that fundamental rights from the ECHR constitute general principles of EU law.<sup>106</sup> In addition, the Charter of Fundamental Rights of the EU (the Charter), which has “*the same legal value as the Treaties*”<sup>107</sup> is addressed to the Member States “only when they are implementing Union law”.<sup>108</sup> The term “when implementing Union law” has been interpreted by the CJEU in a non-restrictive way. For example, in the *Åklagaren* case, the CJEU decided that a Member State is implementing EU law, because “there is a direct link between the collection of VAT revenue in compliance with the EU law applicable and the availability to the EU budget of the corresponding VAT resources, since any lacuna in the collection of the first potentially causes a reduction in the second /.../ The fact that the national legislation upon which those tax penalties and criminal proceedings are founded has not been adopted to transpose Directive 2006/112 cannot call that conclusion into question”/.../<sup>109</sup> Where, on the other hand, a legal situation does not come within the scope of EU law, the CJEU does not have jurisdiction to rule on it and any provisions of the Charter relied upon cannot, of themselves, form the basis for such jurisdiction”<sup>110</sup>, since the Charter “does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties.”<sup>111</sup> In the *Siragusa* case, the CJEU has further developed this interpretation opining that “the concept of implementing EU law as referred to in Article 51 of the Charter, requires a certain degree of connection above and beyond the matters covered being closely related or one of those matters having an indirect impact on the other. In order to determine whether national legislation involves the implementation of EU law for the purposes of Article 51 of the Charter, some of the points to be determined are whether that legislation is intended to implement a provision of EU law; the nature of that legislation and whether it pursues objectives other than those covered by EU law, even if it is capable of indirectly affecting EU law; and also whether there are specific rules of EU law on the matter or

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<sup>106</sup>Article 6(3) of the TEU states that fundamental rights, as guaranteed by the ECHR and resulting from constitutional traditions common to the Member States, shall constitute general principles of the Union's law. See also: C-571/10 *Kamberaj* (Grand Chamber) EU:C:2012:233, para 60.

<sup>107</sup>Article 6(1) of the TEU.

<sup>108</sup>The first sentence of Article 51(1) of the Charter.

<sup>109</sup>C-617/10 *Åklagaren* EU:C:2013:105, paras 26, 28.

<sup>110</sup>*ibid.* para 22.

<sup>111</sup>Article 51(2) of the Charter.

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capable of affecting it.”<sup>112</sup>

(6) Article 51(2) of the Charter provides *“in so far as this Charter contains rights which correspond to the rights guaranteed by the ECHR, the meaning and scope of those rights shall be the same as those laid down by the ECHR. This provision shall not prevent Union law from providing more extensive protection.”*<sup>113</sup>

(7) In its opinion 2/13 of 18 December 2014 on the draft agreement providing for the accession of the EU to the ECHR, the CJEU states that, in regard to the relationship between EU law and the ECHR, that *“in the first place it must be borne in mind that Article 53 of the Charter provides that nothing therein is to be interpreted as restricting or adversely affecting fundamental rights as recognised, in their respective fields of application, by EU law and international law and by international agreement to which the EU or all the Member States are party, including the ECHR and by the Member States' constitutions /.../ In so far as Article 53 of the ECHR essentially reserves the power of the Contracting parties to lay down higher standards of protection of fundamental rights than those guaranteed by the ECHR, that provision should be coordinated with Article 53 of the Charter, as interpreted by the CJEU, so that the power granted to Member States by Article 53 of the ECHR is limited – with respect to the rights recognised by the Charter that correspond to those guaranteed by the ECHR – to that which is necessary to ensure that the level of protection provided for by the Charter and the primacy, unity and effectiveness of EU law are not compromised /.../ Thus, when implementing EU law, the Member States may, under EU law, be required to presume that fundamental rights have been observed by other Member States, so that not only may they not demand a higher level of national protection of fundamental rights from another Member States than that provided by EU law, but, save in exceptional cases, they may not check whether that other Member State has actually, in a specific case, observed the fundamental rights guaranteed by the EU.”*<sup>114</sup>

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<sup>112</sup>C-206/13 *Siragusa* EU:C:2014:126, paras 24-25.

<sup>113</sup>Article 52(3) of the Charter.

<sup>114</sup>Opinion 2/13 of the Court (Grand Chamber) EU:C:2014:2454, paras 187, 189 and 192.

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(8) The Explanations to the Charter, which do not have binding legal effect,<sup>115</sup> provide that *“the rights in Article 6 of the Charter are the rights guaranteed by Article 5 of the ECHR and /.../they have the same meaning and scope. Consequently, the limitations which may legitimately be imposed on them may not exceed those permitted by the ECHR.”*<sup>116</sup> The CJEU in the *J.N.* case confirms that *“rights laid down in Article 6 of the Charter correspond to those guaranteed by Article 5 of the ECHR and that limitations which may legitimately be imposed on the exercise of the rights laid down in Article 6 of the Charter may not exceed those permitted by the ECtHR, in the wording of Article 5 thereof. However, the explanations relating to Article 52 of the Charter indicate that paragraph 3 of that article is intended to ensure the necessary consistency between the Charter and the ECHR, without thereby adversely affecting the autonomy of Union law and that of the Court of Justice of the European Union.”*<sup>117</sup>

(9) On the other hand, according to the opinion of the CJEU, Article 6(3) of the TEU does not govern the relations between the ECHR and legal systems of the Member States, nor does it lay down the consequences for a national court in case of a conflict between the rights guaranteed by the ECHR and a provision of national law.<sup>118</sup> Technically speaking, as long as the EU has not acceded to the ECHR, *“the ECHR does not constitute a legal instrument which has been formally incorporated into EU law”*.<sup>119</sup> This is confirmed also in detention cases, where the CJEU stated that */.../ “whilst Article 52(3) of the Charter provides that the rights contained in the Charter which correspond to rights guaranteed by the ECHR are to have the same meaning and scope as those laid down by the ECHR, the latter does not constitute, as long as the EU has not acceded to it, a legal instrument which has been formally*

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<sup>115</sup>Second paragraph of Article 6(1) of the TEU states that rights, freedoms and principles in the Charter shall be interpreted with due regard to the Explanations referred to in the Charter that set out the sources of those provisions. The Preamble of the Explanations relating to the Charter (2007/C/303/02, 14.12.2007) provides that although the Explanations *“do not as such have the status of law, they are a valuable tool of interpretation intended to clarify the provisions of the Charter”*. See also Article 52(7) of the Charter.

<sup>116</sup>Explanation on Article 6: Article 6 of the Charter entitled *“right to liberty and security”* states that *“everyone has the right to liberty and security of person.”*

<sup>117</sup>C-601/15 PPU, *J.N.* (Grand Chamber) EU:C:2016:84, para 47.

<sup>118</sup>C-571/10 *Kamberaj* (Grand Chamber) EU:C:2012:233, para 62.

<sup>119</sup>C-617/10 *Åklagaren* EU:C:2013:105, para 44.



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*incorporated into EU law.*<sup>120</sup>

(10) Nevertheless, it cannot be ignored that secondary EU law on asylum and on returns of irregular migrants explicitly refers to the case-law of the ECtHR and to its binding force for Member States under the ECHR. For example, recital 32 of the Dublin III Regulation provides that *“with respect to the treatment of persons falling within the scope of this Regulation, Member States are bound by their obligations under instruments of international law, including the relevant case-law of the ECtHR.”* Recital 10 of the Recast Reception Directive provides that *“with respect to the treatment of persons falling within the scope of this Directive, Member States are bound by obligations under instruments of international law to which they are party.”* In the recital 15 of the Recast Reception Directive, the term *“international obligations of the Member States”* is mentioned in relation to detention.<sup>121</sup> The ECHR is explicitly mentioned in recital 9 of the Recast Reception Directive in relation to the issue of family unity. Similarly, recital 22 of the Return Directive states that *“in line with the ECHR, respect for family life should be a primary consideration of Member States when implementing this Directive.”*

(11) Given the described legal framework, a question derives on what are the consequences of this interplay between EU law and the ECHR for national courts’ practice as regards the effective protection of human rights in general and in detention cases, in particular.

(12) A possible answer to this question can be drawn out from the preliminary rulings of the CJEU in relevant cases on human rights protection. For example, in some cases the CJEU took full responsibility for the protection of human rights and did not transfer responsibility for the protection of fundamental rights under EU law back to the referring national courts.<sup>122</sup> In some other cases, the CJEU did transfer the responsibility for the concrete decision on the protection of human rights to referring courts of the Member States.<sup>123</sup> In

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<sup>120</sup> C-601/15 PPU, J.N. (Grand Chamber) EU:C:2016:84, para 45.

<sup>121</sup> Recast Reception Directive (2013/33).

<sup>122</sup> C-60/00 *Carpenter* EU:C:2002:434; C-94/00 *Roquette Frères* EU:C:2002:603; C-112/00 *Schmidberger* EU:C:2003:333.

<sup>123</sup> See, for example: C-117/00 *Commission v Ireland* EU:C:2002:366; C-139/01; *Rechnungshof* EU:C:2003:294; C-101/01 *Lindquist* EU:C:2003:596.

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more recent cases on immigration and international protection, it perhaps becomes clearer that the main responsibility for the protection of fundamental rights under EU law and international human rights obligations rests on the Member States' courts. For example, in the case of *N.S. and M.E.*,<sup>124</sup> the CJEU states in paragraph 80 that *"it must be assumed that the treatment of asylum seekers in all Member States complies with the requirements of the Charter, the Geneva Convention and the ECHR."* In paragraph 77 the CJEU adds: *"According to settled case-law Member States must not only interpret their national law in a manner consistent with EU law but also make sure they do not rely on an interpretation of an instrument of secondary legislation which would be in conflict with the fundamental rights protected by the EU legal order or with other general principles of EU law. In the Dereci case, the CJEU establishes it is up to the referring court to examine whether the refusal of the right of residence undermines the right to respect for private and family life from Article 7 of the Charter: "If it takes the view that the situation is not covered by EU law, it must undertake that examination in the light of Article 8(1) of the ECHR. All the Member States are, after all, parties to the ECHR which enshrines the right to respect for private and family life in Article 8."<sup>125</sup> In the *Zakaria* case, the CJEU states that when the person is refused permission to cross the border, *"it is for the referring court to ascertain, (...), whether refusal to grant the claimant (...) the right to bring his claims before the court infringes the rights from Article 47 of the Charter."<sup>126</sup> In the case of *M.G. and N.R.*, which relates to detention, the CJEU says in paragraph 35 that *"authorities of the Member States are, as a rule, subject to the obligation to observe the rights of the defence."<sup>127</sup> In the *Arslan* case, which also relates to detention, the CJEU has stated that *"it is for Member States to establish, in full compliance with their obligations arising from both international law and EU law, the ground on which an asylum seeker may be detained or kept in detention."<sup>128</sup>****

(13) If in a given case a question on interpretation of secondary EU law in conjunction with the ECHR and national law is raised, the referring court is entitled to expect the CJEU to

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<sup>124</sup>C-411/10 *N.S.u.a* EU:C:2011:865 and C-493/10 *M.E. and Others* EU:C:2011:610.

<sup>125</sup>C-256/11 *Dereci and Others* EU:C:2011:734, paras 72-73.

<sup>126</sup>C-23/12 *Zakaria* EU:C:2013:24, para 40.

<sup>127</sup>C-383/13 *PPU M.G. and N.R.* EU:C:2013:533.

<sup>128</sup>C-534/11 *Arslan* EU:C:2013:343, para 56.

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provide a preliminary ruling concerning the correct interpretation of a legal provision of EU law.<sup>129</sup> Referring courts may expect this not only in cases of preliminary reference concerning material law, which might<sup>130</sup> or might not<sup>131</sup> overlap with the issues already raised in the existing case-law of the ECtHR, but also in cases of the reference for a preliminary ruling on procedural law standards.<sup>132</sup> As the CJEU has reiterated in the *Kremzow* case, “(...) where national legislation falls within the field of application of Community law the CJEU, in a reference for a preliminary ruling, must give the national court all the guidance as to interpretation necessary to enable it to assess the compatibility of that legislation with the fundamental rights – as laid down in particular in the ECHR – whose observance the CJEU ensures.”<sup>133</sup>

(14) The interplay between EU law and the ECHR is influenced also by a particular relationship between the primary EU law on effective legal remedy and on fair trial from Article 47 of the Charter and corresponding provisions on effective legal remedies against detention orders as these remedies are specifically regulated in the respective secondary EU law.

(15) The first paragraph of Article 47 of the Charter is based on Article 13 of the ECHR.<sup>134</sup> Protection under Article 47(1) of the Charter is more extensive, since it guarantees the right to an effective remedy before a court, which is not the case for Article 13 of the ECHR.<sup>135</sup> The second paragraph of Article 47 of the Charter corresponds to Article 6(1) of the ECHR,

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<sup>129</sup>“The presumption that questions referred by national courts for a preliminary ruling are relevant may be rebutted only in exceptional cases, where it is quite obvious that the interpretation of EU law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it” (C-239/14 Tall EU:C:2015:824, para 34).

<sup>130</sup>See, for example: C-71/11 and C-99/11 *Y and Z* EU:C:2012:518; C-199/12 to C-201/12, *X u.a* EU:C:2013:720.

<sup>131</sup>See, for example: C-148/13 to C-150/13, *A B C* EU:C:2014:2406.

<sup>132</sup>See, for example, the case of *Abdida* (C-562/13 *Abdida* EU:C:2014:2453 para 52, first paragraph of operative part of the judgment).

<sup>133</sup>C-299/95 *Kremzow* EU:C:1997:254, para 15.

<sup>134</sup>Explanation relating to the Charter, Article 47: Article 47(1) of the Charter says that “everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this article.”

<sup>135</sup>Article 13 of the ECHR states that everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before “a national authority” notwithstanding that the violation has been committed by persons acting in an official capacity.

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with the Charter guaranteeing more extensive protection than the ECHR. This is because, unlike the ECHR, the Charter guarantees the right to an effective remedy before a court, whilst the right to a fair hearing is not confined only to disputes relating to civil law rights and obligations.<sup>136</sup> From the judgment in the case of *Maaouia v France* onwards, the ECtHR remains consistent in interpreting that decisions regarding the entry, stay and deportation of aliens do not concern the determination of the civil rights or obligations of an applicant or of a criminal charge against him, within the meaning of Article 6(1) of the ECHR on fair trial.<sup>137</sup> In cases of detention, however, asylum seekers and irregular migrants have the right to be brought promptly before a “*judge or other officer authorised by law to exercise judicial power*” according to the provisions of the ECHR.<sup>138</sup> Furthermore, a complete set of standards of fair procedure and trial are regulated in paragraphs 2 to 5 of Article 5 of the ECHR. The ECtHR has held that it is not always necessary that procedure under Article 5(4) of the ECHR be attended by the same guarantees as those required under Article 6 for criminal or civil litigation. It must have a judicial character and provide guarantees appropriate to the type of deprivation of liberty in question.<sup>139</sup>

(16) This could lead to the conclusion that the Member States’ judges, when dealing with detention cases of asylum seekers and irregular migrants, should take into account the aforementioned standards of fair judicial procedure regulated in paragraphs 2 to 5 of Article 5 of the ECHR in conjunction with fair trial standards from Article 47(2) and (3)<sup>140</sup> of the Charter, as legitimate criteria for examining the validity of provisions on the right to effective judicial protection from specific secondary EU law (the Dublin III Regulation, the Recast Reception Directive or the Return Directive).

(17) Despite the fact that the Charter is part of the primary law of the EU, it is not so clear whether the standards for effective judicial protection set out in secondary EU law (in the

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<sup>136</sup> Explanation relating to the Charter, Article 47.

<sup>137</sup> *Maaouia v France* App no 39652/98 (ECtHR 5 October 2000), paras 33-41.

<sup>138</sup> Article 5(3) of the ECHR.

<sup>139</sup> *A and Others v United Kingdom* (Grand Chamber) App no 3455/05 (ECtHR 19 February 2009), para 203. For more on this see, for example, section 4 of the ELI Statement, standard 4.25 (the scope/intensity of judicial review including procedural guarantees).

<sup>140</sup> Article 47(3) of the Charter states that “legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice”.

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two directives and the regulation) on detention must be in accordance with Article 47 of the Charter (in conjunction with Article 5 of the ECHR). The reason for this reservation or eventual doubt lies in the interpretation of Article 47 of the Charter, which was developed by the CJEU in the *Diouf case*. In this case, the CJEU deals with the issue of effective legal remedy in asylum procedures and refers to the provision of Article 47 of the Charter inconsistently – in some parts of the preliminary ruling the CJEU refers to it as being a general principle,<sup>141</sup> while in some other parts of the ruling the CJEU refers to it as being a right.<sup>142</sup>

(18) The difference between a principle and a right is crucial for judicial interpretation.<sup>143</sup> Article 52(5) of the Charter states that *“the provisions of this Charter which contain principles may be implemented by legislative and executive acts taken by institutions, bodies, offices and agencies of the Union, and by acts of Member States when they are implementing Union law, in the exercise of their respective powers. They shall be judicially cognisable only in the interpretation of such acts and in the ruling on their legality.”* This means that if judges indeed have to consider the right to an effective legal remedy of Article 47(1) of the Charter as being a mere principle and not a right, then it is secondary EU law which gives the concrete legal expression to Article 47 of the Charter and not *vice versa*. In that case, the EU legislator could define standards for effective legal remedies in each field of law differently, without regarding the standards and conditions laid down in Article 47 of the Charter.

(19) However, in the preliminary rulings following the *Diouf case*, the CJEU has not reiterated or further developed that interpretation. This could lead to a tentative conclusion that the CJEU does not reiterate consideration of secondary EU law’s significance or even decisiveness over Article 47 of the Charter. Instead, in a detention case (*M.G., N.R.*),

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<sup>141</sup> C-69/10 *Diouf* EU:C:2011:524, paras 28, 35, 48, 50, 63 and 69.

<sup>142</sup> *Ibid.* paras 35, 36, 64.

<sup>143</sup> Article 47 of the Charter, which is entitled “right to an effective remedy and to a fair trial”, states in paragraph 1 that “everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with conditions laid down in this Article.” Paragraph 2 of this Article states that “everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented”.

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regarding the right to a defence, the CJEU stated that where neither the “*conditions under which observance of the third-country national's right to be heard is to be ensured, nor the consequences of the infringement of that right, are laid down by EU law, those conditions and consequences are governed by national law*” [...].<sup>144</sup> Similarly, in the *Mahdi* case, the CJEU states that “*according to settled case-law, in the absence of EU rules concerning the procedural requirements relating to a detention-review measure, the Member States remain competent, in accordance with the principle of procedural autonomy, to determine those requirements, whilst at the same time ensuring that the fundamental rights are observed and that the provisions of EU law relating to that measure are fully effective.*”<sup>145</sup> In the *Mukarubega* case, the CJEU again reaffirmed that observance of the right to be heard and of the right to defence, which are general principles of law, is obligatory even where the applicable legislation does not expressly provide for such a procedural requirement.<sup>146</sup>

(20) Although, from among the cases mentioned above, the CJEU made an explicit reference to Article 47 of the Charter only in the *Mahdi* case, one could conclude based on preliminary rulings that followed the judgment in the *Diouf* case, that it is not just secondary EU law what defines the procedural requirements in detention cases. Instead, secondary EU law needs to be applied always in conjunction with the right to an effective judicial protection as being a general principle of law and this includes case-law of the ECtHR, as well as constitutional traditions common to the Member States.<sup>147</sup>

### **3.2. The relationship between the ECHR and EU law from the standpoint of case-law of the ECtHR**

(1) The basic principle of the relationship between the ECHR and EU law implemented by a Member State was set in the judgment of the Grand Chamber of the ECtHR in the *Bosphorus* case. The ECHR does not prohibit Contracting Parties from transferring sovereign power to

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<sup>144</sup> C-383/13 PPU M.G. and N.R. EU:C:2013:533, para 35. See also: C-249/13 Boudjlida EU:C:2014:2431, para 41.

<sup>145</sup> C-146/14 PPU Mahdi EU:C:2014:1320, para 50.

<sup>146</sup> C-166713 Mukarubega EU:C:2014:2336, paras 45, 49. See also C-249/13 Boudjlida EU:C:2014:2431, para 39.

<sup>147</sup> See Article 6(3) of the TEU.

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international organisations in order to pursue co-operation in certain fields of activity. Even as a holder of such transferred sovereign power, that organisation is not held responsible under the ECHR for proceedings before, or decisions of, its organs as long as it is not a Contracting Party. A Contracting Party is responsible under Article 1 of the ECHR for all acts and omissions of its organs regardless of whether the act or omission in question was a consequence of domestic law or of the necessity to comply with international legal obligations. Article 1 of the ECHR makes no distinction as to the type of rule or measure concerned and does not exclude any part of a Contracting Party's jurisdiction from scrutiny under the ECHR. Member States are thus fully responsible under the ECHR and are subject to full judicial scrutiny by the ECtHR for all acts falling outside its strict international legal obligations. For example, in cases, in which EU law grants certain discretion to Member States. On the other hand, Member States acting on the basis of EU law leaving no discretion are presumed to be in accordance with the ECHR, as the EU legal order is presumed to offer protection of fundamental rights that is equivalent to protection under the ECHR. By "equivalent" the ECtHR means "comparable": any requirement that the organisation's protection be "identical" could run against the interest of the pursued international co-operation. However, any such finding of equivalence could not be final and would be susceptible to review in the light of any relevant change in fundamental right's protection. The presumption on equivalent protection is open to rebuttal in case of "*manifest dysfunction*" of EU law fundamental rights protection.<sup>148</sup> In cases of such rebuttal, "*the interest of international cooperation would be outweighed by the Convention's role as a constitutional instrument of European public order in the field of human rights.*"<sup>149</sup>

(2) In the case of *Avotniš v Latvia* (May 2016), the ECtHR reiterated that the application of the presumption of equivalent protection in the legal system of the EU is subject to two conditions. Firstly, the absence of any margin of manoeuvre on the part of the domestic authorities and secondly, the deployment of the full potential of the supervisory mechanism

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<sup>148</sup>*Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Sirketi v Ireland* App no 45036/98 (ECtHR 30 June 2015), paras 152-157.

<sup>149</sup>*Michaud v France* App no 12323/11 (ECtHR 6 December 2012), para 103; *Avotniš v Latvia* (Grand Chamber) App no 17502/07 (ECtHR 23 May 2016), para 101.

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provided for by EU law.<sup>150</sup>

(3) The fact that a certain situation is regulated by EU secondary law in the field of detention may have further consequences for the responsibility of a contracting state to respect human rights contained in the ECHR. For example, in the case of *M.S.S. v Belgium and Greece*, the fact that a contracting state was bound by legal obligations under the Reception Directive was recognised by the ECtHR as a decisive factor for the establishment of a level of protection of human dignity of an asylum seeker against degrading treatment during detention<sup>151</sup> (and because of living conditions<sup>152</sup>).

(4) In addition, from the standpoint of the ECtHR, no deprivation of liberty, even if it is regulated in secondary EU law, is lawful unless it falls within one of the grounds contained in sub-paragraphs (a) to (f) of Article 5(1) of the ECHR.<sup>153</sup> Regarding of irregular migrants, the second limb of Article 5(1)(f) of the ECHR may be relevant, since detention in cases of irregular migrants should be decided “*with a view to deportation or extradition.*” In cases of detention of asylum seekers, the first limb of Article 5(1)(f) of the ECHR, which relates to “*prevention of unauthorised enter*”, could also be relevant.<sup>154</sup>

(5) If, however, a Contracting State is bound by a secondary EU law on reception of asylum seekers, a third-country national, who has applied for asylum should not be regarded as staying illegally on the territory of that Contracting State.<sup>155</sup> An asylum applicant has the right to remain on the territory of such Member State for the purpose of the procedure according to the provisions of the existing Recast Procedures Directive.<sup>156</sup> An asylum seeker should, therefore, not be detained for a reason of his or her deportation or extradition or to prevent unauthorised entry. Perhaps for that reason, in some cases the ECtHR has implicitly stipulated that Article 5(1)(f) of the ECHR shall not be referred to in cases of detention of

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<sup>150</sup>For the application of these two conditions in a particular case, see the judgment in the case of *Avotins v Latvia* (Grand Chamber) App no 17502/07 (ECtHR 23 May 2016), paras 106-127.

<sup>151</sup>*M.S.S. v Belgium and Greece* App no 30696/09 (ECtHR 21 January 2011), paras 231, 233.

<sup>152</sup>*Ibid.* paras 250, 263.

<sup>153</sup>*A and Others v United Kingdom* (Grand Chamber) App no 3455/05 (ECtHR 19 February 2009), para 163.

<sup>154</sup>See, for example: *Saadi v United Kingdom* (Grand Chamber) App no 13229/03 (ECtHR 29 January 2008).

<sup>155</sup>Recital 9 of the Return Directive 2008/115.

<sup>156</sup>Article 9(1) of the Recast Procedures Directive 2013/32.



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asylum seekers.<sup>157</sup> A relevant provision in these cases could be the second limb of Article 5(1)(b) of the ECHR.<sup>158</sup>

(6) The relationship between the ECHR and EU law is affected also by the case-law of the ECtHR when a national court, against whose decisions there is no judicial remedy under national law, refuses to refer to the CJEU a question raised before that court on the interpretation of EU law in the preliminary ruling procedure (Article 267 of the TFEU). If that national court does not provide legitimate reasons for such refusal, the ECtHR may find a violation of article 6(1) of the ECHR. The standard for justifying a decision of non-referral for a preliminary ruling should be that allowing the ECtHR to establish the reasons of non-referral and whether the question concerned was considered as irrelevant, sufficiently clear or had already been interpreted by the CJEU or whether it was simply ignored.<sup>159</sup>

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<sup>157</sup> See, for example: *S.D. v Greece* App no 53541/07 (ECtHR 11 June 2009), para 62; *Ahmade v Greece* App no 50520/09 (ECtHR 25 September 2012), paras 139, 143; *R.U. v Greece* App no 2237/08 (ECtHR 7 June 2011), paras 94-95.

<sup>158</sup> This provision regulates lawful arrest or detention of a person in order to secure the fulfilment of any obligation prescribed by law.

<sup>159</sup> *Vergauwen and Others v Belgium* App no 4832/04 (ECtHR 10 April 2012), paras 89-91; *Dhahbi v Italy* App no 17120/09 (ECtHR 8 April 2014), paras 31-33; *Schipani and Others v Italy* App no 38369/09 (ECtHR 21 July 2015), paras 71-72.

### 3.3. The relationship between EU law and national (constitutional) law from the standpoint of EU law and case-law of the CJEU

(1) The relationship between EU law and national law is governed by clearly established rules of EU law and principles or standards developed by the CJEU. Some of the most frequently used rules, principles and standards governing this relationship from the standpoint of EU law in general and in detention cases have been summarised in the following paragraphs; while a potentially more problematic relationship between EU law and constitutional law of Member States is discussed in paragraphs 20 to 25 and in subsection 3.4.

(2) As regards specific EU law, the Dublin III Regulation is directly applicable and is binding in its entirety.<sup>160</sup> In the *Simmenthal II* case, the CJEU establishes that provisions of a regulation are “a direct source of rights and duties for all those affected thereby, whether Member States or individuals, who are parties to legal relationships under Community law.”<sup>161</sup> This does not mean that a national measure introduced with the intention of giving effect to the Dublin III Regulation should be considered in breach of EU law. Generally, such a measure could be considered invalid only if it alters, obstructs or obscures the nature of an EU regulation.<sup>162</sup> Member States are, however, required to transpose certain provisions of the Dublin III Regulation into their national legal systems. For example, they should define objective criteria for the risk of absconding<sup>163</sup> and less coercive alternative measures to detention (such as regular reporting, a deposit of a financial guarantee or an obligation to stay at an assigned place).<sup>164</sup>

(3) The Return Directive and the Recast Reception Directive are binding upon each Member State as to the result to be achieved, but shall leave to the national authorities the choice of form and methods.<sup>165</sup> However, some provisions contained in directives may also have direct

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<sup>160</sup>Article 288 of the TFEU; Article 49(5) of the Dublin III Regulation.

<sup>161</sup>C-106/77 *Simmenthal II* EU:C:1978:49, para 15.

<sup>162</sup>C-39/72 *Commission v Italy* EU:C:1973:13; Craig, P., De Búrca, Gráinne, “EU Law: Text, Cases, and Materials” OUP (2<sup>nd</sup> Ed), 1998, p 177.

<sup>163</sup>Article 2(n) of the Dublin III Regulation.

<sup>164</sup>Article 28(2) in conjunction with Article 28(4) of the Dublin III Regulation.

<sup>165</sup>Article 288 of the TFEU; Article 31 of the Recast Reception Directive; Article 20 of the Return Directive.

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effect.<sup>166</sup>

(4) In accordance with the principle of “*indirect effect*”<sup>167</sup> of EU law, a national court called upon to interpret applicable national law, regardless of whether the provisions in question were adopted before or after the directive, is required to do so, as far as possible, in the light of the wording and the purpose of the directive in order to achieve the result pursued by the latter;<sup>168</sup> this includes provisions of EU framework decisions.<sup>169</sup> However, the principle of indirect effect applies only insofar as the wording of national law makes it possible to do so. The national court is not required to act *contra legem*. In addition, the principle of indirect effect is limited by general principles of law, particularly those of legal certainty and non-retroactivity.<sup>170</sup>

(5) Member States may not seek to impose on an individual a provision of its own law which is incompatible with a directive that the State has, through its own fault, omitted to implement.<sup>171</sup>

(6) A particular provision of EU law (Treaty provisions, secondary law, including directives in case of failure to transpose within the time specified, provisions of international agreements and decisions) may have “*direct effect*” by conferring rights that may be invoked by individuals before the national courts and initially seek the protection of those rights by judges in EU Member States. If a provision has direct effect, the national judge does not wait for the Commission to bring an infringement action against the State. Such a judge is bound

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<sup>166</sup>See paragraph 7 in this sub-section.

<sup>167</sup>Fennelly, Nial, “The National Judge as Judge of the European Union” in: Rosas, A., Levits, E., Bot, Y, (eds.), “The Court of Justice and the Constitution of Europe: Analyses and Perspectives on Sixty Years of Case-Law” Asser Press, Springer (2012), p 68.

<sup>168</sup>C-106/89 *Marleasing* EU:C:1990:395, para 8; C-80/86 *Kolpinghuis* EU:C:1987:431, para 12

<sup>169</sup>C-105/03 *Pupino* EU:C:2005:386, para 47.

<sup>170</sup>Fennelly, Nial, “The National Judge as Judge of the European Union” in: Rosas, A., Levits, E., Bot, Y, (eds.), “The Court of Justice and the Constitution of Europe: Analyses and Perspectives on Sixty Years of Case-Law” Asser Press, Springer (2012), p. 68; C-105/03 *Pupino* EU:C:2005:386, para 44-45; C-212/04; *Adeneler* EU:C:2006:443, para 110.

<sup>171</sup>*Ibid.* para 24.

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to provide immediate and direct protection for the rights of individuals.<sup>172</sup>

(7) The “*direct effect*” test provides that the provision at issue is “*unconditional and sufficiently precise*”.<sup>173</sup> For example, the CJEU in the *El Dridi* and *Mahdi* cases decided that Article 15 of the Return Directive regulating detention is unconditional and sufficiently precise, so that no other specific elements are required for it to be implemented by the Member State.<sup>174</sup>

(8) In the *Marks & Spencer* case, the CJEU states that implementation of a directive must be such as to ensure its application in full. Consequently, the adoption of national measures correctly implementing a directive does not exhaust the effects of the directive. Member States remain bound actually to ensure full application of the directive even after the adoption of those measures. Individuals are therefore entitled to rely before national courts, against the State, on the provisions of a directive which appear, so far as their subject-matter is concerned, to be unconditional and sufficiently precise whenever the full application of the directive is not in fact secured. That is to say, not only where the directive has not been implemented or has been implemented incorrectly, but also where the national measures correctly implementing the directive are not being applied in such a way as to achieve the result sought by it.<sup>175</sup>

(9) National rules on the application of EU law on the national court's own motion vary greatly across Member States. The CJEU has not yet made any exhaustive statements on this issue. However, it has identified some particular instances, two of which are particularly worth mentioning here. In the first instance, by virtue of the domestic law, courts must raise of their own motion such points of law, which have not been raised by the parties; such an obligation also exists where binding EU rules are concerned.<sup>176</sup> In the second instance, no

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<sup>172</sup>Fennelly, Nial, “The National Judge as Judge of the European Union” in: Rosas, A., Levits, E., Bot, Y, (eds.), “The Court of Justice and the Constitution of Europe: Analyses and Perspectives on Sixty Years of Case-Law” Asser Press, Springer (2012), p. 64-65.

<sup>173</sup>C-148/8 *Ratti* EU:C:1979:110 para 23; C-8/81 *Becker* EU:C:1982:7, para 25.

<sup>174</sup>C-61/11 *El Dridi* EU:C:2011:268, para 47; C-146/14 PPU *Mahdi* EU:C:2014:132, para 54.

<sup>175</sup>C-62/00 *Marks & Spencer* EU:C:2002:435, para 26-27.

<sup>176</sup>C-430/93 and C-431/93 *Van Schijndel* EU:C:1995:441, para 13; Case C-2/06 *Kempter* EU:C:2008:78, para 45.

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national rule, even one laid down by national constitution,<sup>177</sup> can preclude a national court from deciding at its discretion and of its own motion to refer a case for a preliminary ruling.<sup>178</sup> For example, in a case concerning EU law, a national court which considers that a provision of national law is not only contrary to EU law but also is unconstitutional, does not lose the right or escape the obligation under Article 267 TFEU to refer questions to the CJEU on the interpretation or validity of EU law by reason of the fact that the declaration of a national legal rule as unconstitutional is subject to mandatory reference to the constitutional court.<sup>179</sup>

(10) In regards to sufficient remedies to ensure effective legal protection, it is a matter of national law to establish courts with jurisdiction to provide remedies and to lay down procedural rules and time limits for the pursuit of claims arising from EU law (the principle of “*procedural autonomy*”).<sup>180</sup> This principle comprises of two requirements: national procedural rules should not be less favourable than those governing similar domestic actions (“*principle of equivalence*”) and they should not render virtually impossible or excessively difficult the exercise of rights conferred by EU law (principle of effectiveness).<sup>181</sup> It is for the national judge, to decide by applying the carefully balanced test whether the particular national rules are within the permitted scope of national procedural autonomy or whether they infringe EU law.<sup>182</sup>

(11) However, the principle of procedural autonomy may not in all cases be sufficiently effective to serve the purpose of protection of rights derived by individuals from EU law<sup>183</sup>

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<sup>177</sup>C-188/10 *Melki* EU:C:2010:363, para 44.

<sup>178</sup>Nial Fennelly ‘The National Judge as Judge of the European Union’ in Allan Rosas, Egils Levits, Yves Bot (eds) *The Court of Justice and the Constitution of Europe: Analyses and Perspectives on Sixty Years of Case-Law* (Asser Press, Springer 2012), p 70; C-166/73 *Rheinmühlen* EU:C:1974:3.

<sup>179</sup>C-112/13 *A B and Others* EU:C:2014:2195, para 38.

<sup>180</sup>Fennelly, Nial, “The National Judge as Judge of the European Union” in: Rosas, A., Levits, E., Bot, Y, (eds.), “The Court of Justice and the Constitution of Europe: Analyses and Perspectives on Sixty Years of Case-Law” Asser Press, Springer (2012) p. 69; see: second paragraph of Article 19(1) of the TEU.

<sup>181</sup>C-255/00 *Grundig Italiana SpA* EU:C:2002:525, para 33.

<sup>182</sup>Nial Fennelly ‘The National Judge as Judge of the European Union’ in Allan Rosas, Egils Levits, Yves Bot (eds) *The Court of Justice and the Constitution of Europe: Analyses and Perspectives on Sixty Years of Case-Law* (Asser Press, Springer 2012), p. 69.

<sup>183</sup>*Ibid.* p. 71; Article 47 of the Charter.

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and, therefore, needs to be supplemented with the principle of effective judicial protection. For example, in the *Factortame* case the CJEU stated that “*judicial practice which might impair the effectiveness of Community law by withholding from the national court having jurisdiction to apply such law the power to do everything necessary at the moment of its application to set aside national legislative provisions which might prevent, even temporarily, Community rules from having full force and effect are incompatible with those requirements, which are the very essence of Community law.*”<sup>184</sup>

(12) Under the principle of “*effective judicial protection*”, the national judge is required to exercise the jurisdiction conferred upon him by national law to the greatest extent possible so as to enable the court to give effective protection to rights conferred by EU law. If the deficiency in national remedies consists in the absence of any court capable of exercising the jurisdiction required by Union law, it would fall to the Commission by means of an infringement action to require the Member State to remedy that matter.<sup>185</sup>

(13) Under the (next) principle of “*state liability*”, individuals who have suffered loss or damage as a result of the breach of EU law by a Member State, should be entitled to recover compensation from that State,<sup>186</sup> since respect of the principle of direct effect is “*only a minimum guarantee and is not sufficient in itself to ensure the full and complete implementation of the Treaty.*”<sup>187</sup> In the case of loss or damage caused by the failure to implement a directive by a Member State, the conditions for State liability are that the result prescribed by the directive should entail the grant of rights to individuals; and that it should be possible to identify the content of those rights on the basis of the provisions of the directive; and finally, there should be a causal link between the breach of the State's obligation and the loss and damage suffered by the injured parties.<sup>188</sup> In cases, in which the complaint relates to a national legislative act passed within an area, where Member States enjoy broad legislative discretion, the CJEU has devised a principle which obliges national

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<sup>184</sup>C-213/89 *Factortame* EU:C:1990:257, para 20.

<sup>185</sup>*Ibid.* p. 71-72.

<sup>186</sup>C-6/90 and C-9/90 *Francovich* EU:C:1991:428, para 33. See also the right to compensation from Article 5(5) of the ECHR.

<sup>187</sup>C-46/93 and C-48/93, *Brasserie du Pêcheur and Factortame* EU:C:1996:79, para 20.

<sup>188</sup>C-6/90 and C-9/90 *Francovich* EU:C:1991:428, para 40.

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courts to establish whether the breach of Union law is “sufficiently serious”, meaning that a Member State has “*manifestly and gravely disregarded the limits on its discretion.*”<sup>189</sup> If particular conditions are met, a Member State could be liable also for the effects of judicial decisions of courts of last instance.<sup>190</sup>

(14) The CJEU is especially vigilant in protecting a system of judicial dialogue between national courts and the CJEU under Article 267 of the TFEU. Thus, the preliminary ruling mechanism is the “*cornerstone of EU law.*”<sup>191</sup> For preliminary reference procedure in detention cases, the introduction of an urgent procedure into the rules of the CJEU in March 2008 was very important.<sup>192</sup> It contains an additional requirement: if a preliminary ruling question is referred to in a case pending before a court or tribunal of a Member State with regard to a person in custody, the CJEU shall act with the minimum of delay (Article 267(4) of the TFEU).

(15) Every court or tribunal in a Member State has the unfettered right to make a reference<sup>193</sup> concerning the interpretation of the Treaties (Article 267(1)(a) of the TFEU) or the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union (Article 267(1)(b) of the TFEU). If a national court considers that the grounds put forward by the party in support of invalidity are unfounded, a court may reject them, concluding that the measure is completely valid.<sup>194</sup> But no national court has jurisdiction to

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<sup>189</sup>C-46/93 and C-48/93, *Brasserie du Pêcheur and Factortame* EU:C:1996:79, paras 51 and 55; see also para 56; Fennelly, Nial, “The National Judge as Judge of the European Union” in: Rosas, A., Levits, E., Bot, Y., (eds.), “The Court of Justice and the Constitution of Europe: Analyses and Perspectives on Sixty Years of Case-Law” Asser Press, Springer (2012), p. 75.

<sup>190</sup>C-224/01 *Köbler* EU:C:2003:513, para 53.

<sup>191</sup>CJEU, Report of the Court of Justice on certain aspects of the application of the treaty on European Union, para 11.

<sup>192</sup>Council Decision of 20 December 2007 amending the protocol on the Statute of the Court of Justice, OJ L 24 of 29 January 2008, p. 42, amendments to the Rules of Procedure of the Court of Justice, OJ L 24 of 29 January 2008, p. 39, and OJ L 92 of 13 April 2010, p. 12. The Report on the use of the urgent preliminary ruling procedure by the Court of Justice Luxembourg (31 January 2012) shows that cases dealt with under the urgent preliminary ruling procedure were completed, on average, within 66 days. For example, the early cases lasted 84 days (*Kadzoev*) and 77 days (*El Dridi*).

<sup>193</sup>Fennelly, Nial, “The National Judge as Judge of the European Union” in: Rosas, A., Levits, E., Bot, Y., (eds.), “The Court of Justice and the Constitution of Europe: Analyses and Perspectives on Sixty Years of Case-Law” Asser Press, Springer (2012), p. 76.

<sup>194</sup>*Ibid.* p. 72; C-344/04 *International Air Transport Association* EU:C:2006:10 para 29.

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declare measures taken by EU institutions invalid.<sup>195</sup>

(16) Lower courts have discretion and may, if they consider that a decision on the question is necessary to enable it to give judgment, request the CJEU to give a ruling thereon (Article 267(2) of the TFEU), while the court against whose decisions there is no judicial remedy under national law, has no such discretion and thus has an obligation to bring the matter before the CJEU (Article 267(2) of the TFEU).

(17) Discretion of lower courts regarding initiation of the procedure under Article 267 of the TFEU extends to the relationships between lower and higher courts under national law of a Member State. Thus, for example, if under a national law a lower court is bound by a superior court's interpretation of EU law, such national rule or standard cannot of itself deprive the lower court of the possibility of making a reference to the CJEU, even when the superior court had denied that a reference was necessary.<sup>196</sup>

(18) The courts of last instance are not obliged to request the CJEU to give preliminary ruling only if the matter is "*acte clair*", which means that correct application of EU law may be so obvious as to leave no scope for any reasonable doubt as to the manner in which the question raised should be resolved and that the matter is equally obvious to the courts of the other Member States and to the CJEU.<sup>197</sup> Following a reference in a particular case, it is the duty of the national court to apply EU law as so interpreted, and to decide the main case.<sup>198</sup>

(19) In both phases of the preliminary reference procedure – before and after receiving the preliminary ruling of the CJEU – national courts have to use methods of interpretation of EU law, which may differ from the well-established methods of national administrative law and

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<sup>195</sup>C-314/85 *Foto-Frost v Hauptzollamt Lübeck-Ost* EU:C:1987:452, point 1 of the operative part of the judgment.

<sup>196</sup>C-210/06 *Cartesio* EU:C:2008:723, para 94.

<sup>197</sup>C-283/81 *CILFIT* EU:C:1982:335, paras 16-20; C-428/06 *UGT-Rioja* EU:C:2008:488, para 42-43;

<sup>198</sup>Fennelly, Nial, "The National Judge as Judge of the European Union" in: Rosas, A., Levits, E., Bot, Y, (eds.), "The Court of Justice and the Constitution of Europe: Analyses and Perspectives on Sixty Years of Case-Law" Asser Press, Springer (2012), p. 77; Joined Cases 28-30/62 *da Costa* EU:C:1963:6.



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international law under the Vienna Convention on the Law of Treaties. According to the case-law of the CJEU the literal interpretation is not decisive. It is necessary to consider the spirit, the general scheme and the wording of the relevant EU provisions. Every provision of EU law must be placed in its context and interpreted in light of the provisions in a particular field as a whole, with regard to the objectives thereof and to its state of evolution at the date on which the provision is to be applied.<sup>199</sup>

(20) It would be impossible for EU law and national law to have equal force simultaneously, without some rule for the resolution of potential conflicts. Moreover, it would be pointless for EU law to have full force and effect in a Member State, if an inconsistent rule or subsequently enacted national law could override a provision of EU law.<sup>200</sup> Hence, the CJEU in the *Simmenthal* case II decided that *“the principle of precedence of Community law, the relationship between provisions of the Treaty and directly applicable measures of the institutions on the one hand and the national law of the Member States on the other is such that those provisions and measures not only by their entry into force render automatically inapplicable any conflicting provisions of current national law but – in so far as they are integral part of, and take precedence in the legal order applicable in the territory of each of the Member States – also preclude the valid adoption of new national legislative measures to the extent to which they would be incompatible with Community provisions.”*<sup>201</sup> /.../ *Every national court must apply /.../ Community law in its entirety and protect rights which the latter confers on individuals and must accordingly set aside any provision of national law which may conflict with it, whether prior or subsequent to the Community rule.”*<sup>202</sup>

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<sup>199</sup>C-238/81 *CILFIT* EU:C:1982:335, para 16-20. For other aspects of the methods of interpretation of EU law, see, for example: C-8/55 *Charbonnière de Belgique* EU:C:1956:7; C-70/88 *Chernobyl* EU:C:1990:217; 2/74, *Reyners v Belgium* EU:C:1974:68; 6/72 *Continental Can* EU:C:1975:50; C-43/75 *Defrenne* EU:C:1976:56; C-495/03 *Intermodal Transports* EU:C:2005:552, paras 39, 45; C-257/00 *Givane* EU:C:2003:8, para 37; C-292/89 *The Queen* EU:C:1991:80; C-378/97 *Wijsenbeek* EU:C:1999:439; C-1/99 *Kofisa Italia* EU:C:2001:10. For more details on how to formulate questions for preliminary rulings in disputes concerning asylum seekers, see: Preliminary References to the CJEU: A Note for National Judges Handling Asylum-Related Cases, International Association of Refugee Law Judges, available on the website of the IARLJ.

<sup>200</sup>Fennelly, Nial, “The National Judge as Judge of the European Union” in: Rosas, A., Levits, E., Bot, Y, (eds.), “The Court of Justice and the Constitution of Europe: Analyses and Perspectives on Sixty Years of Case-Law” Asser Press, Springer (2012), p. 66; Case 6/64 *Costa Enel* EU:C:1964:66.

<sup>201</sup>C-106/77 *Simmenthal II* EU:C:1978:49, para 17.

<sup>202</sup>*Ibid.* para 21.

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(21) This principle (“*primacy of EU law*”) is valid from the standpoint of the CJEU not just for the lower courts, but for all the courts in a Member State.<sup>203</sup> This does not mean that the national judge is required to annul conflicting national law, because in such case national law may continue to be applied, but only for the matters outside the scope of EU law.<sup>204</sup>

(22) In the *Nold* case (May 1974), the CJEU stated that in safeguarding the rights, the CJEU is “*bound to draw inspiration from constitutional traditions common to the Member States, and it cannot therefore uphold measures which are incompatible with fundamental rights recognized and protected by the Constitutions of those States.*”<sup>205</sup> However, this standard of “*drawing inspiration*” does not change the early position of the CJEU from 1970, where the CJEU stated that the “*validity of a Community measure or its effect within a Member State cannot be affected by allegations that it runs counter to either fundamental rights as formulated by the constitution of that State or the principles of a national constitutional structure.*”<sup>206</sup>

(23) After the Lisbon Treaty entered into force, a value of constitutional identity of a Member State has received particular meaning in primary EU law. Article 4(2) of the TEU states that the Union shall respect national identities of the Member States, which are inherent in their fundamental structures, both political and constitutional, inclusive of regional and local self-government. Article 52(6) of the Charter states that “*full account shall be taken of national laws and practices as specified in this Charter.*” In addition, Article 53 of the Charter states that “*nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union or all the Member States are party, including the ECHR, and by the Member States’*

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<sup>203</sup>C-118/00 *Larsy* EU:C:2001:368, para 52. On humanitarian protection, see also the judgment of the CJEU in the *Aranyosija* case (C-404/15 *Aranyosija* EU:C:2016:198), which is discussed in the Explanatory Note to Check-list 1 of the ELI Statement Standard 33 - protection of inhuman or degrading treatment in relation to conditions of detention in another Member State.

<sup>204</sup>Fennelly, Nial, “The National Judge as Judge of the European Union” in: Rosas, A., Levits, E., Bot, Y, (eds.), “The Court of Justice and the Constitution of Europe: Analyses and Perspectives on Sixty Years of Case-Law” Asser Press, Springer (2012), p. 67.

<sup>205</sup>C-4/73 *Nold* EU:C:1974:51, para 13.

<sup>206</sup>C-11/70 *Internationale Handelsgesellschaft* EU:C:1970:114, para 3.

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*constitutions.”*

(24) The practical significance of the interplay between constitutional standards of a Member State and EU law can be exemplified by two cases: *Melloni* and *Jeremy F*. The *Melloni* case referred to the European Arrest Warrant (the EAW). The EAW is secondary EU law, which to some extent is comparable to the Dublin III Regulation. Both secondary EU laws are based on the concept of “*mutual trust*” between Member States.<sup>207</sup> The contested issue in the *Melloni* judgment is an example where actions of Member States are entirely determined by EU law. Since in the *Melloni* case the relevant actions of Member States were entirely determined in the EAW, the CJEU did not allow the Spanish Constitutional Court to incorporate (higher) constitutional principles on due process. However, in the latter *Jeremy F* case, where another question concerning fair trial in relation to EAW was referred to the CJEU by the French *Conseil Constitutionnel*, the CJEU decided that the Framework Decision does not prevent a Member State from applying its constitutional rules in respect of suspensive effect of appeal.<sup>208</sup> In general, situations in which Member States enjoy autonomy in procedural law may be frequent, but can also concern material law in the field of fundamental rights.<sup>209</sup>

(25) In the *Gauweiler* case (2015), where a preliminary question affected the relationship between EU law and German constitutional law, the CJEU reiterated its previous case-law in *Elchinov*<sup>210</sup> and *Fazenda Publica*.<sup>211</sup> It established that a judgment in which the CJEU gives a preliminary ruling is binding on the national court in regards to the interpretation or the validity of the acts of the EU institutions in question, for the purposes of the decision to be given in the main proceedings.<sup>212</sup>

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<sup>207</sup>C-399/11 *Melloni* EU:C:2013:107, para 63.

<sup>208</sup>The CJEU stated that the fact that Framework Decision 2002/584/JHA does not provide for a right of appeal with suspensive effect against decisions relating to European arrest warrants, does not prevent the Member States from providing for such a right (C-168/13 PPU, *Jeremy F* EU:C:2013:358, para 51).

<sup>209</sup>See, for example, the position of the CJEU in case of B and D (C-56/09 *Zanotti* EU:C:2010:288, C-101/09 D EU:C:2009:285, paras 113-121) on the issue of political asylum in comparison to the position of the CJEU in case of M'Bodj (C-542/13, paras 43-44) on humanitarian protection.

<sup>210</sup>C-173/09 *Elchinov* EU:C:2010:581.

<sup>211</sup>C-446/98 *Fazenda Pública* EU:C:2000:691.

<sup>212</sup>C-62/14 *Gauweiler* EU:C:2015:400, paras 16.

### 3.4. The relationship between national constitutional law and EU law from the standpoint of case-law of national (constitutional) courts

(1) While national constitutional courts typically accept supremacy of EU law over statutory (ordinary) legal provisions, many of them reject the unconditional or absolute supremacy of valid EU law over “(the core of) national constitutional law.”<sup>213</sup>

(2) For example, in the *Frontini* judgment of 1973, the Italian Constitutional Court adopted a doctrine establishing that EU law may derogate from ordinary constitutional law rules, but not from certain fundamental principles or inalienable rights of persons.<sup>214</sup> In *Solange I* and *Solange II* judgments of 1974 and 1986, the German Constitutional Court made an explicit reference to the doctrine of its Italian counterpart when developing a principle, according to which the Constitutional Court will refrain from scrutinising individual EU acts for their respect of fundamental rights (this being a matter left to CJEU), but that it could scrutinise the conformity of a general fundamental rights protection regime in the EU with the German constitutional standards.<sup>215</sup> This type of *Solange* principle with regard to the relationship between constitutional law of Member States and EU law can be related also to other national constitutional case-law, for example, in Poland,<sup>216</sup> the Czech Republic<sup>217</sup> and Lithuania.<sup>218</sup>

(3) There is, therefore, an existing trend among constitutional courts to use the narrative of constitutional reservations against EU law in exceptional cases. Initially, these national

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<sup>213</sup>Claes, Monica, 2016, The Validity and Primacy of EU Law and the “Cooperative Relationship” between National Constitutional Courts and the Court of Justice of the European Union, *Maastricht Journal of European Comparative Law*, 23, 1, p. 155.

<sup>214</sup>De Witte, Bruno, 2001, Constitutional Aspects of European Union Membership in the Original Six Member States: Model Solutions for the Applicant Countries, in Kellermann, E., Alfred, W. De Zwaan, Jaap, Czuczai, Jenö (eds.), *EU Enlargement: The Constitutional Impact at EU and National Level*, T.M.C. Asser Press, The Hague, 74-75. See also the *Fragd* ruling from 1989 of the Constitutional Court of the Republic of Italy (*Rivista italiana di diritto pubblico comunitario*, 1991, n. 232).

<sup>215</sup>*Ibid* p.75. See rulings of the German Constitutional Court: BVerfGE 37, 271, 29 May 1974 (*Solange I*), BVerfGE 73, 339, 22 October 1986 (*Solange II*), BVerfG, 2 BvL 1/97, 7 June 2000.

<sup>216</sup>Ruling of the Constitutional Tribunal of Poland, K 18/04, 11 May 2005.

<sup>217</sup>Rulings of the Constitutional Court of the Czech Republic, US 50/04, 8 March 2006, US 29/09, 3 November 2009.

<sup>218</sup>Ruling of the Constitutional Court of Lithuania, 14 March 2006, case no 17/02-24/02-06/03-22/04.

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jurisprudence developments were focusing on fundamental rights protection, but after the ratification of the Treaty of Maastricht, the focus moved to *ultra vires* control. Apart from the aforementioned national courts, and some other Member States' courts,<sup>219</sup> commentators refer to the further three distinct groups of Member States. The courts in such Member States as Bulgaria, Croatia, Malta, Slovenia and Romania have not developed a clear view on *ultra vires* and constitutional identity review. In another group of States – Austria, Cyprus, Hungary, Luxemburg, and the Netherlands – supremacy of EU law is almost uncontested, and the courts do not claim their right to the review of EU law and its applicability. In another group of Member States, certain elements of *ultra vires* review or some sort of constitutional identity (review) are present due to specific unamendable constitutional provisions (Greece, Portugal), or due to supremacy of the national constitution over EU law (Lithuania, Slovakia).<sup>220</sup>

(4) National courts have accepted EU law supremacy over national law in those areas where the Member States have conferred competence upon the EU and admitted the ultimate judicial authority of the CJEU on matters of EU law within these fields. The remaining issue, however, concerns the cases which question the scope of EU competences and conflict between EU law and national constitutional law.<sup>221</sup>

(5) The only constitutional court that has gone so far as to declare EU law *ultra vires* was the Czech Constitutional Court in the context of the Czechoslovak social security treaty. The commentators argue, however, that this decision is a result of a domestic conflict between the Supreme Administrative Court supported by the Government during the preliminary

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<sup>219</sup>For example, in the judgment of the Supreme Court of United Kingdom in the case *R (on the application of HS2 Action Alliance Limited) (Appellant) v the Secretary of state for transport and another (Respondents) /.../*, 22 January 2014 [2014] UKSC 3, Lord Reed, with whom Lord Neuberger, Lady Hale, Lord Mance, Lord Kerr, Lord Sumption and Lord Carnwath agreed, has rejected the submission made on behalf of the appellants, that a particular question in a dispute could be simply resolved by applying the doctrine developed by the CJEU of the supremacy of EU law. The Supreme Court added: „if there is a conflict between a constitutional principle, such as embodied in article 9 of the Bill of Rights, and EU law, that conflict has to be resolved by our courts as an issue under the constitutional law of United Kingdom” (para 79).

<sup>220</sup>Claes, 2016, see footnote 59, pp. 157-158.

<sup>221</sup>Keleman, R., Daniel, 2016, On the Unsustainability of Constitutional Pluralism: European Supremacy and the Survival of the Eurozone, *Maastricht Journal of European Comparative Law*, 23, 1, p. 138.

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ruling proceedings before the CJEU and the Czech Constitutional Court, rather than a conflict between fundamental rights contained in the national constitution and EU law.<sup>222</sup>

(6) In the more recent *Gauweiler* case, where for the first time the Federal Constitutional Court of Germany (FCC) referred a preliminary question to the CJEU, the FCC adopted a similar position on *ultra vires* and constitutional identity review suggesting that there is something like a more or less common European approach to the issue.<sup>223</sup> Thus, the FCC has explicitly situated itself in an alleged group of constitutional and highest national courts of such Member States as Denmark, Estonia, France, Ireland, Italy, Latvia, Poland, Sweden, Spain and Czech Republic. In the *Gauweiler* case, the FCC considered it likely that the European Central Bank's act was *ultra vires* and encroached on the Member States' competence in the area of economic policy. The FCC proposed an interpretation, which could save the act from invalidity, and asked the CJEU to support the FCC's interpretation. The FCC stipulated that, should the CJEU not follow the proposed approach, the act could still be considered *ultra vires* and would, therefore, have to be considered inapplicable under German constitutional law.<sup>224</sup>

(7) The *Melloni* and *Jeremy F* cases, discussed in section 3.3., reveal that examples of conflict between EU law and national constitutional law can occur not only in the field of economic policy and pensions rights, but also in the field of fair trial in the criminal or extradition procedure.

(8) Despite the fact that in the *Melloni* judgment the CJEU has strongly put forward an argument of mutual trust and effectiveness of EU law, in its decision of 15 December 2015, which also relates to the European Arrest Warrant, the FCC established that in individual cases, protection of fundamental rights by the FCC may include review of sovereign acts

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<sup>222</sup>*Ibid.* p.160. Zdenek Kuhn explains that the Constitutional Court did not even try to find out whether the protection of fundamental rights would have any meaning in this case, Kühn, Zdenek, 2016, *Ultra Vires Review and the Demise of Constitutional Pluralism: The Czecho-Slovak Pension Saga, and the Dangers of States Courts Defiance of EU Law*, *Maastricht Journal of European Comparative Law*, 23, 1, p. 192.

<sup>223</sup>Claes, 2016, see footnote 59, p. 153. The CJEU delivered the preliminary ruling in this case in June 2015 (C-62/14 *Gauweiler* u.a. EU:C:2015:400).

<sup>224</sup>*Ibid.* p. 152.

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determined by Union law, if this is indispensable to protect the constitutional identity guaranteed by Art. 79 sec. 3 of the Basic Law (*Grundgesetz*). The FCC argued that the principle of individual guilt is rooted in the guarantee of human dignity enshrined in Article 1 sec. 1 of the Basic Law and which is not open to European integration. Therefore, it also has to be guaranteed in the context of extraditions pursuant to the Framework Decision on the European Arrest Warrant if they are meant to ensure the execution of sentences that have been rendered in the absence of the requested person. The FCC also stated that declaring a violation of the constitutional identity is reserved for the FCC. However, in this case the FCC did not decide that due process standards under Union law with regard to the execution of a European Arrest Warrant are lower than those that are required by Article 1 sec. 1 of the Basic Law. Instead, the FCC decided that the Düsseldorf Higher Regional Court failed to recognise the extent of its obligation to investigate and to establish the facts and thereby failed to recognise the significance and the scope of Article 1 sec. 1 of the Basic Law. The FCC reversed and remanded an order of the Düsseldorf Higher Regional Court to extradite a US citizen to Italy, where he had been sentenced in absence to a custodial sentence of thirty years. The FCC invoked a doctrine of *acte clair* and stated that there is no conflict between Union law and the protection of human dignity under Basic Law in the case at hand.<sup>225</sup>

(9) It is reasonable to expect a continuation of a dynamic development of this kind of judicial dialogue between national constitutional courts and the CJEU. It remains to be observed whether or to what extent this dynamic will affect also the protection of the fundamental right to “*human dignity*” of asylum seekers<sup>226</sup> and irregular migrants in administrative detention cases, especially since the decisions on transfer, which may affect the issue of detention under Dublin III Regulation, are also based on a principle of “*mutual trust*”

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<sup>225</sup>Bundesverfassungsgericht, Protection of Fundamental Rights in Individual Cases is Ensured as Part of Identity Review, Press Release No 4/2016 of 26 January 2016 (2BvR 2735/14). In the judgment *Aranyosi, Caldara* (C-404/15 and C-659/15 PPU from 5 April 2016, the CJEU supported that position of the FCC from January 2016.

<sup>226</sup>In the case of *CIMADE*, the CJEU states that based on requirements of Article 1 of the Charter, under which human dignity must be respected and protected, the asylum seeker may not be deprived – even for a temporary period of time after making of the application for asylum and before being actually transferred to the responsible Member State – of the protection of the minimum standards laid down by the Reception Directive 2003/9 (C-179/11, 27 September 2012, para 56.

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between the Member States.<sup>227</sup>

### 3.5. The relationship between ECHR and national law

(1) It is not relevant for the purposes of this Statement whether the relationship between national law and international obligations under the ECHR is defined by the so-called “monism” or “dualism” or perhaps a combination of both legal models in the systems of particular Member States. Many examples of the ECtHR judgments against different Member States confirm the existence of a relationship between the ECHR and national law (implementing EU law) in the context of detention of asylum seekers or illegally staying third country nationals. This relevance has been proven not only in cases, in which the ECtHR had found a violation of Articles 5, 3 or 13 of the ECHR while taking into account, among other things, the legal situation under EU law,<sup>228</sup> but also in those cases, in which EU law was not mentioned by the ECtHR at all, although it could be.<sup>229</sup>

(2) The most general principle which determines the relationship between the ECHR and national law of the Member States is the principle of subsidiarity. This principle forms part of Article 1 of the ECHR.<sup>230</sup> This principle implies that *“the machinery of protection established by the Convention is subsidiary to the national systems safeguarding human rights /.../. The Convention leaves to each Contracting State, in the first place, the task of securing the rights and liberties it enshrines. The institutions created by it make their own contribution to this task but they become involved only through contentious proceedings and once all domestic remedies have been exhausted (Article 26).”*<sup>231</sup>

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<sup>227</sup>C-411/10 and C-493/10, *N.S. and M.E.*, 21 December 2011, paras 78-79.

<sup>228</sup>See, for example, judgments in cases: *Louled Massoud v. Malta* App no 24340/08 (ECtHR 27 July 2010); *M.S.S. v Belgium and Greece* (Grand Chamber) App no 30696/09 (ECtHR 21 January 2011); *Ahmade v Greece* App no 50520/09 25 September 2012); *Mohammed v Austria* App no 2283/12 (ECtHR 6 June 2013); *Suso Musa v Malta*, App no 42337/12 (ECtHR 23 July 2013).

<sup>229</sup>See, for example, judgments in cases: *Buishvili v the Czech Republic* App no 30241/11 (ECtHR 25 October 2012); *Aden Ahmed v Malta* App no 55352/12 (ECtHR 23 July 2013); *M.D. v Belgium* App no 56028/10, (ECtHR 14 November 2013); *Nabil and Others v Hungary* App no 62116/12 (ECtHR 22 September 2015).

<sup>230</sup>Article 1 of the ECHR states that the High Contracting parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.

<sup>231</sup>*Handyside v United Kingdom* App no 5493/72 (ECtHR 7 December 1976), para 48.



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(3) The function of the ECHR and the ECtHR is to provide a European minimum standard for the protection of human rights.<sup>232</sup> In this context, and along with the principle of subsidiarity, the so called doctrine of (wide) “margin of appreciation” plays an important role too. Nevertheless, in his concurring opinion in the *M.S.S.* judgment, Judge Villinger has provided that it would be a wrong place to apply the principle of subsidiarity in a case such as *M.S.S. v Belgium and Greece*. He explains that “tribute has already been paid to subsidiarity in this case by testing the complaint expressly or implicitly with various admissibility conditions and in particular with that of the exhaustion of domestic remedies (which is in itself an application of the principle of subsidiarity par excellence). Subsidiarity plays an important part, for instance, in applying the second paragraphs of Articles 8-11 of the Convention. Its role must surely be more restricted in the light of a cardinal provision such as Article 3 in view of the central importance of the applicant's refoulement for this case.”

(4) Thus, for example, in the case of *Khlaifia v Italy* concerning conditions for detention and an absolute right contained in Article 3 of the ECHR, the issue of the European countries experiencing “exceptional situation characterised by mass arrivals of migrants”<sup>233</sup> and, as a result, struggles to accommodate and process migrants was raised. The question, therefore, arises as to how the ECtHR will assess their efforts, bearing in mind the absolute nature of the prohibition of inhuman and degrading treatment under Article 3 of the ECHR in detention cases. The *Khlaifia* case has been referred to the Grand Chamber of the ECtHR.

(5) With regard to due process standards on detention, the principle of subsidiarity and the doctrine of margin of appreciation have limited scope, too, particularly in the sense that:

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<sup>232</sup>Article 53 of the ECHR states that “nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any Contracting party or under any other agreement to which it is a party.”

<sup>233</sup>*Khlaifia and others v Italy*, (Grand Chamber) App no 16483/12 (ECtHR 15 December 2016), para 137.

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- Sub-paragraphs (a) to (f) of Article 5(1) of the ECHR contain an exhaustive list of permissible grounds for detention and, therefore, no deprivation of liberty is lawful unless it falls within one of those grounds.<sup>234</sup>
- Detention must conform to the substantive and procedural rules of national law,<sup>235</sup> but a person must be entitled to review the lawfulness of his/her detention not only based on requirements of domestic law but also of the ECHR.<sup>236</sup> However, Articles 5 § 4 of the ECHR do not impose an obligation on a judge examining an appeal against detention to address every argument contained in the appellant's submissions; nor does it guarantee a right to judicial review of such a scope as to empower the national court, on all aspects of the case including questions of pure expediency, to substitute its own discretion for that of the decision-making authority. However, the ECtHR has held that its guarantees would be deprived of their substance if the judge could treat as irrelevant, or disregard, particular facts invoked by the detainee which could cast doubt on the existence of the conditions which are essential for the “lawfulness”, in the sense of the ECHR, of the deprivation of liberty.<sup>237</sup>
- The previously mentioned standard from Article 5(4) of the ECHR is somehow “*lex specialis*” to the relationship between ECHR and national law in non-detention cases, because in non-detention cases, the position of the ECtHR is that “*in accordance with Article 19 of the ECHR, its sole duty is to ensure the observance of the engagements undertaken by the Contracting Parties to the ECHR. In particular, it is not its function to deal with errors of facts or law allegedly made by a national court in assessing the evidence before it, unless and in so far as they may have infringed rights and freedoms protected by the ECHR. The ECtHR cannot itself assess facts which have led a national*

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<sup>234</sup>*A and others v United Kingdom* (Grand Chamber) App no 3455/05 (ECtHR 19 February 2009), para 163.

<sup>235</sup>*Amuur v France* App no 18776/92 (25 June 1996), para 50; *Abdolkhani and Karimnina v Turkey* App no 30471/08 (ECtHR 22 September 2009), para 130.

<sup>236</sup>See, for example: *Louled Massoud v Malta* App no 24340/08 (ECtHR 27 July 2010).

<sup>237</sup>*Nikolova v Bulgaria* App no 31195/96 (ECtHR 25 March 1999), para 91. In the case of *Čalovskis v Latvia* App no 22205/13 (ECtHR 24 July 2014), para 158, the fourth section of the ECtHR states that only such breaches of the domestic procedural and material law which amount to a gross or obvious irregularity in the exceptional sense indicated by the case-law should attract the Court's attention. The notion of “gross or obvious irregularity does not lend itself to precise definition and will depend on the circumstances”.

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*court to adopt one decision rather than another; otherwise, it would be acting as a court of fourth instance and would disregard the limits imposed on its action.*"<sup>238</sup>

- National law on detention must satisfy the principle of legal certainty, so that the law must be sufficiently accessible, precise and foreseeable.<sup>239</sup> However, quality of law only becomes relevant if it is shown that any failing in this regard has tangibly prejudiced applicant's substantive rights from the ECtHR.<sup>240</sup> This includes the requirement of clear legal provisions for ordering detention, for extending detention and for setting time limits for detention and the existence of a legal remedy.

With regard to the legal impact of the final judgments of the ECtHR on national law, the ECtHR in the case of *L.M. And Others v Russia*, which relates also to the issue of detention of asylum seekers, reiterates that, by Article 46 of the ECHR, the Contracting Parties have undertaken to abide by the final judgments of the ECtHR in any case to which they are parties, execution being supervised by the Committee of Ministers. It follows, *inter alia*, that a judgment in which the ECtHR finds a breach of the ECHR imposes on the respondent State a legal obligation not just to pay those concerned the sums awarded by way of just satisfaction, but also to choose the general and/or, if appropriate, individual measures to be adopted in their domestic legal order to put an end to the violation found by the ECtHR and to redress as far as possible the effects. It is primarily for the State concerned to choose the means to be used in its domestic legal order to discharge its obligation under Article 46 of the ECHR. However, with a view to helping the respondent State to fulfil its obligations under Article 46, the ECtHR may seek to indicate the type of individual and/or general measures that might be taken in order to put an end to the situation it has found to exist. In certain situations, the ECtHR can exceptionally indicate the specific remedy or other measure to be taken by the respondent State. Whenever the ECtHR takes this adjudicative approach, it does so with due respect for the Convention organs' respective functions: it falls to the Committee of Ministers to evaluate the implementation of individual and general measures

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<sup>238</sup>*Avotīnš v Latvia* (Grand Chamber) App no 17502/07 (ECtHR 23 May 2016), para 99.

<sup>239</sup>*Nasrulloev v Russia* App no 656/06 (ECtHR 11 October 2007), para 71.

<sup>240</sup>*Bordovskiy v Russia* App no 49491/99 (ECtHR 8 February 2005), para 49.

under Article 46(2) of the ECHR.<sup>241</sup>

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<sup>241</sup> *L.M. and Others v Russia* App no 40081/14 (ECtHR 15 October 2015) paras 165-167. In this case, the ECtHR decided in the operative part of the judgment that the respondent State is to ensure immediate release of applicants from detention.

## Overview of Standards

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Dublin III Regulation	Return Directive	Recast Reception Directive
Standard 1. Direct applicability of Article 28 of the Dublin III Regulation; p.63	Standard 1. Direct effect of Article 15 of the Return Directive and a more favourable clause; p. 162	Standard 1. Article 8(1)(2) and (3) of the Recast Reception Directive; p. 259
Standard 2. Definition of detention; p. 64	Standard 2. Definition of detention; p. 164	Standard 2. Definition of detention; p. 260
Standard 3. Special reception needs of vulnerable persons; p. 66	Standard 3. Special needs of vulnerable persons; p. 165	Standard 3. Special reception needs of vulnerable persons; p. 262
Standard 4. Persons who can be subject to detention; p. 67	Standard 4. Persons who can be subject to detention; p. 166	Standard 4. Persons who can be subject to detention; p. 263
	Standard 5. Identifying the illegality of stay as a pre-condition for detention; p. 168	
Standard 5. Authorities who can order a detention; p. 68	Standard 6. Authorities who can order a detention; p. 168	Standard 5. Authorities who can order a detention; p. 264
Standard 6. Permissible grounds for detention –significant risk of absconding linked to the purpose of securing transfer procedures; p. 68	Standard 7. Permissible grounds for detention (“in particular” when there is a risk of absconding or a person avoids or hampers the preparation of return or removal); p. 169	Standard 6. Permissible grounds for detention; p. 264
Standard 7. Objective criteria for assessing the risk of absconding; p. 70	Standard 8. Objective criteria for assessing the risk of absconding; p. 170	Standard 7. Objective criteria for assessing the risk of absconding; p. 266
Standard 8. Proof and burden of proof concerning the risk of absconding; p. 70	Standard 9. Proof and burden of proof concerning the risk of absconding; p. 170	Standard 8. Proof and burden of proof concerning determination of a ground for detention; p. 267
	Standard 10. Avoiding or hampering the preparation of the return or the removal process and reasonable prospects of removal; p. 171	
	Standard 11. Reasonable prospects of removal; p. 172	
Standard 9. Control of the quality of law on detention; p. 71	Standard 12. Control of the quality of law on detention; p. 172	Standard 9. Control of the quality of law on detention; p. 268
Standard 10. Right to information and a personal interview before detention order is issued; p. 72	Standard 13. Right to information and a personal interview before detention order is issued; p. 173	Standard 10. Right to information and a personal interview before detention order is issued; p. 268
Standard 11. Requirement of individual assessment; p. 73	Standard 14. Requirement of individual assessment; p. 175	Standard 11. Requirement of individual assessment; p. 269
Standard 12. Best interests of a child; p. 73	Standard 15. Best interests of a child; p. 175	Standard 12. Best interests of a child; p. 269
Standard 13. Consideration of the effectiveness of less coercive alternative measures to detention; p. 75	Standard 16. Consideration of the effectiveness of less coercive alternative measures to detention; p. 177	Standard 13. Consideration of the effectiveness of less coercive alternative measures to detention; p. 271
Standard 14. Principle of proportionality and the necessity test; p. 76	Standard 17. Principle of proportionality and the necessity test; p. 178	Standard 14. Principle of proportionality and the necessity test; p. 271
Standard 15. Length of detention and due diligence requirement; p. 77	Standard 18. Length of detention and conditions for extension of detention, including due diligence requirement; p. 179	Standard 15. Length of detention and due diligence requirement; p. 273
	Standard 19. Due diligence requirement and criminal sanctions; p. 180	
Standard 16. Right to be informed “promptly” about the reasons for detention after a detention order is issued; p. 77	Standard 20. Right to be informed “promptly” about the reasons for detention after a detention order is issued; p. 181	Standard 16. Right to be informed “promptly” about the reasons for detention after a detention order is issued; p. 274
Standard 17. Right to be informed “adequately” about the reasons for detention and about procedures laid down in national law for challenging the detention order; p. 78	Standard 21. Right to be informed “adequately” about the reasons for detention and about procedures laid down in national law for challenging the detention order; p. 182	Standard 17. Right to be informed “adequately” about the reasons for detention and about procedures laid down in national law for challenging the detention order; p. 274
Standard 18. Written decision on	Standard 22. Written decision on	Standard 18. Written decision on

<b>Dublin III Regulation</b>	<b>Return Directive</b>	<b>Recast Reception Directive</b>
detention (or its extension) must be delivered to the applicant/legal representative and must contain reasons closely connected to the grounds of detention; p. 79	detention (and its extension) must be delivered to the applicant/legal representative and must contain reasons closely connected to the grounds of detention; p. 184	detention (or its extension) must be delivered to the applicant/legal representative and must contain reasons closely connected to the grounds of detention; p. 276
Standard 19. Obligation to keep records on detention cases; p. 80	Standard 23. Obligation to keep records on detention cases; p. 184	Standard 19. Obligation to keep records on detention cases; p. 276
Standard 20. Right to free legal assistance and representation; p. 80	Standard 24. Right to (free) legal assistance and/or representation; p. 185	Standard 20. Right to free legal assistance and representation; p. 277
Standard 21. Other aspects of the practical and effective right to judicial review; p. 81	Standard 25. Other aspects of the practical and effective right to judicial review; p. 186	Standard 21. Other aspects of the practical and effective right to judicial review; p. 278
Standard 22. Automatic judicial review or detainee's right to initiate judicial review of the lawfulness of detention (including conditions of detention); p. 83	Standard 26. Automatic judicial review or detainee's right to initiate judicial review of the lawfulness of detention (including conditions of detention); p. 187	Standard 22. Automatic judicial review or detainee's right to initiate judicial review of the lawfulness of detention (including conditions of detention); p. 279
Standard 23. Right to judicial review before an "independent and impartial tribunal/court established by law"; p. 85	Standard 27. Right to judicial review before an "independent and impartial tribunal/court established by law"; p. 189	Standard 23. Right to judicial review before an "independent and impartial tribunal/court established by law"; p. 281
Standard 24. Right to "speedy" judicial review of the lawfulness of detention; p. 86	Standard 28. Right to "speedy" judicial review of the lawfulness of detention; p. 190	Standard 24. Right to "speedy" judicial review of the lawfulness of detention; p. 282
Standard 25. Right to judicial review of the continuing detention; p. 88	Standard 29. Right to judicial review of the continuing detention or of the extension (prolongation) of the detention period; p. 192	Standard 25. Right to judicial review of the continuing detention; p. 284
Standard 26. The scope and intensity of judicial review including procedural guarantees; p. 88	Standard 30. The "scope and intensity" of judicial review including procedural guarantees; p. 193	Standard 26. The scope and intensity of judicial review including procedural guarantees; p. 285
Standard 27. Restrictions on the right to a defence and/or equality of arms based on national (public) security, public policy or public order; p. 90	Standard 31. Restrictions on the right to a defence and/or equality of arms based on national (public) security, public policy or public order; p. 195	Standard 27. Restrictions on the right to a defence and/or equality of arms based on national (public) security, public policy or public order; p. 287
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Standard 29. The impact of interim measures (under Rule 39 and national law) on the lawfulness of detention; p. 94	Standard 33. The impact of interim measures (under Rule 39 and national law) on the lawfulness of detention; p. 199	Standard 29. The impact of interim measures (under Rule 39 and national law) on the lawfulness of detention; p. 290
Standard 30. Derogation from obligations under Article 5(1) of the ECHR; p. 94	Standard 34. Derogation from obligations under Article 5(1) of the ECHR; p. 200	Standard 30. Derogation from obligations under Article 5(1) of the ECHR; p. 290
Standard 31. Right to compensation in the case of unlawful detention; p. 95	Standard 35. Right to compensation in the case of unlawful detention; p. 200	Standard 31. Right to compensation in the case of unlawful detention; p. 291
Standard 32. Right to reasoned judicial decisions and their enforcement (execution); p. 97	Standard 36. Right to reasoned judicial decisions and their enforcement (execution); p. 203	Standard 32. Right to reasoned judicial decisions and their enforcement (execution); p. 293
Standard 33. Protection of inhuman or degrading treatment in relation to reception conditions (of detention) in another Member State(s); p. 99		
Standard 34. Conditions of detention: p. 101	Standard 37. Conditions of detention; p. 205	Standard 33. Conditions of detention; p. 295

## Section 4. Detention under the Dublin III Regulation and the ECHR: Basic Judicial Check-list 1

### Standard 1. Direct applicability of Article 28 of the Dublin III Regulation

The Dublin III Regulation<sup>242</sup> is generally applicable. It is binding in its entirety and it is directly applicable in the Member States.<sup>243</sup> This does not mean that any national measure enacted with the intention of transposing or giving effect to the provisions on detention under the Dublin III Regulation into national legislation is invalid.<sup>244</sup> Only the methods of implementation of the Dublin III Regulation which “*would have the result of creating an obstacle to the direct effect of the Regulation and of jeopardizing its simultaneous and uniform application in the whole of the EU*” /.../ can be considered contrary to the TFEU.<sup>245</sup> The CJEU further adds that “*it cannot be accepted that a Member State applies in an incomplete or selective manner provisions of a Community Regulation so as to render abortive certain aspects of Community legislation*” /.../.<sup>246</sup>

Furthermore, in detention cases under the Dublin III Regulation and within the limits of recitals 12 and 20 and Article 28(4) of the Dublin III Regulation, Reception Directive 2013/33/EU and the Procedures Directive 2013/32/EU are relevant, too.

Recital 32 of the Dublin III Regulation states that: “*With respect to the treatment of persons falling within the scope of this Regulation, Member States are bound by their obligations under instruments of international law, including the relevant case-law of the European*

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<sup>242</sup>Council Regulation (EC) No 604/2013 of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast) [2013] OJ L180/31 (hereinafter the Dublin III Regulation); See also: C-528/15 *Al Chodor and Others* [2017] EU:C:2017:213 para 27.

<sup>243</sup>TFEU Article 288(2); Dublin III Regulation Article 49.

<sup>244</sup>The Dublin III Regulation even imposes obligations on to Member States to regulate certain legal aspects of detention in national law. See for example: Dublin III Regulation art 2(n) (objective criteria for risk of absconding) or Recital 20 and Dublin III Regulation art 28(2) (less coercive and alternative measures of detention) and standards 7 and Section 13 of this check-list.

<sup>245</sup>Case 39/72 *Commission v Italy* [1973] ECR 101, para 17.

<sup>246</sup>*Ibid.* para 20.

*Court of Human Rights.*<sup>247</sup> Due to Article 78 of the TFEU and recital 20 of the Dublin III Regulation the first relevant “*instrument of international law*” that needs to be mentioned is the 1951 Convention relating to the Status of Refugees, which in Article 31(2) regulates restrictions in movements of refugees.<sup>248</sup>

Recital 39 of the Dublin III Regulation among other things states that “*this regulation respects the fundamental rights and observes the principles which are acknowledged, in particular, in the Charter of Fundamental Rights of the EU*”.<sup>249</sup> In this sense, Article 6 of the Charter of Fundamental Rights,<sup>250</sup> which corresponds to Article 5 of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter the ECHR),<sup>251</sup> needs to be mentioned and Article 45(2) of the Charter”,<sup>252</sup> which may be considered in the light of Article 2(1) of Protocol 4 to the ECHR.

## **Standard 2. Definition of detention**

Article 31(2) of the 1951 Convention relating to the Status of Refugees uses the expression “*restrictions on movements of refugees*”. Unlike Recast Reception Directive (2013/33/EU),<sup>253</sup> the Dublin III Regulation does not use the specific terminology “*deprivation of freedom of movement*” or “*deprivation of liberty*”. The CJEU in the case of *Al Chodor and Others* stated that Articles 2(n) and 28(2) of the Dublin III Regulation provide for limitation on the exercise

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<sup>247</sup>For the relation between Dublin III Regulation and directives in the field of international protection, see Recitals 11 and 12 and article 28(4) of the Dublin III Regulation.

<sup>248</sup>See paragraph 3 in the section 3 of this Statement. Recital 20 of the Dublin III Regulation states that „in particular, the detention of applicants must be in accordance with Article 31 of the Geneva Convention.”

<sup>249</sup>Among the concrete provisions of the Charter of Fundamental Rights of the European Union [2012] OJ C 326/ 02 (hereinafter the Charter) that are explicitly mentioned in the recital 39, Articles 6 and 45 are not included.

<sup>250</sup>Article 6 of the Charter states that everyone has a right to liberty and security of person.

<sup>251</sup>In the case C-601/15 (PPU) *J.N. v Staatsecretariat van Veiligheid en Justitie* [2016] EU:C:2016:84, the CJEU established that rights laid down in Article 6 of the Charter correspond to those guaranteed by Article 5 of the ECHR (C-601/15, para 47).

<sup>252</sup>Article 45 of the Charter states that freedom of movement and residence may be granted, in accordance with the Treaties, to nationals of third countries legally resident in the territory of a Member State.

<sup>253</sup>Directive 2013/33/EU of 26 June 2013 laying down standards for the reception of applicants for international protection (recast) [2013] OJ L 180/96 article 2(h) (hereinafter the Recast Reception Directive) stated that detention means confinement of an applicant by a Member State within a particular place, where the applicant is deprived of his or her “*freedom of movement*”.



#### Section 4. Detention under the Dublin III Regulation and the ECHR: Basic Judicial Check-list 1

of the “*fundamental right to liberty*” enshrined in Article 6 of the Charter and that for the purpose of interpreting Article 6 of the Charter, account must be taken of Article 5 of the ECHR as the “*minimum threshold of protection.*”<sup>254</sup> The CJEU further adds that detention of applicants constitutes a “*serious interference*” with applicant's right to liberty.<sup>255</sup>

Despite this general position of the CJEU it is worth noting that under the ECHR, a distinction between the right to liberty of movement under Article 2(1) of Protocol 4 to the ECHR and the right to liberty and security of person under Article 5 of the ECHR, leading to application of different procedural safeguards under the ECHR, can be explained by the test established by the ECtHR, which says that “*to determine whether someone has been deprived of his liberty /.../ the starting-point must be his concrete situation, and account must be taken of a whole range of criteria such as the type, duration, effects and manner of implementation of the measure in question. The difference between deprivation of and restriction upon liberty is merely one of degree or intensity, and not one of nature or substance /.../. The mere fact that it is possible for asylum seekers to leave voluntarily the country where they wish to take refuge cannot exclude a restriction on liberty /.../.*”<sup>256</sup>

The notion of deprivation of liberty within the meaning of Article 5(1) of the ECHR comprises not only the *objective element* of a person's confinement in a particular restricted space for a non-negligible length of time, but also, as an additional *subjective element*, the question of whether he has validly consented to the confinement in question.<sup>257</sup> However, the ECtHR also decided that the right to liberty is too important in a democratic society for a person to lose the benefit of Convention protection for the single reason that he/she may have given himself/herself up to be taken into detention, especially when that person is legally

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<sup>254</sup>C-528/15 *Al Chodor and Others* [2017] EU:C:2017:213, paras 36-37.

<sup>255</sup>*Ibid.* para 40.

<sup>256</sup>*Amuur v France* App no 19776/92 (ECtHR, 25 June 1996) paras 42, 48. See also: *Rantsev v Cyprus and Russia* (2010) App no 25965/04 (ECtHR, 7 January 2010) para 314, *Stanev v Bulgaria* (Grand Chamber) App no 367/60/06 (ECtHR, 17 January 2012) para 115, *Medvedyev and Others v France* (Grand Chamber) App no 3394/03 (ECtHR 29 March 2010) para 73, *Creangă v Romania* (Grand Chamber) App no 29226/03 (ECtHR 23 Feb 2012) para 91; *Khlaifia and others v Italy* (Grand Chamber) App No 16483/12 (ECtHR 15 December 2016) para 64.

<sup>257</sup>*Storck v Germany* App no 61603/00 (ECtHR 16 June 2005) para 74; *Stanev v Bulgaria* (Grand Chamber) App No 36760/06 (ECtHR 17 January 2012) para 117.

incapable of consenting to, or disagreeing with, the proposed action.<sup>258</sup> Thus, “[d]etention may violate Article 5 of the ECHR even though the person concerned has agreed to it.”<sup>259</sup>

Where the facts indicate a deprivation of liberty within Article 5(1) of the ECHR, a relatively short duration of the detention does not affect this conclusion.<sup>260</sup> For concrete examples of deprivation of liberty or restriction of freedom of movement in the case-law of the ECtHR and the CJEU, see the Explanatory note.

### Standard 3. Special reception needs of vulnerable persons

“As regards the general guarantees governing detention /.../, Member States should apply the provisions of the Reception Directive 2013/33/EU also to persons detained on the basis of this Regulation.”<sup>261</sup> In order to effectively implement the “general principle” from Article 21 of the Recast Reception Directive 2013/33/EU on taking into account the special situation of vulnerable persons, Member States shall assess whether the applicant is someone with special reception needs.<sup>262</sup> That assessment shall be initiated “within a reasonable period of time” after an application for international protection is made and may be integrated into existing national procedures, but does not need to take the form of an administrative procedure.<sup>263</sup> However, “reasonable period of time” could mean as soon as possible and without delay if age assessment is at stake and asylum seeker is detained.<sup>264</sup> Member States shall provide for appropriate monitoring of the situation of persons with special needs

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<sup>258</sup>*H.L v United Kingdom*, App no 45508/99 (ECtHR 5 October 2004), para 90; *Stanev v Bulgaria (Grand Chamber)* App No 36760/06 (ECtHR 17 January 2012) para 119.

<sup>259</sup>*Kasparov v Russia* App no 53659/07 (ECtHR 11 October 2016) para 36.

<sup>260</sup>*Rantsev v Cyprus and Russia* App No 25965/04 (ECtHR, 7 January 2010) para 317; *Iskandarov v Russia* App no 17185/05 (23 September 2010) para 140; European Court of Human Rights, *Guide on Article 5 – Right to Liberty and Security* (Council of Europe/European Court of Human Rights, 2014) 5-6 (points 7, 9, 12). Since measures of the Member States on detention under the Dublin III Regulation in most cases interfere with the right to personal liberty, this check-list further refers to standards and rules in relation to Article 5 of the ECHR and Article 6 of the Charter.

<sup>261</sup>Recital 20 of the Dublin III Regulation.

<sup>262</sup>For more on this principle, see various standards under point 34 of this check-list. According to Article 2(k) of the Recast Reception Directive applicant with special needs means a vulnerable person, in accordance with Article 21, who is in need of special guarantees in order to benefit from the rights and comply with the obligations provided for in this Directive.

<sup>263</sup>Article 22(1) and (2) of the Recast Reception Directive 2013/33/EU.

<sup>264</sup>See, for example, *Mahamed Jama v Malta* App no 10290/13 (ECtHR 26 November 2015), paras 148-150; *Aarabi v Grèce* App no 39766/09 (ECtHR 2 April 2015), paras 43-45.

throughout the duration of the asylum procedure.<sup>265</sup> Member States shall ensure that those special reception needs are also addressed, if they become apparent at a later stage in the asylum procedure.<sup>266</sup>

#### **Standard 4. Persons who can be subject to detention**

There are two categories of persons who can be detained under the Dublin III Regulation: an asylum seeker (“*an applicant*”) or “*another person*” (who is a third country national or a stateless person who has withdrawn the application under examination, or whose application has been rejected and he/she made an application in another Member State, or who is on the territory of another Member State without a residence document).<sup>267</sup> Based on the judgment of the CJEU in the *MA, BT, DA case*, an unaccompanied minor, having no member of his family present in the territory of a Member State<sup>268</sup> and whose identical application has not been rejected by a final decision in another Member State,<sup>269</sup> cannot be detained under the Dublin III Regulation, because he/she, as a rule, should not be transferred to another Member State.<sup>270</sup> Furthermore, if the Member State, following interpretation of the CJEU in the case of *K*, has an obligation to apply a humanitarian clause for the purpose of family reunification, the applicant cannot be detained in order to secure transfer procedures.<sup>271</sup> Similarly, the applicant could be successful also in an action challenging a transfer decision made in respect of him/her, where he/she can invoke an infringement not just of the rules set out in Article 19(2) of Dublin III Regulation<sup>272</sup>, but also

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<sup>265</sup>The third sub-paragraph of Article 22(1) of the Recast Reception Directive 2013/33/EU.

<sup>266</sup>The second sub-paragraph of Article 22(1) of the Reception Directive 2013/33/EU. As regards the importance of early and proper examination of whether a child is accompanied or unaccompanied, see *Rahimi v Greece*, App no 8687/08 (ECtHR 2 April 2015), paras 63-73. In regards to an appointment of child's representative, see also standard 12 on best interests of a child. For the example of excessive delays in the procedure for vulnerability assessment, see: *Abdi Mahamud, v Malta* App no 56796/13 (ECtHR 3 May 2016) paras 132-135.

<sup>267</sup>Article 27(1) of the Dublin III Regulation.

<sup>268</sup>C-648/11 *MA, BT and DA v Secretary of State of the Home Department* EU:C:2013:367, para 62.

<sup>269</sup>*Ibid.* paras 63-64.

<sup>270</sup>*Ibid.* para 55; See also standard no 12 on the principle of the best interests of the child. For the possible interplay between the detention procedures under the Return Directive and the Dublin III Regulation, see the first paragraph in the Explanatory note of this standard.

<sup>271</sup>See in particular paragraphs 40, 38 and 41 of the judgment in C-245/11 *K v Bundesasylamt* (Grand Chamber) EU:C:2012:685, para 40.

<sup>272</sup>C-155/15 *George Karim v Migrationsverket* (Grand Chamber) EU:C:2016:410, para 21.

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of the other criteria for determining the Member State responsible laid down in Chapter III of the Dublin III Regulation.<sup>273</sup> The procedures under the Dublin III Regulation have to be carried out in compliance with a series of specified time limits. For example, “notwithstanding the deadline” from Article 21(1) of the Dublin III Regulation, which provides that the take charge request must be made as quickly as possible and in any event (“absolutely”) within the three months of the date on which the application for international protection was lodged; in the case of a Eurodac hit with data registered under Article 14 of the Eurodac Regulation, that request must be made within two months of receipt of that hit. If those deadlines are passed, the responsibility for examining the application for international protection is on the Member State in which the application was lodged. Therefore, a decision to transfer to a Member State other than the one with which the application was lodged cannot validly be adopted once the period laid down in those provisions have expired even if the requested Member State would be willing to take charge of the person concerned. Consequently, such a person cannot be detained based on Dublin III Regulation. In the same way, the CJEU interpreted also the meaning of deadlines from Article 13(1) and 29(2) of the Dublin III Regulation.<sup>274</sup>

### **Standard 5. Authorities who can order a detention**

Detention of applicants shall be ordered by judicial or administrative authorities.<sup>275</sup>

### **Standard 6. Permissible grounds for detention – significant risk of absconding linked to the purpose of securing transfer procedures**

The “*significant risk of absconding*”<sup>276</sup> constitutes a permissible ground for detention, but only for the legitimate purpose “*to secure transfer procedures*” in accordance with the

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<sup>273</sup>C-63/15 *Mehrdad Ghezelbash v Staatssecretaris van Veiligheid en Justitie* EU:C:2016:186, paras 44, 51, 54.

For more on the importance of the judgment of the Grand Chamber in the case of *Ghazelbash*, see the Explanatory note to this Check-list.

<sup>274</sup>C-490/16 *A.S. v Republika Slovenija* (Grand Chamber) ECLI:EU:C:2017:585, paras. 45-60. Concerning the legal interpretation of „irregular crossing of an external border “from Article 13(1) of the Dublin III Regulation, which may be relevant for detention of asylum seeker, see also judgment of the CJEU in the case of C-646/16 *Jafari* (Grand Chamber) ECLI:EU:C:2017:586.

<sup>275</sup>Article 9(2) of the Recast Reception Directive in conjunction with Article 28(4) of the Dublin III Regulation.

<sup>276</sup>Articles 28(2) and 2(n) of the Dublin III Regulation.

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Dublin III Regulation. Where – for different reasons according to the Dublin III Regulation – the obligation of a requested Member State does not exist or ceases to exist so that the transfer cannot take place,<sup>277</sup> a permissible ground for detention under the Dublin III Regulation also ceases to exist.<sup>278</sup> Article 28(1) of the Dublin III regulation explicitly states that Member States shall not hold a person in detention for the sole reason that he or she is subject to the procedure established by this Regulation. This may also be considered as a reflection of the right to non-discrimination from Article 21 of the Charter which prohibits any discrimination based on any ground such as sex race, colour, ethnic or social origin, genetic features, language, religion or belief, birth, political or any other opinion, membership of national minority, property, birth, disability, age or sexual orientation; within the scope of application of the Treaties and without prejudice to any of their specific provisions, any discrimination on grounds of nationality shall be prohibited, too. Article 5(1) sub-paragraphs (a) to (f) of the ECHR contain an exhaustive list of permissible grounds of deprivation of liberty. Thus, no deprivation of liberty is lawful unless it falls within one of those grounds.<sup>279</sup> Only a narrow interpretation of those exceptions is consistent with the aim of that provision which enshrines a fundamental human right, namely the protection of the individual against arbitrary interference by the state with his or her right to liberty.<sup>280</sup> The risk of absconding in the context of securing transfer procedures under Dublin III Regulation could be linked either to Article 5(1)(f)<sup>281</sup> or to Article 5(1)(b)<sup>282</sup> of the ECHR.<sup>283</sup>

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<sup>277</sup>See, for example: the second sub-paragraph of Article 13(2) or Article 19(2) of the Dublin III Regulation.

<sup>278</sup>See also standard no 3 on who can be subject to detention.

<sup>279</sup>*Saadi v United Kingdom* (Grand Chamber) App no 13229/03 (ECtHR 29 Jan 2008), para 43; *A and Others v United Kingdom* (Grand Chamber) App no 3455/05 (ECtHR 19 February 2009), para 163. See also standard no 18 of this Check-list.

<sup>280</sup>*Khlaifia and others v Italy* (Grand Chamber) App no 16483/12 (ECtHR 15 December 2016) para 88.

<sup>281</sup>The lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

<sup>282</sup>The lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law.

<sup>283</sup>See the Explanatory notes to this Check-list on significant risk of absconding and on the question who can be subject to detention (standard no 4). Factors which under case-law of the ECtHR might speak against the risk of absconding in relation to Article 5(1)(c) of the ECHR are state of health, stable place of residence, no attempt to escape, strong family ties, no previous criminal record of the applicant (*Segeda v Russia* App no 41545/06 (ECtHR 19 December 2013) para 65.

### **Standard 7. Objective criteria for assessing the risk of absconding**

Based on Article 2(n) of the Dublin III Regulation, Member States have a legal obligation to define objective criteria for a risk of absconding in “national law”. In the light of standard no. 9 of this check-list and based on case-law of the CJEU from other sorts of disputes, guidelines or circulars cannot be considered as adequate instruments for implementing Article 2(n) of the Dublin III Regulation. The provisions of Directives “*must be implemented with unquestionable binding force, and the specificity, precision and clarity necessary to satisfy the requirements of legal certainty; mere administrative practices, which by their nature are alterable at will by the authorities and are not given the appropriate publicity, cannot be regarded as constituting the proper fulfilment of a Member State's obligation under the Treaty.*”<sup>284</sup> In the case of *Al Chodor*, the CJEU has confirmed that objective criteria for the risk of absconding have to be defined in a binding provision of general application, while settled case-law confirming a consistent administrative practice cannot suffice.<sup>285</sup>

### **Standard 8. Proof and burden of proof concerning the risk of absconding**

According to Article 2(n) of the Dublin III Regulation, risk of absconding means the existence of legitimate reasons to “believe” that a person “may” abscond. A standard of proof, which is defined in Article 28(2) of the Dublin III Regulation, is set at the level of “significant” risk. The burden of proof is on the State. The nature of the assessment of the risk of absconding can be compared to the nature of the assessment of real risk that an asylum seeker would be tortured or ill-treated if returned or extradited to his/her country of origin. In both those cases, any such allegation always concerns an eventuality, “*something which may or may not occur in the future. Consequently, such allegations cannot be proven in the same way as past*”

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<sup>284</sup>C-159/99 *Commission v Italy* [2001] EU:C:2001:278 para 32; see also: C-315/98, *Commission v Italy*, para 10.

<sup>285</sup>C-528/15 *Al Chodor and Others* [2017] EU:C:2017:213 para 45; *mutatis mutandis* C-601/15 (PPU) *J.N. v Staatsecretariat van Veiligheid en Justitie* [2016] EU:C:2016:84 para 60. See also standard no 9 of this Check-list. For concrete examples of criteria for the risk of absconding that are defined in national law of the Member States along with the possible legal consequences if objective criteria are not defined in national law, see the Explanatory note. Factors which under case-law of the ECtHR might speak against the risk of absconding in relation to Article 5(1)(c) of the ECHR are state of health, stable place of residence, no attempt to escape, strong family ties, no previous criminal record of the applicant (*Segeda v Russia* (2013) App no 41545/06 (ECtHR 19 December 2013) para 65).

events.<sup>286</sup>

### **Standard 9. Control of the quality of law on detention**

Article 5(1) of the ECHR requires that any deprivation of liberty must be “lawful”; it must conform to the substantive and procedural rules of national law.<sup>287</sup> The law must satisfy the principle of legal certainty. It must be “sufficiently accessible and precise, in order to avoid all risk of arbitrariness”<sup>288</sup> It must also be foreseeable.<sup>289</sup> This was reiterated by the Grand Chamber in the case of *Khlaifia and others v Italy*, in which the ECtHR stated “where deprivation of liberty is concerned it is particularly important that the general principle of legal certainty be satisfied. It is therefore essential that the conditions for deprivation of liberty under domestic law be clearly defined and that the law itself be foreseeable in its application, so that it meets the standard of lawfulness set by the ECHR, a standard which requires that all law be sufficiently precise to allow the person – if need be, with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail”.<sup>290</sup> The standards on the quality of law relate not only to clearly regulated grounds for detention, but also to time-limits for detention or for extending detention and for the existence of a legal remedy by which the lawfulness of detention may be challenged.<sup>291</sup>

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<sup>286</sup>*Fozil Nazarov v Russia* App no 74759/13 (ECtHR 20 April 2015), para 38. In his concurring opinion in the case of *Saadi v Italy* App no 37201/06 (ECtHR 28 February 2008) Judge Zupančič opined that “the cognitive approach to future events may be only a rational probabilistic assessment in the spectrum of experiment which moves from abstract probability to concrete probability. The correctness of that probabilistic assessment – one might use the word prognosis – critically depends on the nature of information (not evidence!) adduced in a particular situation.”

<sup>287</sup>*Amuur v France* App no 19776/92 (ECtHR, 25 June 1996), para 50; *Abdolkhani and Karimnia v Turkey* App no 30471/08 (ECtHR 22 September 2009).

<sup>288</sup>*Amuur v France (1996)* App no 19776/92 (ECtHR, 25 June 1996), para 50.

<sup>289</sup>*Nasrulloev v Russia* App no 656/06 (ECtHR 11 October 2007), para 71; C-528/15 *Al Chodor and Others* EU:C:2017:213 paras 38-40.

<sup>290</sup>*Khlaifia and others v Italy* (Grand Chamber) App No 16483/12 (ECtHR 15 December 2016), para 92.

<sup>291</sup>For further details, see the Explanatory note to this Check-list.

### **Standard 10. Right to information and a personal interview before detention order is issued**

The right to information and a personal interview are expressions of the general principles of EU law to be heard or to a defence during the administrative procedure and before the detention order is issued. As soon as a form for international protection is submitted by the applicant on the territory of a Member State, including at the border or in the transit zones<sup>292</sup>, or a report prepared by the authorities has reached the competent authorities, the latter shall inform the applicant about the application of the provisions of the Dublin III Regulation.<sup>293</sup> However, under the case-law of the ECtHR certain obligations for the contracting State regarding effective access to the relevant procedures (access to information, interpreters, legal advisers) in relation to Article 3 or Article 5 of the ECHR or Article 4 of Protocol No. 4 may exist also outside the territory of that Member State. For example, on the high seas, when aliens are intercepted by that Member State for the purpose of their return to a third country (a form of detention, which shall be subject to the effective control).<sup>294</sup> Under EU secondary law, the information provided may have the form of a common leaflet and shall be provided in writing in a language that the applicant understands or is reasonably supposed to understand. The information may be supplied in conjunction with the personal interview. The safeguards required during the personal interview are as follows: it shall be conducted in a language that the applicant understands or is reasonably supposed to understand and in which he/she is able to communicate; where necessary, an interpreter must ensure appropriate communication; confidentiality must be ensured; a person who conducts an interview must be qualified under national law; a written summary of the interview shall contain at least the main information supplied by the applicant; and an applicant and/or his/her legal advisor or counsellor must have timely access to the summary.<sup>295</sup> The right to a personal interview as a general principle of EU law, which needs to be secured before a detention order is issued, will often be indispensable for the effective fulfilment of other standards such as individual assessment, consideration of

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<sup>292</sup>Article 3(1) of the Dublin III Regulation.

<sup>293</sup>Article 4(1) of the Dublin III Regulation.

<sup>294</sup>*Hirsi Jamaa and Others v Italy (Grand Chamber)* App no 27765/09 (ECtHR 23 February 2012) paras 201-207; *Sharifi et autres c. Italie et Grèce* App No 16643/09 (ECtHR 21 January 2015) para 242.

<sup>295</sup>Article 5(4), 5(5) and 5(6) of the Dublin III Regulation.



less coercive alternative measures to detention and the principle of proportionality.<sup>296</sup>

### **Standard 11. Requirement of individual assessment**

Detention may be ordered only in an individual case and based on an individual assessment of the particular circumstances of the person involved, in relation to at least one objective criterion which needs to be defined by national law and by taking into account the proportionality (necessity) test and the (in)effectiveness of less coercive measures.<sup>297</sup> In practice, the requirement of an individual assessment means that the mere fact that, for example, the person concerned has no identity documents, which may be regulated as an objective criterion for the risk of absconding, cannot, on its own, be a ground for detention or extending detention, since any assessment relating to the risk of the person absconding concerned must be based on an individual examination of that person's case.<sup>298</sup>

### **Standard 12. Best interests of a child**

*“The minor's best interests, as prescribed in Article 23(2) of the Recast Reception Directive 2013/33, shall be a primary consideration for Member States.”*<sup>299</sup> Minors shall be detained *“only as a measure of last resort and after it having been established that other less coercive alternative measures cannot be applied effectively. Unaccompanied minors shall be detained only in exceptional circumstances.”* Detention shall be for the shortest period of time and all efforts shall be made to release the detained minors as soon as possible.<sup>300</sup>

However, in the *MA, BT, DA case*, the CJEU states that *“although express mention of the best interests of the minor is made only in the first paragraph of Article 6 of the Dublin III*

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<sup>296</sup>For further discussion on the right to be heard and to defence and for the consequences of the interference in this rights, see the Explanatory note to this Check-list.

<sup>297</sup>Articles 2(n) and 28(2) of the Dublin III Regulation; C-528/15 *Al Chodor and Others* [2017] EU:C:2017:213, para 34. See also: Case of *O.M. v Hungary* App no 9912/15 (ECtHR 5 July 2016) para 52.

<sup>298</sup>C-146/14 PPU *Mahdi* EU:C:2014:1320 [2014], paras 70-74.

<sup>299</sup>Second sub-paragraph of Article 11(2) of the Recast Reception Directive in conjunction with Article 28(4) of the Dublin III Regulation.

<sup>300</sup>Articles 11(2) and 11(3) of the Recast Reception Directive in conjunction with Article 28(4) of the Dublin III Regulation.

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*Regulation, the effect of Article 24(2) of the Charter,<sup>301</sup> in conjunction with Article 51(1) of the Charter thereof, is that the child's best interests must also be a primary consideration in all decisions adopted by the Member States on the basis of the second paragraph of Article 6 of the Dublin III Regulation".<sup>302</sup> This means – taking into account also the fact that the CJEU refers to Article 24(2) of the CFR as being a right and not a principle – the principle of the best interests of a child extends beyond the requirements of legal representation of an unaccompanied minor, family reunification, well-being and social development of a minor, his/her safety and security, respect of his/her opinion and the need to identify the family members, siblings or relatives of the unaccompanied minor.<sup>303</sup> The best interests of the child extend to all sorts of decisions taken during the procedures carried out under the Dublin III Regulation and this includes detention. As regards unaccompanied children, the child's representative must be appointed "as soon as possible" and before any administrative proceedings are undertaken.<sup>304</sup> Under the case law of the ECtHR, where children are seeking asylum their extreme vulnerability is compounded. Such double vulnerability must take precedence over child's irregular status.<sup>305</sup> It derives both from the case-law on the detention of children<sup>306</sup> and from other cases concerning children,<sup>307</sup> and requires that in all actions relating to children an in-depth examination of the child's best interests must be undertaken prior to a decision that will impact that child's life. This includes principle of proportionality and consideration of the effectiveness of less coercive and alternative*

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<sup>301</sup>Article 24(2) of the Charter states that "*in all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration.*"

<sup>302</sup>*C-648/11 MA, BT and DA v Secretary of State of the Home Department* EU:C:2013:367 [2013] para 59.

<sup>303</sup>Articles 6(2), 6(3)(a),(b),(c) and (d) and 6(4) of the Dublin III Regulation and Article 23 of the Recast Reception Directive 2013/33.

<sup>304</sup>Article 25(1)(a) of the 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), [2013] OJ L180/60 (hereinafter the Recast Procedures Directive).

<sup>305</sup>*Mubilanzila, Mayeka and Kaniki Mitunga v Belgium* App no 13178/03 (ECtHR 12 Jan 2007) para 55; *Popov v France* App nos 39472/07 and 39474/07 (ECtHR 19 January 2012) para 91; *Tarakhel v Switzerland* App no 29217/12 (ECtHR 4 November 2014) para 99; *A.B. and Others v France* App no 11593/12 (ECtHR 12 July 2016) para 110.

<sup>306</sup>*Rahimi v Greece* App no 8687/08 (ECtHR 5 July 2011), paras 51-96; *Mubilanzila, Mayeka and Kaniki Mitunga v Belgium* App no 13178/03 (ECtHR 12 Jan 2007), para 53; *Muskhadzhiyeva and Others v Belgium* App no 41442/07 (ECtHR 19 January 2010) paras 61-62; *Popov v France* App nos 39472/07 and 39474/07 (ECtHR 19 January 2012) paras 92-103.

<sup>307</sup>*Neulinger and Shuruk v Switzerland* App no 41616/07 (ECtHR 6 July 2010), para 139.

measures to detention.<sup>308</sup>

### **Standard 13. Consideration of the effectiveness of less coercive alternative measures to detention**

Article 8(4) of the Recast Reception Directive requires that Member States shall ensure that the rules concerning alternatives to detention, such as regular reporting to the authorities, the deposit of a financial guarantee, or an obligation to stay at an assigned place, are laid down in national law. Article 28(4) of the Dublin III Regulation<sup>309</sup> does not make reference to Article 8(4) of the Recast Reception Directive. However, recital 20 of the Dublin III Regulation states that *“as regards the general guarantees governing detention, as well as detention conditions, where appropriate, Member States should apply the provisions of Directive 2013/33/EU also to persons detained on the basis of this Regulation.”* A requirement for less coercive alternative measures can be considered as part of the *“general guarantees governing detention”* and since under Article 28(2) of the Dublin III Regulation one of the conditions for detention is that other less coercive alternative measures cannot be applied effectively, it is possible to take the aforementioned recital of the Dublin III Regulation and Article 28(2) of the Dublin III Regulation as the legal grounds for the obligation of the Member State to define alternatives to detention in national law.<sup>310</sup> 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, because the text of Article 28(2) of the Dublin III Regulation requires that a Member State may detain only in so far as detention is proportional *“and”* other less

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<sup>308</sup>*Popov v France* App nos 39472/07 and 39474/07 (ECtHR 19 January 2012) para 119; *A.B. and Others v France* App no 11593/12 (ECtHR 12 July 2016) para 110. For further discussion on the best interest of a child, see the Explanatory note and standards nos. 34.1, 34.5. and 34.6 of this check-list.

<sup>309</sup>This provision states that *“as regards the detention conditions and the guarantees applicable to persons detained, in order to secure the transfer procedures to the Member State responsible, Articles 9, 10 and 11 of Directive 2013/33/EU shall apply.”*

<sup>310</sup>See *mutatis mutandis* C-601/15 (PPU) *J.N. v Staatsecretariat van Veiligheid en Justitie* [2016] EU:C:2016:84 para 61. See also: the Explanatory note on consideration of the effectiveness and less coercive measures to detention. For the relevance of alternative measures for detention from the standpoint of case-law of the ECtHR, see the last paragraph of the Explanatory note on the standard of proportionality (necessity test).

coercive alternative measures cannot be applied effectively.<sup>311</sup>

#### **Standard 14. Principle of proportionality and the necessity test**

The necessity test in cases of restrictions of “*movements*” of refugees is part of Article 31(2) of the 1951 Convention relating to the Status of Refugees. However, under EU law, Article 28(2) of the Dublin III Regulation is an expression of the principle of proportionality from Article 52(1) of the Charter and the necessity test forms a part of that principle of proportionality.<sup>312</sup> Article 52(1) of the Charter states that “*any limitations on the exercise of the rights and freedoms recognized by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognized by the Union on the need to protect the rights and freedoms of others.*”<sup>313</sup> In a case of detention under the Dublin III Regulation, the objective of the general interest recognised by the EU is “*to secure transfer procedures in accordance*” with the Dublin III Regulation.<sup>314</sup> As regards the principle of proportionality and the necessity test, the standards under the case-law of the ECtHR – if taken in conjunction with applicable EU law – are not less stringent.<sup>315</sup>

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<sup>311</sup>See *mutatis mutandis* the standard that administrative authority must ascertain whether other sufficient but less coercive measures to detention can be applied effectively in a specific case under the Return Directive (C-146/14 PPU *Mahdi* EU:C:2014:1320 [2014] para 61). In regards to the effectiveness of less coercive measures to detention, see the last paragraph of the Explanatory note on effective and less coercive measures to detention.

<sup>312</sup>“*When there is a significant risk of absconding, Member States may detain the person concerned in order to secure transfer procedures in accordance with this Regulation, on the basis of an individual assessment and only in so far as detention is proportional and other less coercive alternative measures cannot be applied effectively*” (Article 28(2) of the Dublin III Regulation).

<sup>313</sup>See *mutatis mutandis* judgment of the CJEU in the case C-601/15 PPU, *J.N.*, 15 February 2016, para 50. Necessity and proportionality are mentioned also in recital 20 of the Dublin III Regulation. Among other things, recital 20 of the Dublin III Regulation states that detention of applicants must be in accordance with Article 31 of the Geneva Convention. Article 31 of the Geneva Convention states that contracting States shall not apply to the movements of such refugees restrictions other than those which are “*necessary*”.

<sup>314</sup>Article 28(2) and (4) of the Dublin III Regulation.

<sup>315</sup>For more on this, see the Explanatory note to this Check-list.

### **Standard 15. Length of detention and due diligence requirement**

Detention shall be applied for the shortest period possible and shall not be longer than the time reasonably necessary to fulfil the required administrative procedures with due diligence until the transfer under this Regulation is carried out.<sup>316</sup> The transfer from the requesting Member State to the Member State responsible shall be carried out as soon as practically possible, and at the latest within six weeks of the implicit or explicit acceptance of the request by another Member State or of the moment when the appeal or review no longer has a suspensive effect in accordance with Article 27(3) of the Dublin III Regulation. When the requesting Member State fails to comply with deadlines for submitting a take charge or take back request or where the transfer does not take place within the period of six weeks referred to in the third sub-paragraph, the person shall no longer be detained.<sup>317</sup>

### **Standard 16. Right to be informed “promptly” about the reasons for detention after a detention order is issued**

According to Article 9(4) of the Recast Reception Directive, in conjunction with Article 28(4) of the Dublin III Regulation, detained applicants “*shall be immediately*” informed – among other things – of the reasons for detention. Article 5(2) of the ECHR states that “*everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest.*” The requirement of “prompt information” is to be given an autonomous meaning extending beyond the realm of criminal law measures.<sup>318</sup> The standards of “*immediate*” information under EU law and of “*prompt*” information under the case-law of the ECHR could slightly differ, because of a different obligatory content and form of the information that needs to be given to the applicants.<sup>319</sup> Under the case-law of the ECtHR the requirement of “promptness” means that the “*reasons*” for detention need to be

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<sup>316</sup>Article 28(3) of the Dublin III Regulation. A Member State must ask for an urgent reply for a take charge or take back request (second paragraph of Article 28(3) of the Dublin III Regulation). See also Recital 17 of the Recast Reception Directive in conjunction with Recital 20 of the Dublin III Regulation.

<sup>317</sup>The third and the fourth subparagraphs of Article 28(3) of the Dublin III Regulation. Concerning the length of detention, see also standard no 25 on the right to judicial review of the continuing detention. In regards to the length of the detention from the standpoint of the case-law of the ECtHR, see Explanatory note on length of detention.

<sup>318</sup>*Khlaifia and others v Italy (Grand Chamber)* App No 16483/12 (ECtHR 15 December 2016) para 116.

<sup>319</sup>See standard no 17 of this Check-list.

given to the applicant within a few hours of arrest.<sup>320</sup> Where reasons were provided after 76 hours of detention,<sup>321</sup> after 4 days of detention<sup>322</sup> or after 10 days of detention,<sup>323</sup> the ECtHR found that they were not given promptly. If the applicant is incapable of receiving the information, the relevant details must be given to those persons who represent his interests such as a lawyer or a guardian.<sup>324</sup>

### **Standard 17. Right to be informed “adequately” about the reasons for detention and about procedures laid down in national law for challenging the detention order**

Based on EU secondary law, detained applicants must be informed immediately “*in writing, in a language which they understand or are reasonably supposed to understand*” not just about the reasons for detention, but also about “*the procedures laid down in national law for challenging the detention order, as well as of the possibility to request free legal assistance and representation*”.<sup>325</sup>

As regards the manner of communicating the reasons for arrest, the ECtHR states that “*any person arrested must be told in simple, non-technical language that he can understand, the essential legal and factual grounds for his arrest, so as to be able, if he sees fit, to apply to a court to challenge its lawfulness in accordance with Article 5(4) of the ECHR /.../.*” This information “*need[s] not be related in its entirety by the arresting officer at the very moment of arrest. Whether the content and promptness of the information conveyed were sufficient is to be assessed in each case according to its special features,*”<sup>326</sup> but the information

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<sup>320</sup>*Fox, Campbell and Hartley v United Kingdom* App no 12244/86; 12245/86; 12383/86 (ECtHR 30 August 1990) paras 41-42; *M.A. v Cyprus* App no 41872/10 (ECtHR 23 July 2013) para 228; *Kerr v United Kingdom* (decision) App no 40451/98 (ECtHR 7 December 1999).

<sup>321</sup>*Saadi v United Kingdom (Grand Chamber)* App no 13229/03 (ECtHR 29 Jan 2008) paras 81-85.

<sup>322</sup>*Shamayev and Others v Georgia and Russia* App no 36378/02 (ECtHR 12 October 2005), para 416; *Khlaifia and others v Italy (Grand Chamber)* App no 16483/12 (ECtHR 15 December 2016) para 120.

<sup>323</sup>*Rusu v Austria* App no 34082/02 (ECtHR 2 October 2008), para 43.

<sup>324</sup>*X. v United Kingdom*, Commission report, para 16; *Z.H. v Hungary* App no 28973/11 (ECtHR 8 November 2012) paras 42-43; see: European Court of Human Rights, *Guide on Article 5 – Right to Liberty and Security* (Council of Europe/European Court of Human Rights, 2014) 22 (point 116).

<sup>325</sup>Article 9(4) of the Recast Reception Directive in conjunction with Article 28(4) of the Dublin III Regulation.

<sup>326</sup>*Shamayev and Others v Georgia and Russia* App no 36378/02 (ECtHR 2 October 2005) para 413; *Khlaifia and Others v Italy (Grand Chamber)* App no 16483/12, (ECtHR 5 December 2016) para 115.

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provided must be correct.<sup>327</sup> Information about the legal status of a migrant or about the possible removal measures that could be implemented cannot satisfy the need for information as to the legal basis for the migrant's deprivation of liberty.<sup>328</sup> Moreover "*a bare indication of the legal basis*" for the arrest, taken on its own, is insufficient for the purposes of Article 5(2) of the ECHR.<sup>329</sup> In *M.A. v Cyprus* (para. 229), the ECtHR has accepted that (correct) information does not necessarily have to be given in writing. "*In cases where detainees had not been informed of the reasons for their deprivation of liberty, the ECtHR has found that their right to appeal against their detention was deprived of all effective substance*".<sup>330</sup>

#### **Standard 18. Written decision on detention (or its extension)<sup>331</sup> must be delivered to the applicant/legal representative and must contain reasons closely connected to the grounds of detention**

Detention of applicants shall be ordered in writing. The detention order shall state the reasons in fact and in law on which it is based.<sup>332</sup> Similarly, under ECHR de facto detention must be "*incarnated by a formal decision of legal relevance, complete with reasoning*."<sup>333</sup> If the express – or even underlying – reason for detention is other than to prevent the detainee from effecting an unauthorised entry or to secure the fulfilment of any obligation

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<sup>327</sup>*Rusu v Austria* App no 34082/02 (ECtHR 2 October 2008), para 42.

<sup>328</sup>*Khlaifia and others v Italy (Grand Chamber)* App No 16483/12 (ECtHR 15 December 2016) para 118.

<sup>329</sup>*Guide on Article 5 – Right to Liberty and Security* (Council of Europe/European Court of Human Rights, 2014) 22 (point 122); *Fox, Campbell and Hartley v United Kingdom*, App no 12244/86; 12245/86; 12383/86 (ECtHR 30 August 1990), para 40; *Murray v United Kingdom* (Grand Chamber) App no 14310/88 (28 October 1994) para 76, *Kortesis v Greece* App no 60593/10 (ECtHR 12 June 2012) paras 61-62.

<sup>330</sup>*Khlaifia and others v Italy* (Grand Chamber) App no 16483/12 (ECtHR 15 December 2016) para 132. For examples of incorrect information about the reasons for detention, see the Explanatory note to this Check-list.

<sup>331</sup> Detention and extension of detention are similar in nature since both deprive the third-country national concerned of his liberty" /.../ (C-146/14 PPU Mahdi EU:C:2014:1320 [2014] para 44.

<sup>332</sup>Article 9(2) of the Recast Reception Directive in conjunction with Article 28(4) of the Dublin III Regulation. The obligation of the administration to give reasons for its decisions is a general principle of EU law (see: Article 41(2)(c) of the Charter; see also: C-601/15 (PPU) *J.N. v Staatsecretariat van Veiligheid en Justitie* [2016] EU:C:2016:84, para 62 and *mutatis mutandis*, C-146/14 PPU *Mahdi* EU:C:2014:1320 [2014] paras 44, 52.

<sup>333</sup>*Ilias and Ahmed v Hungary* App no 47287/15 (ECtHR 14 March 2017) para 68.

prescribed by law, it cannot be justified under Article 5(1)(f)<sup>334</sup> or Article 5(1)(b) of the ECHR. The detention will be arbitrary where there has been bad faith or deception.<sup>335</sup>

### **Standard 19. The obligation to keep records on detention cases**

A special requirement of Article 5(1) of the ECHR is the obligation to keep records of matters of detention. The ECtHR considers that the unacknowledged detention of an individual is a complete negation of the fundamentally important guarantees contained in Article 5 of the ECHR and discloses the gravest violation of that provision.<sup>336</sup> The absence of a record of such information as the date, time and location of detention, the name of the detainee, the reasons for detention and the name of the person effecting it must be seen as incompatible, *inter alia*, with the very purpose of Article 5 of the ECHR.<sup>337</sup>

### **Standard 20. Right to free legal assistance and representation**

In cases of judicial review of the detention order provided for in Article 9(3) of the Recast Reception Directive Member States “*shall*” ensure that applicants have access to free legal assistance and representation. “*This shall include, at least, the preparation of the required procedural documents and participation in the hearing before the judicial authorities on behalf of the applicant. Free legal assistance and representation shall be provided by suitably qualified persons as admitted or permitted under national law whose interests do not conflict or could not potentially conflict with those of the applicant.*”<sup>338</sup> Procedures for access to legal assistance and representation shall be laid down in national law.<sup>339</sup> The second sentence of Article 47(2) of the Charter states that “*everyone shall have the possibility of*

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<sup>334</sup>See mutatis mutandis: *Bozano v France* App no 9990/82 (ECtHR 18 December 1986); para 60; *Čonka v. Belgium* App no 51564/99 (ECtHR 5 February 2002), para 42; *Khodorkovskiy v. Russia* App no 5829/04 (ECtHR 31 May 2011), para 142; *Azimov v. Russia* App no 67474/11 (ECtHR 28 April 2013), para 164.

<sup>335</sup>*Bozano v France* App no 9990/82 (ECtHR 18 December 1986), para 55; *Čonka v Belgium* App no 51564/99 (ECtHR 5 February 2002), para 42.

<sup>336</sup>*El-Masri v the Former Yugoslav Republic of Macedonia* (Grand Chamber) App no 39630/09 (ECtHR 13 December 2012) para 233; *Kurt v Turkey* App no 15/1997/799/1002 (ECtHR 25 May 1998) para 125.

<sup>337</sup>*Kasparov v Russia* App no 53659/07 (11 October 2016) para 55.

<sup>338</sup>Article 9(6) of the Recast Reception Directive in conjunction with Article 28(4) and Recital 20 of the Dublin III Regulation.

<sup>339</sup>Article 9(10) of the Recast Reception Directive in conjunction with article 28(4) of the Dublin III Regulation.



*being advised, defended and represented.*” Article 47(3) of the Charter states that “*legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice*”. These are mandatory provisions of EU law. Article 9(7) of the Recast Reception Directive is a non-mandatory provision and sets possible conditions or modalities that Member States may regulate regarding the right to free legal assistance and representation. In addition, and without prejudice to the aforementioned provisions from the Recast Reception Directive, rules on free legal aid from Articles 20-23 of the Recast Procedures Directive 2013/32 are also applicable.<sup>340</sup>

From the standpoint of the case-law of the ECtHR, the ECHR “*is intended to guarantee rights that are not theoretical or illusory, but practical and effective.*”<sup>341</sup> In the case of *Čonka*, the ECtHR held that the accessibility of a remedy implies, *inter alia*, that the circumstances voluntarily created by the authorities must be such as to afford applicants a realistic possibility of using the remedy.<sup>342</sup> In the context of detention proceedings, the ECtHR has held that the authorities are not obliged to provide free legal aid.<sup>343</sup> However, if the absence of legal aid raises concerns about the accessibility of a remedy, an issue may arise under Article 5(4) of the ECHR<sup>344</sup> (for example, when legal representation is required in the domestic context) or under Article 13 in conjunction with Article 3 of the ECHR.<sup>345</sup>

## **Standard 21. Other aspects of the practical and effective right to judicial review**

Apart from the issues of free legal aid and representation,<sup>346</sup> there may be certain other aspects of effective access to a court relevant in detention cases. The following guidance

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<sup>340</sup>See Recital 12 of the Dublin III Regulation.

<sup>341</sup>*Čonka v Belgium* App no 51564/99 (ECtHR 5 February 2002) para 46.

<sup>342</sup>*Ibid.* para 46.

<sup>343</sup>*Lebedev v Russia*, App no 4493/04 (ECtHR 25 October 2007), para 84; *Susa Musa v Malta* App 42337/12 (23 July 2013) para 61.

<sup>344</sup>*Ibid.* para 61; *Abdolkhani and Karimnia v Turkey* App no 30471/08 (ECtHR 22 September 2009) para 141. For further standards as regards free legal aid under EU law and the ECHR, see the Explanatory note.

<sup>345</sup>See, for example: *Alimov v Turkey* App no 14344/13 (ECtHR 6 September 2016), para 66.

<sup>346</sup>For the example of violation of the right of individual petition under Article 34 of the ECHR due to measures limiting an asylum applicant's contact with his representative, see quotation from the judgment in the case of *L.M. and Others v Russia* App nos 40081/14, 40088/14 and 40127/14 (ECtHR 10 October 2015) paras 153-163 and judgment in the case of *I.M. v France* that are mentioned in the Explanatory note to this Check-list.

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may be gleaned from the case-law of the ECtHR regarding general standards for practical and effective access to a court in civil disputes. The right of access to a court must be “*practical and effective*”.<sup>347</sup> For the right of access to be effective, an individual must “*have a clear, practical opportunity to challenge an act that is an interference with his rights*”.<sup>348</sup> The rules governing the formal steps to be taken and the time-limits to be complied with in lodging an appeal or an application for judicial review are aimed at ensuring a proper administration of justice and compliance, in particular, with the principle of legal certainty.<sup>349</sup> The rules in question, or their application, should not prevent litigants from using an available remedy.<sup>350</sup> The practical and effective nature of this right may be impaired by the prohibitive cost of the proceedings in view of the individual's financial capacity;<sup>351</sup> by issues relating to time-limits;<sup>352</sup> and by the existence of procedural bars preventing or limiting the possibilities of applying to a court.<sup>353</sup> The right of access to a court is not absolute, but may be subject to limitations permitted by implication.<sup>354</sup> The limitations applied must not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired. The limitation must pursue a legitimate aim and there must be a reasonable relationship of proportionality between the

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<sup>347</sup>*Bellet v France* App no 23805/94 (4 December 1995) para 38.

<sup>348</sup>*Ibid.* para 36. See also: *Stoichkov v Bulgaria* App no 9808/02, (ECtHR 24 March 2005) para 66; *Vachev v Bulgaria* App no 42987/98, (ECtHR 8 July 2004) para 71; *Ismoilov and others v Russia*, App no 2947/06 (ECtHR 24 April 2008) para 45; *Nunes Dias v Portugal* App nos 69829/01; 2672/03 (ECtHR 10 March 2003).

<sup>349</sup>*Cañete de Goñi v Spain* App no 55782/00 (ECtHR 15 October 2002) para 36.

<sup>350</sup>*Miragall Escolano and Others v Spain* App nos. 38366/97, 38688/97, 40777/98, 40843/98, 41015/98, 41400/98, 41446/98, 41484/98, 41487/98 and 41509/98 (ECtHR 25 January 2000); *Zvolsky and Zvolska v the Czech Republic* App no 46129/99 (ECtHR 12. November 2002) para 51.

<sup>351</sup>*Ait-Mouhoub v France* App no 22924/93 (ECtHR 28 October 1998), paras 57-58; *Garcia Manibardo v Spain*, App no 38695/97 (ECtHR 15 February 2000), paras 38-45; *Kreuz v Poland* (no1), App no 28249/95 (ECtHR 19 June 2001) paras 60-67, *Podbielski and PPU PolPure v Poland* App no 39199/98 (ECtHR 26 July 2005) paras 65-66; *Weissman and others v Romania* App no 63945/00 (ECtHR 24 May 2006) para 42.

<sup>352</sup>*Melnyk v Ukraine* App no 23436/03 (28 February 2006), para 26; *Yagtzilar and Others v Greece* App no 41727/98, (6 December 2001) para 27.

<sup>353</sup>*Perez de Rada Cavanilles v Spain* App no 28090/95 (ECtHR 28 October 1998), para 49, *Miragall Escolano And Others v Spain* App no 38366/97 (ECtHR 25 January 2000), para 38; *Case of Sotiris and Nikos Koutras Attee v Greece*, App no 39442/98 (ECtHR 16 February 2001), para 20; *Beles and Others v Czech Republic*, 47273/99 (ECtHR 12 November 2002), para 50; *RTBF v Belgium*, 50084/06 (ECtHR 29 March 2011) paras 71, 72, 74; *Annoni di Gussola and Others v France* App no 31819/96, 33293/96 (ECtHR 14 November 2000), para 56; *The App nos 13092/87, 13984/88* (ECtHR 9 December 1994), para 83, *Philis v Greece* App nos 12750/87, 13780/88, 14003/88 (ECtHR 27 August 1981), para 65.

<sup>354</sup>*Golder v United Kingdom* App no 4451/70 (ECtHR 21 February 1975) para 38; *Stanev v Bulgaria*, App no 36760/06 (17 January 2012), para 230.

means employed and the aim sought to be achieved.<sup>355</sup>

**Standard 22. Automatic judicial review or detainee’s right to initiate judicial review of the lawfulness of detention (including conditions of detention)<sup>356</sup>**

Under secondary EU law, a judicial review of the lawfulness of detention (including conditions of detention) may be provided *ex officio* from the beginning of detention or/and at the request of the applicant after the launch of the relevant proceedings.<sup>357</sup> However, according to Article 5(4) of the ECHR, everyone who is deprived of his/her liberty by arrest or detention “*shall be entitled to take proceedings*” by which the lawfulness of his/her detention shall be decided.<sup>358</sup> A difference between EU law and the ECHR could imply that the ECtHR may find a breach of Article 5(4) of the ECHR, because proceedings could only be initiated *ex officio*, for example by the prosecutor, meaning that the applicant himself had no right to bring proceedings.<sup>359</sup> Article 5(4) is the *lex specialis* which cannot be bypassed by relying on the right to an effective remedy under Article 13 ECHR read together with Article 5. However, where the complaint concerns the conditions of detention, Article 13 can be invoked together with Article 3. However, even if the ECtHR does not find a violation of Article 3 of the ECHR, it may find a violation of Article 13 taken together with Article 3 of the ECHR.<sup>360</sup>

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<sup>355</sup>*Ashingdane v United Kingdom*, App no 8225/78 (ECtHR 28 May 1985), para 57; *Fayed v United Kingdom*, App no 17101/90 (ECtHR 21 September 1994), para 65, *Markovic and Others v Italy* App no 1398/03 (ECtHR 14 December 2006), para 99. For more details about these aspects of effective and practical right to access to a court, see the Explanatory note and the European Court of Human Rights *Guide on Article 6, Right to fair trial (civil limb)* (Council of Europe/European Court of Human Rights, 2013) 13-14.

<sup>356</sup>As regards conditions of detention, see standard no 34 of this Check-list.

<sup>357</sup>Article 9(3) of the Recast Reception Directive in conjunction with Article 28(4) of the Dublin III Regulation. See also Article 26(2) of the Recast Procedures Directive (in conjunction with Recital 12 of the Dublin III Regulation), which imposes an obligation to the Member States to ensure a possibility to speedy judicial review.

<sup>358</sup>This option should not be merely hypothetical. See, for example: *Abdi Mahamud v Malta* App no 56796/13 (ECtHR 3 May 2016) para 53.

<sup>359</sup>*Nasrullojev v Russia* App no 656/06 (ECtHR 11 October 2007) paras 88-90. For some further examples of automatic review under the case-law of the ECtHR (including of persons of unsound mind), see the Explanatory note to this Check-list.

<sup>360</sup>See, for example: *Ilias and Ahmed v Hungary* App no 47287/15 (ECtHR 14 March 2017) paras 98-101.

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While the ECtHR has generally held that Article 5(4) can only be invoked while the person remains in detention, which means that Article 5(4) had no application for the purpose “*of obtaining, after release, a declaration that a previous detention or arrest was unlawful,*”<sup>361</sup> Article 3 complaints can be invoked anytime. Nevertheless, Article 5(4) complaint might be admissible if lodged while the applicant is still in detention, even if he/she is subsequently released, if the applicant did not have an effective remedy to challenge the lawfulness of his/her detention during the time he/she was detained; likewise, the ECtHR has recognised that a complaint concerning the “speediness” of the review can be raised even after the person has been released.<sup>362</sup> Furthermore, complaints under Article 3 of the ECHR may be raised not just based on Article 5(4) of the ECHR, but also based on Article 13 of the ECHR.<sup>363</sup>

A difference between EU law, which regulates alternatively automatic judicial review and detainee’s right to initiate judicial review, and the ECHR, which guarantees the right to initiate judicial review, could imply that the ECtHR may find a breach of Article 5(4) of the ECHR where proceedings could only be initiated *ex officio*, for example, by the prosecutor, meaning that the applicant had no right to bring proceedings.<sup>364</sup>

At the same time, the requirement deriving from the ECtHR case law that the detainee be “entitled to take proceedings” suggests that there is no requirement for automatic review, even where the detainee may find it difficult to initiate proceedings (for example, where there are language difficulties or he/she is not represented).<sup>365</sup> As regards distinction between judicial protection concerning lawfulness of detention and judicial protection concerning compensation in the case of unlawful detention see standard no. 31 of this Check-list.

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<sup>361</sup>*Stephens v Malta* (no1) App no 11956/07 (ECtHR 21 April 2009), para 102; *Fox, Hartley and Campbell v United Kingdom* App no 12244/86, 12245/86, 12383/86 (ECtHR 30 August 1990), para 45; *Slivenko v Latvia* App no 48321/99 (ECtHR 9 October 2003), para 155; *X v Sweden* App no 10230/82 (Commission decision, 11 May 1983); *Richmond Yaw and Others v Italy* App nos. 3342/11, 3391/11, 3408/11 and 3447/11 (ECtHR 6 October 2016) para 82.

<sup>362</sup>*Abdullahi Elmi and Aweys Abubakar v Malta* App 25794/13 and 28151/13 (ECtHR 22 November 2016), paras 117-119.

<sup>363</sup>*Khlaifia and others v Italy* (Grand Chamber) App no 16483/12 (ECtHR 15 December 2016), para 267.

<sup>364</sup>For some further examples of automatic review under the case-law of the ECtHR (including of persons of unsound mind), see the Explanatory note to this Check-list.

<sup>365</sup>See: *J.N. v United Kingdom* App no 37289/12 (ECtHR 19 May 2016).

**Standard 23. Right to judicial review before an “independent and impartial tribunal/court established by law”**

Article 9(3) of the Recast Reception Directive in conjunction with Article 28(4) of the Dublin III Regulation and Article 26(2) of the Recast Procedures Directive and do not define the concrete character of the institution which must provide a “judicial review”. A logical conclusion might be that “judicial” review may only be provided by a judicial authority. Article 9(3) of the Recast Reception Directive taken in conjunction with Article 47(1) and (2) of the Charter provide a guarantee that the “judicial review” on detention is provided by an “*independent and impartial tribunal*.”<sup>366</sup> Furthermore, Article 6 of the Charter corresponds to Article 5(4) of the ECHR (a *lex specialis* to Article 13 of the ECHR), which gives a right to take proceedings by which the lawfulness of detention will be decided by a “*court*.” The CJEU has already stated: “*limitations which may legitimately be imposed on the exercise of the rights laid down in Article 6 of the Charter may not exceed those permitted by the ECtHR.*”<sup>367</sup> In the case of H.I.D. the CJEU has put that “*the first sentence of recital 27 in the preamble to the Procedures Directive 2005/85 states that, in accordance with a fundamental principle of European Union law, the decisions taken in relation to an application for asylum and the withdrawal of refugee status must be subject to an effective remedy before a court or tribunal within the meaning of Article 267 TFEU.*”<sup>368</sup> Based on this starting point the CJEU then developed standards on independence of courts or tribunals with a reference to the settled case-law of the CJEU in relation to the question whether a “*body making a reference is a court or tribunal for the purposes of Article 267 TFEU.*”<sup>369</sup> In respect of determination of courts or tribunals, unlike the recital 27 of the Directive 2005/85, the recital 50 in the preamble of the Recast Procedures Directive no longer refers to Article 267 of the TFEU. Since the standards on the notions of “*tribunal/court*”, “*established by law*”, “*independence and impartiality*” in the case-law of the CJEU in the field of rights of asylum-seekers are

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<sup>366</sup>“Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in a compliance with the conditions laid down in this Article “(Article 47(1) of the Charter). “Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law” (first sentence of Article 47(2) of the Charter).

<sup>367</sup>C-601/15 (PPU) *J.N. v Staatsecretariat van Veiligheid en Justitie* [2016] EU:C:2016:84 para 47.

<sup>368</sup>C-175/11, *H.I.D., B.A. v Refugee Applications Commissioner, Refugee Appeals Tribunal, Minister for Justice, Equality and Law Reform, Ireland, Attorney General* (ECtHR 31 January 2013), para 81.

<sup>369</sup>*Ibid.* para 83.

limited to the interpretation provided by the preliminary ruling in the *H.I.D.* case, additional guidance for the interpretation of these standards may be found in the case-law of the ECtHR.<sup>370</sup>

#### **Standard 24. Right to “speedy” judicial review of the lawfulness of detention**

Under the provisions of Article 9(3) of the Recast Reception Directive and Article 26(2) of the Recast Procedures Directive, according to which administrative authorities order detention, Member States shall provide for a speedy judicial review of the lawfulness of detention. Under the Recast Reception Directive, a judicial review of the lawfulness of detention may be provided as speedily as possible *ex-officio* from the beginning of detention or/and as speedily as possible at the request of the applicant after the launch of the relevant proceedings. A Member State has an obligation to define in national law the period within which the judicial review (*ex-officio* and/or at the request of the applicant) shall be conducted.<sup>371</sup>

Under the standards of the ECHR, “*speediness*” is in itself a virtue to be protected regardless of the outcome of the proceedings in question.<sup>372</sup> As a starting point, the ECtHR has taken the moment when the application for release was made/proceedings were instituted. The relevant period comes to an end with the final determination of the legality of the applicant’s detention, including any appeal.<sup>373</sup> If an administrative remedy has to be exhausted before recourse can be taken to a court, time starts running when the administrative authority is seized of the matter.<sup>374</sup> If the proceedings have been conducted over two levels of jurisdiction, an overall assessment of the speediness of judicial review must be made in order to determine whether the requirement of speediness has been

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<sup>370</sup>For the concrete standards on “independence” and “impartiality” of courts “established by law” that are developed by the CJEU in the case of *H.I.D.* and by the ECtHR, see the Explanatory note.

<sup>371</sup>Article 9(3) of the Recast Reception Directive in conjunction with Article 28(4) of the Dublin III Regulation.

<sup>372</sup>*Doherty v United Kingdom* App no 76874/11 (18 February 2016), para 80.

<sup>373</sup>*Sanchez-Reisse v Switzerland* App no 9862/82 (ECtHR 21 October 1986), para 54; *E. v Norway*, 11701/85 (29 August 1990), para 64.

<sup>374</sup>*Sanchez-Reisse v Switzerland* App no 9862/82 (ECtHR 21 October 1986), para 54.

complied with.<sup>375</sup> 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). The question whether a right to the speedy decision has been respected must be determined in light of the circumstances of an individual case.<sup>376</sup> 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.<sup>377</sup> 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 is not to be addressed in the abstract but in the context of a general assessment of the information, taking into account the circumstances of the case, particularly in the light of the complexity of the case, any specificities of the domestic procedure and the applicant’s behaviour in the course of the proceedings*”.<sup>378</sup>

Thus, the ECtHR in its case-law decided that where an individual's personal liberty is at stake, the ECtHR has very strict standards concerning the State's compliance with the requirement of a speedy review of the lawfulness of detention. In the cases of *Kadem v Malta* (paras. 44-45) and *Rehbock v Slovenia* (paras. 82-86), the ECtHR considered periods of seventeen (17) and twenty-six (26) days excessive for deciding on the lawfulness of the applicant's detention. In *Mamedova v Russia* (para. 96), the length of appeal proceedings lasting, *inter alia*, twenty-six days (26), was found to be in breach of the speediness requirement.<sup>379</sup> In *Karimov v Russia*, the ECtHR established that delays of thirteen (13) to twenty (20) days in examining the appeals against detention order may be incompatible with the “speediness” requirement of Article 5(4) of the ECHR.<sup>380</sup> It is thus for a State to organise its judicial system in such a way as to enable the courts to comply with the requirements of Article 5(4) of the

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<sup>375</sup>*Hutchison Reid v United Kingdom* App no 50272/99 (ECtHR 20 Feb 2003), para 78; *Navarra v France*, 13190/87 (ECtHR 23 November 1993), para 28; *European Court of Human Rights Guide on Article 5 of the Convention*, (Council of Europe/European Court of Human Rights, 2014) 33/points 211-213.

<sup>376</sup>*Karimov v Russia* App no 54219/08 (ECtHR 29 July 2010), para 123; *Rehbock v Slovenia* App no 29462/95 (ECtHR 28 November 2000) para 84.

<sup>377</sup>*Karimov v Russia* App no 54219/08 (ECtHR 29 July 2010), paras 125-126.

<sup>378</sup>*Khlaifia and others v Italy* App no 16483/12, (ECtHR 15 December 2016) para 131.

<sup>379</sup>*Aden Ahmed v Malta* App no 55352/12 (ECtHR 23 June 2013), para 115.

<sup>380</sup>*Karimov v Russia* App no 54219/08 (ECtHR 29 July 2010), para 127.

ECHR.<sup>381</sup> Neither an excessive workload nor a vacation period can justify a period of inactivity on the part of the judicial authorities.<sup>382</sup>

### **Standard 25. Right to judicial review of the continuing detention**

*“Detention shall be reviewed by a judicial authority at reasonable intervals of time, ex-officio and /or at the request of the applicant concerned, in particular whenever it is of a prolonged duration, relevant circumstances arise or new information becomes available which may affect the lawfulness of detention.”*<sup>383</sup> Also from the standpoint of ECHR, it is not sufficient that the lawfulness of detention is determined at the time of an arrest. There must be a possibility of subsequent review to ensure that the continuing detention does not become unlawful or arbitrary. For example, in *Kim v Russia* (para. 42), the ECtHR expressly recognised that during a long period of detention new factors may come to light which impact on the lawfulness of detention, and the detained person should have the possibility of bringing new proceedings before a court which has jurisdiction to consider the complaint *“speedily”*.

### **Standard 26. The scope and intensity of judicial review including procedural guarantees**

The Dublin III Regulation does not regulate specifically the scope or intensity of the judicial review of a detention order. The relevant standards should, therefore, be derived from the general principle of effectiveness of legal remedies under EU law<sup>384</sup> in conjunction with Article 47(1) of the Charter. Furthermore, in this respect, the CJEU's interpretation of the right to an effective legal remedy in cases of the extension of detention under the Return Directive and the case-law of the ECtHR under Article 5(1) (f) and 5(4) of the ECHR concerning expulsion of irregular migrants, are relevant, too. Thus, based on the standards

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<sup>381</sup>*ibid.* para 123.

<sup>382</sup>*E. v Norway* App no 11701/85 (ECtHR 29 August 1990), para 66; *Bezicheri v Italy*, App no 11400/85 (ECtHR 25 October 1989), para 25. For further examples of decisions as regards speediness of judicial review, see the Explanatory note to this Check-list.

<sup>383</sup>Article 9(5) of the Recast Reception Directive in conjunction with Article 28(4) of the Dublin III Regulation. See *mutatis mutandis* standard no 29 on the right to judicial review of the continuing detention or its extension in case of detention under the Return Directive.

<sup>384</sup>For more on this, see the Explanatory note to this Check-list.



developed in the *Mahdi* case, a judicial authority must be able to rule on all relevant matters of fact and of law in order to determine whether a detention is justified. This requires an in-depth examination of the matters of fact specific to each individual case. Where detention is no longer justified, the judicial authority must be able to substitute its own decision for that of the administrative authority and to make a decision on whether to order an alternative measure or to release the third country national concerned. To that end, the judicial authority must be able to take into account both the facts stated and the evidence adduced by the administrative authority and any observations that may be submitted by a third-country national. Furthermore, a judicial authority must be able to consider any other elements that are relevant for its decision should it so deem necessary. Accordingly, the powers of the judicial authority in the context of an examination can under no circumstances be confined only to the matters adduced by the administrative authority concerned. Any other interpretation would result in an ineffective examination by the judicial authority and would thereby jeopardize the achievement of the objectives pursued.<sup>385</sup> Similarly to Article 9(5) of the Recast Reception Directive<sup>386</sup> (in conjunction with Article 28(4) of the Dublin III Regulation, under the case law of the ECtHR, the reviewing court must have jurisdiction to decide on whether or not deprivation of liberty has become unlawful in the light of new factors, which have emerged subsequently to the initial decision depriving a person of his/her liberty.<sup>387</sup>

Nevertheless, under the case-law of the ECtHR, the scope and intensity of judicial review on detention is explained in a slightly different way as this was decided by the CJEU in the case of *Mahdi*. Under the case-law of the ECtHR *“Article 5(4) of the ECHR does not guarantee a right to judicial review of such a scope as to empower the court, on all aspects of the case including questions of pure expediency, to substitute its own discretion for that of the decision-making authority. The review should, however, be wide enough to bear on those conditions, which are essential for the lawful detention of a person according to Article 5(1) of the ECHR. The reviewing court must not have merely advisory functions but must have the*

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<sup>385</sup>C-146/14 PPU *Mahdi* EU:C:2014:1320 [2014] paras 62-64.

<sup>386</sup>Detention shall be reviewed by a judicial authority /.../ in particular whenever it is of a prolonged duration, relevant circumstances arise or new information becomes available which may affect the lawfulness of detention.

<sup>387</sup>*Azimov v Russia* App no 677474/11 (ECtHR, 18 April 2013), paras 151-152.

*competence to decide the lawfulness of the detention and to order release if the detention is unlawful. The requirement of procedural fairness under Article 5(4) does not impose a uniform, unvarying standard to be applied irrespective of the context, facts and circumstances. Although it is not always necessary that an Article 5(4) procedure be attended by the same guarantees as those required under Article 6 for criminal or civil litigation, it must have a judicial character and provide guarantees appropriate to the type of deprivation of liberty in question. Thus, the procedure must be adversarial and must always ensure equality of arms between the parties. An oral hearing may be necessary, for example in cases of detention on remand.”*<sup>388</sup> Equality of arms is not ensured if the applicant, or his/her counsel, is denied access to those investigation file documents which are essential in order to challenge effectively the lawfulness of his/her detention.<sup>389</sup> It may also be essential that the individual concerned not only has the opportunity to be heard in person but that he/she also has the effective assistance of his/her lawyer.<sup>390</sup> 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.<sup>391</sup>

#### **Standard 27. Restrictions on the right to a defence and/or equality of arms based on national (public) security, public policy or public order**

If in a given case, a risk of absconding exists and, in addition or related to the risk of absconding, a Government ascertains the existence of a risk to national security, because a person had been, for example, concerned in the commission, preparation or instigation of acts of international terrorism and were members of, belong to, or had links with an international terrorist group, then certain limitations as regards standards of equality of arms and/or the right to a defence, such as restricted access to a court file, may be

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<sup>388</sup>*A and Others v United Kingdom* App no 3455/05 (ECtHR 19 February 2009) para 204; *Reinprecht v Austria*, 67175/01 (ECtHR 15 November 2005), para 31; see also: *Khlaifia and others v Italy* (Grand Chamber), App no 16483/12 (ECtHR 15 December 2016), para 128.

<sup>389</sup>*Ovsjannikov v Estonia* App no 1346/12 (ECtHR 20 February 2014), para 72; *Fodale v Italy* App no 70148/01 (1 June 2006), para 41; *Korneykova v Ukraine* App no 56660/12 (ECtHR 24 March 2016), para 68.

<sup>390</sup>*Cernák v Slovakia* App no 36997/08 (ECtHR 17 December 2013), para 78.

<sup>391</sup>*Çatal v Turkey* App no 26808/08 (ECtHR 17 March 2012), para 33; *Altınok v Turkey* App no 31610/08 (ECtHR 29 November 2011), para 45.

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imposed.<sup>392</sup> For example, under the Recast Reception Directive national security or public order may be a separate and an autonomous ground for detention and, thus, in such a case an applicant may be limited not only in access to court files, but also *in his/her personal freedom in view of the requirement of necessity, if the applicant's individual conduct represents a genuine, present and sufficiently serious threat, affecting a fundamental interest of society or the internal or external security of the Member State concerned*".<sup>393</sup> Based on recital 12 of the Dublin III Regulation,<sup>394</sup> rules under Article 23 of the Recast Procedures Directive on exceptions as regards disclosure of information or sources due to security concerns<sup>395</sup> could be relevant also in detention cases under the Dublin III regulation.<sup>396</sup> The right to have access to a court file (as being part of the right from Article 5(4) of the ECHR or Article 47(1) and (2) of the Charter in conjunction with Article 9(3) of the Recast Reception Directive) may be restricted for reason of national security and public order in accordance with principle of proportionality under Article 52(1) of the Charter.<sup>397</sup>

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<sup>392</sup>See circumstances of national security concerns in the case of *A and Others v United Kingdom* App 3455/05, (ECtHR 19 February 2009), para 166. The recital 37 of the Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) (Official Journal of the EU, L 337, 20. 12. 2011) states that the notion of national security and public order also covers cases in which a third-country national belongs to an association which supports international terrorism or supports such an association.

<sup>393</sup>C-601/15 (PPU) *J.N. v Staatsecretariat van Veiligheid en Justitie* [2016] EU:C:2016:84 para 67. However, under the Recast Reception Directive a competent authority must previously determine on a case-by-case basis, whether the threat presented by the person concerned to national security or public order corresponds at least to the gravity of the interference with the liberty of those persons that such measures entail (*Ibid.* para 69).

<sup>394</sup>Recital 12 of the Dublin III regulation states that the Recast Procedures Directive "should apply in addition and without prejudice to the provisions concerning the procedural safeguards regulated under this Regulation, subject to the limitations in the application of that Directive."

<sup>395</sup>Such as: the security of the organisations or person(s) providing the information or the security of the person(s) to whom the information relates or where the investigative interests relating to the examination of applications for international protection by the competent authorities of the Member States or the international relations of the member States would be compromised (Article 23 of the Recast Procedures Directive).

<sup>396</sup>See also second sentence of Article 32(2) of the 1951 Convention relating to the Status of Refugees.

<sup>397</sup>See *mutatis mutandis*: C-300/11 *ZZ v Secretary of State for the Home Department* EU:C:2013:363, para 50-51; C-601/15 PPU, *J.N. v Staatsecretariat van Veiligheid en Justitie* [2016] EU:C:2016:84, para 50; Joined Cases C-402/05 P and C-415/05 *Kadi and Al Barakaat* (Grand Chamber), 3. 9. 2008. For further comparison, see approach of the CJEU concerning the risk of "public policy" in the case of *Z.Zh* (C-554/13, 11. 06. 2015, paras 48, 50, 56, 60, 65) and the Explanatory note. In the case of *J.N.* the CJEU states that strict circumscription of the power of the competent national authorities to detain an applicant on the basis of

### **Standard 28. Right to be released immediately in cases of unlawful detention**

The second sub-paragraph of Article 9 of the Recast Reception Directive (in conjunction with Article 28(4) of the Dublin III Regulation) states that “*where, as a result of the judicial review, detention is held to be unlawful, the applicant concerned shall be released immediately.*” However, not every irregularity in the exercise of the rights for the defence in an administrative procedure will constitute an infringement of those rights, and therefore, not every such breach will automatically require the release of the person concerned.<sup>398</sup>

Similarly, Article 5(4) of the ECHR states that for “*everyone who is deprived of his liberty /.../ the “lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.”* The Grand Chamber of the ECtHR in *Stanev v Bulgaria* states that “*the reviewing court must not have merely advisory functions but must have the competence to decide the lawfulness of the detention and to order release if the detention is unlawful*” (see *Ireland v the United Kingdom*, 18 January 1978, § 200, Series A no. 25; *Weeks v the United Kingdom*, 2 March 1987, § 61, Series A no. 114; *Chahal v the United Kingdom*, 15 November 1996, § 130, Reports of Judgments and Decisions 1996-V; and *A. and Others v the United Kingdom* [GC], no. 3455/05, § 202, ECHR 2009).<sup>399</sup> The court must have the power to order release if it finds that the detention is unlawful, because a mere power of recommendation is insufficient.<sup>400</sup> It is inconceivable that in a State subject to the rule of law a person should continue to be deprived of his liberty despite the existence of a court order for his release.<sup>401</sup> Therefore, while the ECtHR recognises that some delay in carrying out a decision to release a detainee is understandable and often inevitable, the national

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Article 8(3)(e) of the Recast Reception Directive is also ensured by the interpretation which the case law of the CJEU gives to the concepts of “national security” and “public order” found in other directives and which also applies in the case of Recast Reception Directive.

<sup>398</sup>C-383/13 PPU *M.G. and N.R.* EU:C:2013:533, para 39.

<sup>399</sup>*Stanev v Bulgaria* (Grand Chamber) App no 36760/06 17 January 2012, para 168; see also: *Amie v Bulgaria*, App no 58149/08 (ECtHR 12 February 2013), para 80; *A and Others v United Kingdom*, 3455/05 (ECtHR 19 Feb 2009, para 202; *Khlaifia and others v Italy* (Grand Chamber), 16483/12 (ECtHR 15 December 2016), para 131.

<sup>400</sup>*Benjamin and Wilson v United Kingdom* App no 28212/95 (26 September 2002), paras 33-34. In case the ECtHR finds a violation of Article 5 of the ECHR, it may decide in the operative part of the judgment that the respondent State must ensure immediate release of applicants from detention (see, for example: *L.M. and Others v Russia*, 15 October 2015, point 9 of the operative part of the judgment, para 169 and the last paragraph of section 3.5. of the ELI Statement).

<sup>401</sup>*Assanidze v Georgia* (Grand Chamber) App no 71503/01, (ECtHR 8 April 2004), para 173.

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authorities must attempt to keep it to a minimum.<sup>402</sup> This rule needs to be applied in conjunction with standards on the right to speedy judicial review.<sup>403</sup> If a judgment of the first instance court on unlawfulness of detention with a judicial order to release a detainee is not final due to the possibility of the administrative authority appealing against the judgment of the first instance court to the appellate court, then it is highly probable that standards of immediate release and speedy judicial review cannot be guaranteed, unless the first instance court issues an effective interim measure regarding the release of a detainee or if the first instance court applies the principle of direct effect of the second sub-paragraph of article 9(3) of the Recast Reception Directive. In this respect, it is also relevant that pursuant to Article 47 of the Charter, *“the principle of effective judicial protection affords an individual a right of access to a court or tribunal but not to a number of levels of jurisdiction.”*<sup>404</sup> Also, under the case-law of the ECtHR, States are not obliged to set up a second level of jurisdiction for the examination of the lawfulness of detention.<sup>405</sup> However, if a State institutes such a system, it must in principle accord to detainees the same guarantees on appeal as at first instance<sup>406</sup> and this includes the principle of adversarial proceedings and equality of arms.<sup>407</sup>

For the standards on immediate release in case of infringement in the right to be heard before the detention order is issued, see the Explanatory Note on standard no. 10 on the right to information and to personal interview before the detention order is issued.

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<sup>402</sup>*Giulia Manzoni v Italy* App no 19218/91, 1 July 1997, para 25. In the case of *Quinn v France*, a delay of eleven hours in executing a decision to release the applicant “forthwith” was found to be incompatible with Article 5(1) of the ECHR (*Quinn v France*, 18580/91 (ECtHR 22 March 1995) para 39-43); 114. European Court of Human Rights Guide on Article 5 of the Convention, (Council of Europe/European Court of Human Rights, 2014), p.11/point 40). In the case of *Mahamed Jama v Malta*, the applicant remained in detention for five days following a decision granting her subsidiary protection and the ECtHR found violation of article 5(1) of the ECHR (*Mahamed v Malta* App no 10290/13 (ECtHR 26 November 2015), paras 154-159).

<sup>403</sup>See standard no 24 of this Check-list.

<sup>404</sup>C-69/10, *Diouf v Ministre du Travail, de l’Emploi et de l’Immigration* EU:C:2011:524 para 69.

<sup>405</sup>*A.M. v the Netherlands* App no 29094/09 (ECtHR 5 July 2016), para 70.

<sup>406</sup>*Kučera v Slovakia* App no 48666/99, (ECtHR 17 07 2007), para 107, *Navarra v France*, 13190/87 (ECtHR 23 November 1993), para 28; *Toth v Austria*, 11894/85 (12 December 1991), para 84.

<sup>407</sup>*Catal v Turkey* App no 26808/08 (ECtHR 17 March 2012), paras 33-34.

**Standard 29. The impact of interim measures (under Rule 39 and national law) on the lawfulness of detention**<sup>408</sup>

The ECtHR has held that the grant of an interim measure under Rule 39 does not in itself render the detention of the person concerned unlawful.<sup>409</sup> However, the authorities must still envisage expulsion at a later stage.<sup>410</sup> Therefore, in a number of cases, in which respondent States refrained from deporting applicants in compliance with a Rule 39 measure, the ECtHR accepted that expulsion proceedings were temporarily suspended, but nevertheless remained “in progress”, with the consequence that the applicant’s continued detention did not violate Article 5(1) of the ECHR.<sup>411</sup> Similarly, when expulsion is suspended or blocked as a consequence of internal judicial review proceedings, the ECtHR considers them as a part of the deportation proceedings being ‘in progress’.<sup>412</sup> Nevertheless, suspension of the domestic proceedings due to the indication of an interim measure by the ECtHR should not result in a situation where the applicant languishes in detention for an unreasonably long period.<sup>413</sup>

**Standard 30. Derogation from obligations under Article 5(1) of the ECHR**<sup>414</sup>

In regards to Article 15 of the ECHR, the ECtHR states that by reason of their direct and continuous contact with the pressing needs of the moment, the national authorities are in principle better placed than an international judge to decide both on the presence of such

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<sup>408</sup>Rule 39(1) states that Chamber or, where appropriate, the President of the Section or a duty judge appointed pursuant to paragraph 4 of this Rule may, at the request of a party or of any other person concerned, or of their own motion, indicate to the parties any interim measure which they consider should be adopted in the interests of the parties or of the proper conduct of the proceedings (Rules of Court, Registry of the Court, Strasbourg, 1 January 2016).

<sup>409</sup>*Gebremedhin v France*, App no 25389/05 (ECtHR 26 March 2007), para 74.

<sup>410</sup>*S.P. v Belgium* (decision) App no 12572/08 (ECtHR 14 June 2011).

<sup>411</sup>*Al Hanchi v Bosnia and Herzegovina*, App no 48205/09, (ECtHR 15 November 2011), paras 49-51; *Al Husin v Bosnia and Herzegovina*, 3727/08, 7.02.2012, paras 67-69; *Umirov v Russia*, 17455/11, 11.02.2013, paras 138-42.

<sup>412</sup>*Alim v Russia*, App no 39417/07 (ECtHR 27 September 2011), para 60.

<sup>413</sup>*A.H. and J.K. v Cyprus* App no 41903/10 and 41911/10 (ECtHR 21 June 2015), para 188.

<sup>414</sup>Article 15 of the ECHR states that “in time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.”

an emergency and on the nature and scope of the derogations necessary to avert it. Accordingly, in this matter a wide margin of appreciation should be left to the national authorities. Nonetheless, Contracting Parties do not enjoy an unlimited discretion. It is for the ECtHR to rule whether, *inter alia*, the States have gone beyond the extent strictly required by the exigencies of the crisis. The domestic margin of appreciation is thus accompanied by European supervision. In exercising this supervision, the ECtHR must give appropriate weight to such relevant factors as the nature of the rights affected by the derogation and the circumstances leading to, and the duration of, the emergency situation.<sup>415</sup> If the highest domestic court has examined the issues relating to the States' derogation, the ECtHR considers it would be justified in reaching a contrary conclusion only if satisfied that the national court had misinterpreted or misapplied Article 15 or the ECtHR's jurisprudence under that Article or reached a conclusion which was manifestly unreasonable.<sup>416</sup>

### **Standard 31. Right to compensation in the case of unlawful detention**

Explanations relating to the Charter provide that *"the rights in Article 6 are the rights guaranteed by Article 5 of the ECHR, and in accordance with Article 52(3) of the Charter, they have the same meaning and scope. Consequently, the limitations which may legitimately be imposed on them, may not exceed those permitted by the ECHR."*<sup>417</sup> Article 5(5) of the ECHR states that *"everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation."* In the case of *Richmond Yaw and others v Italy*, the ECtHR confirmed that mere recognition given by the Supreme Court of the irregularity of the prolongation of detention does not constitute a

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<sup>415</sup>*A and Others v United Kingdom* App no 3455/05 (19 February 2009) para 173.

<sup>416</sup>*Ibid.* para 174. For the standards on "public emergency threatening the life of the nation" and on the measures "strictly required by the exigencies of the situation", see the Explanatory note to this Check-list.

<sup>417</sup>*Explanations Relating to the Charter of Fundamental Rights* (Official Journal of the EU (2007/C 303/02, 14 December 2007). The third sub-paragraph of Article 6(1) of the Treaty of the Consolidated Version of the Treaty on European Union states that the rights freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions.

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sufficient redress for the victim of a violation of Article 5(1)(f) of the ECHR.<sup>418</sup> Under the case-law of the ECtHR, the right to compensation set forth in paragraph 5 presupposes that a violation of one of the paragraphs has been established, either by a domestic authority or by the Court.<sup>419</sup> Article 5(5) of the ECHR is complied with where it is possible to apply for compensation in respect of a deprivation of liberty affected in conditions contrary to paragraphs 1, 2, 3 or 4.<sup>420</sup> The arrest or detention may be lawful under domestic law, but still in breach of Article 5, which makes Article 5(5) of the ECHR applicable.<sup>421</sup> Article 5(5) creates a direct and enforceable right to compensation before the national courts.<sup>422</sup> An enforceable right to compensation must be available either before or after the ECtHR's judgment.<sup>423</sup> The effective enjoyment of the right to compensation must be ensured with a sufficient degree of certainty.<sup>424</sup> Compensation must be available both in theory<sup>425</sup> and in practice.<sup>426</sup> In considering compensation claims, the domestic authorities are required to interpret and apply domestic law in the spirit of Article 5, without excessive formalism.<sup>427</sup> The right to compensation relates primarily to financial compensation. It does not confer a right to secure the detained person's release, which is covered by Article 5(4) of the ECHR.<sup>428</sup> In the case of *Abdi Mahamud v Malta*, the ECtHR established that action in tort cannot be considered as an effective remedy for the purpose of a complaint about conditions of detention under Article 3 of the ECHR. In that case the ECtHR established that it has not been satisfactory established that action in tort may give rise to compensation for any non-

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<sup>418</sup>*Richmond Yaw and Others v Italy* App nos 3342/11, 3391/11, 3408/11, 3447/11 (ECtHR 6 October 2016), para 50.

<sup>419</sup>*N.C. v Italy (Grand Chamber)* App no 24952/94 (ECtHR 18 December 2012), para 49; *Pantea v Romania*, App no 33343/96 (ECtHR 3 June 2003), para 262; *Vachev v Bulgaria* App no 42987/98 (ECtHR 8 July 2004), para 78.

<sup>420</sup>*Michalák v Slovakia* App no 30157/03 (ECtHR 8 February 2011), para 204; *Lobanov v Russia*, App no 15578/03, (ECtHR 02 February 2010), para 54.

<sup>421</sup>*Harkmann v Estonia* App no 2192/03 (ECtHR 11 July 2006), para 50.

<sup>422</sup>*A. and Others v United Kingdom (Grand Chamber)* App no 3455/05 (19 February 2009), para 229; *Storck v Germany*, App no 61603/00 (ECtHR 16 June 2006), para 122.

<sup>423</sup>*Stanev v Bulgaria (Grand Chamber)*, App no 36760/06 (ECtHR 17 January 2012), paras 183-84; *Brogan and Others v United Kingdom*, App no 11386/85 (ECtHR 29 November 1988), para 67.

<sup>424</sup>*Ciulla v Italy* App no 11152/84 (ECtHR 22 February 1989), para 44; *Sakik and Others v Turkey* App no 87/1996/706/898-903 (ECtHR 26 November 1997), para 60.

<sup>425</sup>*Dubovik v Ukraine* App nos 33210/07 and 41866/08 (ECtHR 15 October 2009), para 74.

<sup>426</sup>*Chitayev and Chitayev v Russia* App no 59334/00 (ECtHR 18 January 2007), para 195.

<sup>427</sup>*Shulgin v Ukraine* App no 29912/05 (ECtHR 8 December 2011), para 65; *Houtman and Meeus v Belgium* App no 22945/07 (ECtHR 17 March 2009), para 46.

<sup>428</sup>*Bozano v France* App no 9990/82 (ECtHR 18 December 1986).



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pecuniary damage and that it was not a preventive remedy as it cannot impede the continuation of the violation alleged or provide the applicant with an improvement in the detention conditions.<sup>429</sup>

Article 5(5) of the ECHR does not prohibit the Contracting States from making the award of compensation dependent upon the ability of the person concerned to show damage resulting from the breach. There can be no question of “compensation” where there is no pecuniary or non-pecuniary damage to compensate.<sup>430</sup> However, excessive formalism in requiring proof of non-pecuniary damage resulting from unlawful detention is not compliant with the right to compensation.<sup>431</sup>

Article 5 (5) of the ECHR does not entitle the applicant to a particular amount of compensation.<sup>432</sup> However, compensation which is negligible or disproportionate to the seriousness of the violation would not comply with the requirements of Article 5 (5) of the ECHR as this would render the right guaranteed under that provision theoretical and illusory.<sup>433</sup> An award cannot be considerably lower than that awarded by the ECtHR in similar cases.<sup>434</sup>

For the general principles and standards regarding state liability where an individual suffered loss or damage as a result of the breach of EU law by a Member State, see paragraph 13 of Section 3.3. of this Statement.

### **Standard 32. Right to reasoned judicial decisions and their enforcement (execution)**

In general, the fundamental right to fair legal process enshrined in Article 47 of the Charter

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<sup>429</sup>*Abdi Mahamud v Malta*, App no 56796/13 (ECtHR 3 May 2016), para 50.

<sup>430</sup>*Wassink v the Netherlands*, App no 12535/86 (ECtHR 27 September 1990), para 38.

<sup>431</sup>*Danev v Bulgaria* App no 9411/05 (ECtHR 2 September 2010) paras 34-35.

<sup>432</sup>*Damian-Burueana and Damian v Romania* App no 6773/02 (ECtHR 26 May 2009), para 89; *Şahin Çağdaş v Turkey* App no 28137/02 (ECtHR 11 April 2006), para 34.

<sup>433</sup>*Cumber v United Kingdom*, Commission decision App no 28779/95 (ECtHR 27 November 1996), *Attard v Malta* (decision) App no 46750/99 (ECtHR 28 September 2000).

<sup>434</sup>*Ganea v Moldova* App no 2474/06 (ECtHR 17 May 2011), para 30; *Cristina Boicenco v Moldova*, 25688/09 (ECtHR 27 September 2011), para 43.

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entails an obligation “to provide a relevant and adequate statement of reasons”.<sup>435</sup> Concerning disputes on detention of asylum seekers, the secondary EU law explicitly regulates that decisions on detention, which must be ordered in writing by judicial or administrative authorities, shall state “the reasons in fact and in law on which the decision is based”.<sup>436</sup> Since Article 47 of the Charter is not limited to civil rights (and obligations and criminal charges) as is the case with Article 6 of the ECHR,<sup>437</sup> more detailed standards regarding the obligation to state reasons in judgments may be inspired by the guarantees enshrined in Article 6(1) of the ECHR. Under case-law of the ECtHR, these guarantees include the obligation for courts to give “sufficient” reasons for their decisions.<sup>438</sup> A reasoned decision shows the parties that their case has truly been heard. Although a domestic court has a certain margin of appreciation when choosing arguments and admitting evidence, it is obliged to justify its activities by giving reasons for its decisions.<sup>439</sup> Article 6(1) of the ECHR obliges courts to give reasons for their decisions, but cannot be understood as requiring a detailed answer to every argument.<sup>440</sup> The extent to which this duty to give reasons applies may vary according to the nature of the decision,<sup>441</sup> and can only be determined in the light of the circumstances of the case. It is necessary to take into account, *inter alia*, the diversity of the submissions that a litigant may bring before the courts and the differences existing in the contracting States with regard to statutory provisions, customary rules, legal opinion and the presentation and drafting of judgments.<sup>442</sup> However, where a party’s submission is decisive for the outcome of the proceedings, it requires a specific and express reply.<sup>443</sup> The

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<sup>435</sup>C-439/11 P, *Ziegler (Appeal)* (ECtHR 11 July 2013) EU:C:2013:513, para 104.

<sup>436</sup>Article 9(2) of Reception Directive 2013/33/EU, in conjunction with Article 28(4) of Dublin III Regulation.

<sup>437</sup>See: *Maaouia v France*, App no 39652/98 (ECtHR 5 October 2000), paras 33-41.

<sup>438</sup>*H. v Belgium* App no 8950/80 (ECtHR 30 November 1987), para 53.

<sup>439</sup>*Suominen v Finland* App no 37801/97 (ECtHR 1 July 2003), para 36.

<sup>440</sup>*Van de Hurk v the Netherlands* App no 16034/90 (ECtHR 19 March 1994), para 61; *Garcia Ruiz v Spain* (Grand Chamber) App no 30544/96 (ECtHR 21 January 1999), para 26; *Jahnke and Lenoble v France* (decision), App no 40490/98 (ECtHR 29 August 2000); *Perez v France* (Grand Chamber) App no 47287/99 (ECtHR 12 February 2004), para 81; see *mutatis mutandis*: C-439/11 P, *Ziegler (Appeal)* (ECtHR 11 July 2013) EU:C:2013:513 para 82.

<sup>441</sup>*Ruiz Torija v Spain* App no 18390/91 (ECtHR 9 December 1994), para 29; *Hiro Balani v Spain* App no 18064/91, (ECtHR 9 December 1994), para 27.

<sup>442</sup>*Ruiz Torija v Spain* App no 18390/91 (ECtHR 9 December 1994), para 29; *Hiro Balani v Spain* App no 18064/91 (ECtHR 9 December 1994), para 27.

<sup>443</sup>*Ruiz Torija v Spain* App no 18390/91 (ECtHR 9 December 1994), para 30; *Hiro Balani v Spain* App no 18064/91 (ECtHR 9 December 1994), para 28.

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courts are therefore required to examine the litigants' main arguments<sup>444</sup> and/or pleas concerning the rights and freedoms guaranteed by the ECHR and its Protocols with particular rigour and care.<sup>445</sup>

Furthermore, the right to enforcement (execution) of judicial decisions, given by any court, is an integral part of the right of access to court.<sup>446</sup> The effective protection of the litigant and the restoration of legality therefore presuppose an obligation on the administrative authorities' part to comply with the judgment.<sup>447</sup> Thus, while some delay in the enforcement (execution) of a judgment may be justified in certain circumstances, the delay may not be such as to impair the litigant's right to enforcement of the judgment.<sup>448</sup> Enforcement (execution) must be full and exhaustive and not just partial,<sup>449</sup> and may not be prevented, invalidated or unduly delayed.<sup>450</sup>

### **Standard 33. Protection of inhuman or degrading treatment in relation to reception conditions (of detention) in another Member State(s)**

If there are substantial grounds for believing that there are systemic flaws in the asylum procedure and in the reception conditions for applicants in the Member State, resulting in a risk of inhuman or degrading treatment within the meaning of Article 4 of the Charter, the determining Member State must continue to examine the criteria set out in Chapter III of the Dublin III Regulation in order to establish whether some other Member State can be

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<sup>444</sup>*Buzescu v Romania* App no 61302/00 (ECtHR 24 May 2005), para 67; *Donadze v Georgia* App no 74644/01 (ECtHR 7 March 2006), para 35.

<sup>445</sup>*Wagner and J.M.W.L. v Luxembourg* App no 76240/01 (ECtHR 28 June 2007), para 96; European Court of Human Rights *Guide on Article 6, Right to a fair trial (civil limb)*, (Council of Europe/European Court of Human Rights, May 2013), 45-46/points 237-242.

<sup>446</sup>*Hornsby v Greece* App no 18357/91 (ECtHR 19 March 1997), para 40; *Scordino v Italy (no1)* (Grand Chamber) App no 36813/97 (ECtHR 29 March 2006), para 196.

<sup>447</sup>*Hornsby v Greece* App no 18357/91 (ECtHR 19 March 1997), para 41; *Kyrtatos v Greece* App no 41666/98 (ECtHR 22 May 2003), paras 31-32.

<sup>448</sup>*Burdov v Russia*, App no 33509/04 (ECtHR 15 January 2009), paras 35-37.

<sup>449</sup>*Matheus v France* App no 62740/00 (ECtHR 31 March 2005), para 58; *Sabin Popescu v Romania* App no 48102/99 (ECtHR 2 March 2004) paras 68-76.

<sup>450</sup>*Immobiliare Saffi v Italy*, (Grand Chamber) App no 22774/93 (28 July 1999) para 74. See also standard no 28 of this Check-list on the right to be immediately released in case of unlawful detention.

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designated as responsible.<sup>451</sup> If there is no other Member State responsible, then the applicant cannot be transferred and cannot be detained any longer, based on the Dublin III Regulation. One of the relevant criteria for the application of Article 3(2) of the Dublin III Regulation is that the Member State “cannot be unaware” of systemic deficiencies in the reception conditions in the relevant Member State.<sup>452</sup> The term “systemic flaws” should not be taken to mean that the “slightest infringement” would be sufficient to prevent the transfer of an asylum seeker to the Member State.<sup>453</sup> Furthermore, in this context, the CJEU makes a comparison to the concept of “safe third country,” in the sense that a country can only be considered safe if it “not only has ratified the Geneva Convention and the ECHR, but it also observes the provisions thereof /.../ The same principle is applicable both to Member State and third countries.”<sup>454</sup> Under the case-law of the ECtHR, the applicant “should not be expected to bear the entire burden of proof” regarding the detention conditions in the Member State where he/she is supposed to be transferred.<sup>455</sup> From the reasoning in the judgment of the Grand Chamber in the case of *Tarakhel v Switzerland*, it is clear that the existence of systemic deficiencies as regards reception conditions in another Member State is not a *conditio sine qua non* for protection under Article 3 of the ECHR.<sup>456</sup>

Since the existence of systemic deficiencies regarding reception conditions in another Member State is not a *conditio sine qua non* for the protection under Article 3 of the ECHR (or Article 4 of the Charter), suffering which flows from naturally occurring illness - particularly serious mental or physical conditions, which may lead to the applicant's health significantly deteriorating - may be covered by Article 3 of the ECHR (or Article 4 of the Charter), too.<sup>457</sup>

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<sup>451</sup>Second sub-paragraph of Article 3(2) of the Dublin III Regulation; C-411/10 and C-493/10 Joined Cases *N.S. and M.E* (Grand Chamber) (ECtHR 21 December 2011) para 86.

<sup>452</sup>*Ibid.* paras 94, 106; *M.S.S. v Belgium and Greece* (Grand Chamber) App no 30696/09 (ECtHR 21 January 2011), paras 352, 366.

<sup>453</sup>C-411/10 and C-493/10 *N.S. and M.E.* (Grand Chamber), (ECtHR 21 December 2011) paras 82, 84.

<sup>454</sup>*M.S.S. v Belgium and Greece*, (ECtHR 21 January 2011) para 351- 352.

<sup>455</sup>*M.S.S. v Belgium and Greece*, (ECtHR 21 January 2011) para 351- 352.

<sup>456</sup>*Tarakhel v Switzerland* App no 29217/12 (ECtHR 4 November 2014). The same position is taken by the CJEU in the case C-578/16 PPU *C.K and others* EU:C:2017:127, para 91).

<sup>457</sup>C-578/16 PPU, *C.K. and others* EU:C:2017:127 paras 55-93. For concrete criteria and standards that are applicable for the assessment of conditions in detention in another Member State, see the Explanatory note to this Check-list.

### **Standard 34. Conditions of detention**

*“As regards /.../ detention conditions, where appropriate, Member States should apply the provisions of the Reception Directive 2013/33/EU also to persons detained on the basis of this Regulation.”*<sup>458</sup> The standard no. 34 is composed of 9 particular elements that are described under points 34.1. - 34.9. below.

#### **Standard 34.1. General conditions of detention: respect for human dignity, prohibition of inhuman/degrading treatment and the protection of family life**

*“Applicants who are in detention should be treated with full respect for human dignity and their reception should be specifically designed to meet their needs in that situation.”*<sup>459</sup> The CJEU in the case of *Cimade* states that *“further to the general scheme and purpose of the Reception Directive 2003/9 and the observance of fundamental rights, in particular the requirements of Article 1 of the Charter, under which human dignity must be respected and protected, the asylum seeker may not /.../ be deprived - even for a temporary period of time after the making of the application for asylum and before being actually transferred to the responsible Member State - of the protection of the minimum standards laid down by that directive.”*<sup>460</sup>

As a rule, detention shall take place in specialised detention facilities. If this is not possible, the detained applicant shall, in so far as possible, be kept separately from ordinary prisoners and detention conditions, as provided for in the Recast Reception Directive.<sup>461</sup> This exception (derogation) must be interpreted strictly,<sup>462</sup> because the separated accommodation of third-country nationals and ordinary prisoners is an unconditional

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<sup>458</sup>Recital 20 of the Dublin III Regulation. In this regard, Article 28(4) of the Dublin III Regulation explicitly mention Articles 9, 10 and 11 of the Reception Directive 2013/33/EU. For further details on this issue, see also standards of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT, /Inf (2017)3, Factsheet, March 2017, Council of Europe).

<sup>459</sup> The first sentence in Recital 18 of the Dublin III Regulation.

<sup>460</sup>C-179/11 *Cimade* EU:C:2012:594, para 56.

<sup>461</sup>Article 10(1) of the Recast Reception Directive in conjunction with Article 28(4) of the Dublin III Regulation. See also standards on separation of facilities for detainees who are irregular migrants from ordinary prisoners in: C-473/13 and C-514/13 Joined Cases *Bero v Regierungspräsidium Kassel* and *Bouzalmate v Kreisverwaltung Kleve* EU:C:2014:2095, paras 24-32; C-474/13, *Pham* 17.07.2014, paras 14-23.

<sup>462</sup>See for comparison: C-473/13 and C-514/13 Joined Cases *Bero v Regierungspräsidium Kassel* and *Bouzalmate v Kreisverwaltung Kleve* EU:C:2014:2095 para 25.

obligation.<sup>463</sup>

When assessing conditions of detention, account has to be taken of the cumulative effects, as well as of specific allegations made by the applicant. In particular, the major factors will be the length of the period during which the applicant was detained in the impugned conditions and where overcrowding reaches a certain level, the lack of space in an institution may also constitute a key factor to be taken into account.<sup>464</sup>

Moreover, where children are detained (either alone or together with their parents), the jurisprudence of the ECtHR shows that Article 3 of the ECHR is not the only right that may be engaged. In the case of *Mubilanzila Mayeka and Kaniki Mitunga v Belgium* the Court found that the detention of an unaccompanied five-year old violated the Article 3 and Article 8 rights of both the child and her mother in DRC.<sup>465</sup> In the case of *A.B et autres c. France*, which concerned the administrative detention of accompanied foreign minors, the Court not only held that the conditions of detention violated the children's Article 3 rights, but also that there had been an interference with the whole family's Article 8 rights.<sup>466</sup> In this context, the ECtHR has also adjudicated that the sole fact that a family unit is maintained does not necessarily guarantee respect for the right to a family life, particularly where the family is detained.<sup>467</sup> The fact of confining the applicants to a detention centre, for fifteen days, thereby subjecting them to custodial living conditions typical of that kind of institution, can be regarded as an interference with the effective exercise of their family life.<sup>468</sup> Such interference must be in accordance with the law and necessary in a democratic society.<sup>469</sup> Authorities have a duty to strike a fair balance between the competing interests of the individual and society as a whole. In assessing proportionality, the child's best interests must be paramount. The protection of the child's best interests involves both keeping the family together as far as possible, and considering alternatives to detention so that the detention

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<sup>463</sup>C-474/13, *Pham*, 17 July 2014, para 17. This stands even if a person concerned wishes to be detained together with ordinary prisoners (*Ibid.* para 23).

<sup>464</sup>*Ibid.* paras 163-164. See more on this under standard 34.3 of this Check-list.

<sup>465</sup>*Mubilanzila Mayeka and Kaniki Mitunga v Belgium* App no 13178/03 (ECtHR 12 October 2006) paras 72-85.

<sup>466</sup>*A. B. and Others v France* App no 11593/12 (ECtHR 12 July, paras 139-156.

<sup>467</sup>*Popov v France*, 39472/07 and 39474/07, 19. 1. 2012, para 134.

<sup>468</sup>*Ibid.* para 134.

<sup>469</sup>*Ibid.* para 135.

of minors is only a measure of last resort.<sup>470</sup>

From the standpoint of EU law, there is a “*general principle*” that in implementing the Recast Reception Directive Member States shall take into account the specific situation of vulnerable persons such as minors, unaccompanied minors, disabled people, elderly people, pregnant women, single parents with minor children, victims of human trafficking, persons with serious illnesses, persons with mental disorders and persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence, such as victims of female genital mutilation.<sup>471</sup>

### **Standard 34.2. Inhuman/degrading treatment in detention: threshold and onus**

Article 3 of the ECHR enshrines one of the most fundamental values of democratic societies and prohibits in absolute terms torture and inhuman or degrading treatment or punishment, irrespective of the circumstances and of the victim’s conduct. In view of the absolute nature of Article 3 of the ECHR, the “margin of appreciation” does not apply where there is an alleged breach of the substantive Article. In order to fall within the scope of Article 3, ill-treatment must attain a minimum level of severity. The assessment of this minimum is relative; it depends on all the circumstances of the case, such as the duration of the treatment and its physical or mental effects and, in some instances, the sex, age and state of health of the victim.<sup>472</sup> Article 3 of the ECHR requires the State to ensure that detention conditions are compatible with respect for human dignity, that the manner and method of the execution of the measure do not subject the detainees to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention and that, given the practical demands of imprisonment, their health and well-being are adequately secured.<sup>473</sup> From the standpoint of Article 3 of the ECHR, the ECtHR “*attaches considerable importance to the applicant's status as an asylum seeker and, as such, a member of a*

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<sup>470</sup>*Ibid.* 139-141. See also standard no 34.5 of this Check-list on minors and the Explanatory note on standard no 37.1 of the Check-list no 2.

<sup>471</sup>Article 21(1) of the Reception Directive 2013/33/EU.

<sup>472</sup>*M.S.S. v Belgium and Greece* (Grand Chamber) App no 30696/09 (ECtHR 21 January 2011) para 219; *Kudła v Poland* (Grand Chamber) App no 30210/96 (ECtHR 26 October 2000) para 91; *Khlaifia and Others v Italy* App no 16483/12 (ECtHR 15 December 2016) paras 158-159.

<sup>473</sup>*M.S.S. v Belgium and Greece* (Grand Chamber) App no 30696/09 (ECtHR 21 January 2011) para 221.

*particularly underprivileged and vulnerable population group in need of special protection*".<sup>474</sup>

In order to determine whether the threshold of severity has been reached, the ECtHR also takes other factors into consideration, in particular: the purpose for which the ill-treatment was inflicted, although the absence of an intention to humiliate or debase the victim cannot conclusively rule out its characterisation as degrading; the context in which the ill-treatment was inflicted, such as an atmosphere of heightened tension and emotions; whether the victim is in a vulnerable situation, which is normally the case for persons deprived of their liberty, but there is an inevitable element of suffering and humiliation involved in custodial measures and this as such, in itself, will not entail a violation of Article 3 of the ECHR.<sup>475</sup>

The ECtHR considers treatment to be "*inhuman*" when it was "*premeditated, was applied for hours at a stretch and caused either actual bodily injury or intense physical or mental suffering*".<sup>476</sup> The treatment is considered to be "*degrading*" when it humiliates or debases an individual, showing a lack of respect for, or diminishing, his or her human dignity, or arousing feelings of fear, anguish or inferiority capable of breaking an individual's moral and physical resistance.<sup>477</sup> It may suffice that the victim is humiliated in his or her own eyes, even if not in the eyes of others. Although the question whether the purpose of the treatment was to humiliate or debase the victim is a factor to be taken into account, the absence of any such purpose cannot conclusively rule out a finding of a violation of Article 3 of the ECHR.<sup>478</sup> In practice, the ECtHR will not always distinguish between inhuman treatment and degrading treatment, sometimes preferring instead to simply find that there has been a breach of Article 3. In other cases, it might make a specific finding that the treatment in question is either inhuman or degrading.

With regard to the burden of proof, the ECtHR generally relies on the rule that allegations of ill-treatment must be supported by appropriate evidence. In other words, the applicant

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<sup>474</sup>*M.S.S. v Belgium and Greece* (Grand Chamber) App no 30696/09 (ECtHR 21 January 2011) para 251.

<sup>475</sup>*Khlaifia and Others v Italy* App no 16483/12 (ECtHR 15 December 2016) para 160.

<sup>476</sup>*M.S.S. v Belgium and Greece* App no 3069/09 (ECtHR 21 January 2011), para 220.

<sup>477</sup>*Ibid.* para 220; *Kudła v Poland* App no 30210/96 (ECtHR 26 October 2000), para 92; *Pretty v United Kingdom* App no 2346/02 (ECtHR 29 April 2002), para 52.

<sup>478</sup>*M.S.S. v Belgium and Greece* App no 30696/09 (ECtHR 21 January 2011), para 220; *Khlaifia and others v Italy* (Grand Chamber) App no 16483/12 (ECtHR 15 December 2016), para 169.



bears the responsibility of providing evidence of treatment contrary to Article 3. However, the ECtHR has noted that cases concerning allegations of inadequate conditions of detention do not lend themselves to a rigorous application of the principle *affirmanti incumbit probatio* (he who alleges something must prove that allegation) because in such instances the respondent Government alone has access to information capable of corroborating or refuting these allegations. Accordingly, applicants might experience certain difficulties in procuring evidence to substantiate a complaint in that connection. Nevertheless, in such cases applicants may well be expected to submit at least a detailed account of the facts complained of and provide – to the greatest possible extent – some evidence in support of their complaints.<sup>479</sup> However, after the ECtHR has given notice of the applicant’s complaint to the Government, the burden is on the latter to collect and produce relevant documents. A failure on their part to submit convincing evidence on material conditions of detention may give rise to the drawing of inferences as to the well-foundedness of the applicant’s allegations.<sup>480</sup> *“In assessing evidence, the ECtHR has generally applied the standard of proof beyond reasonable doubt. However, such proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of facts”*.<sup>481</sup>

**Standard 34.3. Conditions of detention: overcrowding, ventilation, access to light and natural air or to exercise in the open air, quality of heating, health requirements, basic sanitary and hygiene requirements**

The ECtHR has found overcrowding by itself to be sufficient to breach Article 3 where the personal space granted to the applicant was less than 3 m<sup>2</sup> of floor surface per detainee (including space occupied by furniture but not counting the in-cell sanitary facility). In multi-occupancy accommodation this ought to be maintained as the relevant minimum standard

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<sup>479</sup>See *Visloguzov v Ukraine* App no 32362/02 (ECtHR 20 May 2010), para 45.

<sup>480</sup>See: *Gubin v Russia* App no 8217/04 (ECtHR 17 June 2010), para 56; *Khudoyorov v Russia* App no 6847/02 (ECtHR 8 November 2005), para 113; *Alimov v Turkey*, App no 1434/13, (ECtHR 6 September 2016), para 75.

<sup>481</sup>*Koktysh v Ukraine* App no 43707/07 (ECtHR 10 December 2009), para 90; *Salman v Turkey*, (Grand Chamber), App no 21986/93 (ECtHR 27 June 2000) para 100; *Khlaifia and Others v Italy* App no 16483/12 (ECtHR 15 December 2016), paras 127, 168.

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for its assessment under Article 3 of the ECHR.<sup>482</sup> A weighty but not irrebuttable presumption of a violation of Article 3 arose when the personal space available to a detainee fell below 3 sq. m in multi-occupancy accommodation. The presumption could be rebutted in particular by demonstrating that the cumulative effects of the other aspects of the conditions of detention compensated for the scarce allocation of personal space. In that connection, the ECtHR takes into account such factors as the length and extent of the restriction, the degree of freedom of movement and the adequacy of out-of-cell activities, as well as whether or not the conditions of detention in the particular facility are generally decent.”<sup>483</sup>

In *Aden Ahmed v Malta* (para. 87) the ECtHR had regard not just to the floor space afforded to each detainee, but also to whether each detainee had an individual sleeping place in the cell, and whether the overall surface area of the cell was such as to allow detainees to move freely between the furniture items. Based on standards from *Aden Ahmed v Malta*, in deciding whether or not there has been a violation of Article 3 on account of the lack of personal space, the ECtHR has to have regard to the following three elements: “*each detainee must have an individual sleeping place in a cell; each detainee must dispose of at least three square meters of floor space; and the overall surface area of the cell must be such as to allow the detainees to move freely between the furniture items. The absence of any above elements creates in itself a strong presumption that the conditions of detention amounted to degrading treatment and were in breach of Article 3.*”<sup>484</sup> As the fourth element, the ECtHR refers to “*other aspects.*” Where overcrowding was not significant enough to raise itself an issue under Article 3, the ECtHR has taken into account “*other aspects*” of detention

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<sup>482</sup>*Khlaifia and Others v Italy* (Grand Chamber) App no 16483/12 (ECtHR 15 December 2016), para 166; see also: *Kadikis v Latvia* App no 62393/00 (ECtHR 4 May 2006), para 55; *Andrei Frolov v Russia* App no 205/02 (ECtHR 29 March 2007), paras 47-49; *Kantayev v Russia* App no 37213/02 (ECtHR 21 June 2007), paras 50-51; *Sulejmanovic v Italy* App no 22635/03 (ECtHR 16 July 2009), para 43; *Torreggiani and Others v Italy* App nos 43517/09, 46882/09, 55400/09 et al. (ECtHR 8 January 2013), para 68.

<sup>483</sup>*Khlaifia and Others v Italy* (Grand Chamber) App no 16483/12 (ECtHR 15 December 2016), para 166. For example, the ECtHR notes that scarce space in relative terms may in some circumstances be compensated for by the possibility to move about freely within the confines of a detention facility and by unobstructed access to natural light and air (*Alimov v Turkey* App no 14344/13 (ECtHR 6 September 2016), para 78 or by the freedom to spend time away from the dormitory rooms (*Mahamed Jama v Malta* App no 10290/13 (ECtHR 26 November 2016), para 92. See also: *Abdi Mahamud v Malta* App no 56796/13 (ECtHR 3 May 2016) paras 81-83).

<sup>484</sup>*Aden Ahmed v Malta* App no 55352/12 (ECtHR 9 December 2013), para 87.

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conditions, including the ability to use the toilets privately,<sup>485</sup> available ventilation, access to light and natural air, the quality of heating and balanced meals<sup>486</sup> and respect for basic health requirements. Therefore, in cases where each detainee had 3 to 4 m<sup>2</sup>, the ECtHR found a violation of Article 3 where the lack of space was accompanied by a lack of ventilation and light,<sup>487</sup> limited access to outdoor exercise,<sup>488</sup> or a total lack of privacy in cells.<sup>489</sup> The ECtHR mentions the Prisons Standards developed by the Committee for the Prevention of Torture, which specifically deal with outdoor exercise and consider it a basic safeguard of prisoners' well-being that all of them, without exception, should be allowed at least one hour of exercise in the open air every day, preferably as part of a broader programme of out-of-cell activities.<sup>490</sup> Under the standards of the ECHR “*access to outdoor exercise is a fundamental component of the protection afforded to persons deprived of their liberty under Article 3 and as such it cannot be left to the discretion of the authorities.*”<sup>491</sup> For that reason, physical characteristics of outdoor exercise facilities are also relevant.<sup>492</sup> Under EU secondary law, there is a special provision which says that detained applicants shall have

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<sup>485</sup>For the compliance with basic sanitary and hygienic requirements, see, for example: *Anayev and Others v Russia* App nos 42525/07 and 60800/08, paras 156-159, *Aden Ahmed v Malta* App no 55352/12 (ECtHR 9 December 2013), para 88; *Moiseyev v Russia* App no 62936/00 (ECtHR 9 October 2008) para 124.

<sup>486</sup>See, for example, *Mahamed Jama v Malta* App no 10290/13 (ECtHR 26 November 2015), paras 96, 98; *Abdi Mahamud v Malta* App no 56796/13 (ECtHR 3 May 2016), paras 84, 85, 89).

<sup>487</sup>*Torreggiani and Others v Italy* App nos 43517/09, 46882/09, 55400/09 et al (ECtHR 8 January 2013), para 69; see also *Sergey Babushkin v Russia* App no 5993/08 (ECtHR 16 October 2015) para 44; *Vlasov v Russia* App no 51279/09 (ECtHR 10 February 2010), para 84; *Moiseyev v Russia* App no 62936/00 (ECtHR 9 October 2008), paras 124-127.

<sup>488</sup>*István Kovács Gábor v Hungary* App no 15707/10 (ECtHR 17 January 2012), para 26; see also *Mandič and Jović v Slovenia* App nos 5774/10 and 5985/10, para 78; *Babar Ahmad and Others v United Kingdom* App nos 24027/07, 11949/08, 36742/08, 66911/09 and 67354/09 (ECtHR 10 April 2012) paras 213-214.

<sup>489</sup>*Novoselov v Russia* App no 66460/01 (ECtHR 2 June 2005) paras 32 and 40-43; *Khoudoyorov v Russia* no 6847/02 (ECtHR 8 November 2005), paras 106-107; *Belevitski v Russia* App no 72967/01 (ECtHR 1 March 2007) paras 73-79.

<sup>490</sup>*Abdullahi Elmi and Aweys Abubakar v Malta* App nos 25794/13 and 28151/13 (ECtHR 22 November 2016), para 102.

<sup>491</sup>This is so regardless of how good the material conditions might be in the cells. (*Alimov v Turkey* App no 14344/13 (ECtHR 6 September 2016), para 83. See also: *Mahamed Jama v Malta* App no 10290/13 (ECtHR 25 November 2015), para 93.

<sup>492</sup>For instance, an exercise yard that is just two square metres larger than the cell, is surrounded by three-metre-high walls, and has an opening to the sky covered with metal bars and a thick net does not offer inmates proper opportunities for recreation and recuperation (*Mahamed Jama v Malta* App no 10290/13 (ECtHR 26 November 2015), para 93; see also paras 94-95).

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access to open-air spaces.<sup>493</sup> In addition, the time during which an individual was detained in the contested conditions is an important factor to consider.<sup>494</sup>

As regards the notion of the so called “continuous detention”, the ECtHR stated that when complaints in relation to conditions of detention do not simply relate to a specific event, but which concern a whole range of problems regarding sanitary conditions, the temperature in cells, overcrowding, lack of adequate medical treatment, which have affected an inmate throughout his or her incarceration, the ECtHR regards this as a “continuing situation”, even if the person concerned has been transferred between various detention facilities in the relevant period.<sup>495</sup>

For concrete examples of circumstances where the ECtHR did (not) find a violation of Article 3 of the ECHR, see summaries of cases in the judgment of the *Khlaifia and others v Italy* (paras. 171-177) and the Explanatory Note.

### **Standard 34.4. Right to communication and information in detention**

In regards to the right to communication, representatives of the UNHCR or of the organisation which is working on the territory of the Member State concerned (on behalf of the UNHCR) pursuant to an agreement with that Member State, shall have the possibility to communicate and visit applicants in conditions that respect privacy.<sup>496</sup> Member States shall ensure that family members, legal advisers or counsellors and persons representing relevant non-governmental organisations recognised by the Member State concerned have the possibility to communicate with and visit applicants in conditions that respect privacy. Restrictions on access to the detention facility may be imposed only where, by virtue of national law, they are objectively necessary for the security, public order or administrative management of the detention facility, provided that access is not thereby severely restricted or rendered impossible.<sup>497</sup> In addition, regarding rules applied in detention facilities and

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<sup>493</sup>Article 10(2) of the Recast Reception Directive in conjunction with Article 28(4) of the Dublin III Regulation.

<sup>494</sup>*Kalashnikov v Russia* App no 47095/99 (ECtHR 15 July 2002) para 102; *Kehayov v Bulgaria* App no 41035/98 (ECtHR 18 January 2005) para 64, *Alver v Estonia* App no 64812/01 (ECtHR 8 November 2005), para 50.

<sup>495</sup>*Alimov v Turkey* App no 14344/13 (ECtHR 6 September 2016), para 59.

<sup>496</sup>Article 10(3) of the Recast Reception Directive in conjunction with Article 28(4) of the Dublin III Regulation.

<sup>497</sup>Article 10(4) of the Recast Reception Directive in conjunction with Article 28(4) of the Dublin III Regulation.

rights and obligations of detainees, Member States shall ensure that applicants in detention are systematically provided with information that explains those rules, rights and obligations. They must be informed in a language which they understand or are reasonably supposed to understand. Member States may derogate from this obligation in duly justified cases and for a reasonable period which shall be as short as possible, in the event that the applicant is detained at a border post or in a transit zone.<sup>498</sup>

### **Standard 34.5. Minors**

According to Article 2(i) of the Dublin III Regulation “minor” means a third country national or a stateless person below the age of 18 years. “*The minor's best interest, as prescribed in Article 23(2), shall be a primary consideration for Member States.*”<sup>499</sup> This includes taking due account of family reunification possibilities; the minor's well-being and social development, taking into particular consideration the minor's background; safety and security considerations, in particular where there is a risk of the minor being a victim of human trafficking; and the views of the minor in accordance with his or her age and maturity.<sup>500</sup> The child's extreme vulnerability is the decisive factor and takes precedence over considerations relating to the status of illegal migrants.<sup>501</sup>

The second sentence of Recital 18 of the Recast Reception Directive states that Member States should in particular ensure that Article 37 of the 1989 United Nations Convention on the Rights of the Child is applied. Apart from general conditions and procedural requirements that are described in other standards of this check-list, Article 37 of the UN Convention on the Rights of the Child among other things provides that deprivation of liberty of a child “*shall be used only as a measure of last resort and for the shortest appropriate period of time*” /.../ and “*in a manner which takes into account the needs of*

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<sup>498</sup>This derogation shall not apply in cases referred to in Article 43 of Directive 2013/32/EU (Article 10(5) of the Recast Reception Directive in conjunction with Article 28(4) of the Dublin III Regulation.

<sup>499</sup>Second sub-paragraph of Article 11(2) of the Recast Reception Directive in conjunction with Article 28(4) of the Dublin III Regulation. See also: Article 6(1) of the Dublin III Regulation.

<sup>500</sup> See also standard 12 on the best interests of a child.

<sup>501</sup> *Popov v France* App nos 39472/07 and 39474/07 (ECtHR 19 January 2012), para 91; *Mubilanzila Mayeka and Kaniki Mitunga v Belgium* App no 13178/03 (ECtHR 12 October 2006), para 55.

*persons of his or her age” /.../.<sup>502</sup> Every child deprived of liberty “shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances /.../ and shall have the right to prompt access to legal and other appropriate assistance.”<sup>503</sup> When minors are detained, they shall have the possibility to engage in leisure activities, including play and recreational activities appropriate to their age.”<sup>504</sup> In general, from the standpoint of Article 3 of the ECHR, several criteria need to be taken into consideration in cases concerning the detention of children: whether the child is accompanied or not; the age of the child, his/her state of health, including eventual feelings of fear, anguish, inferiority; the duration of detention and its physical and mental effects; and the particular circumstances in the detention centre, including circumstances in the close surrounding area.<sup>505</sup>*

#### **Standard 34.6. Unaccompanied Minors**

Under the Recast Reception Directive unaccompanied minor means a minor who arrives on the territory of the member State unaccompanied by an adult responsible for him or her whether by law or by the practice of the Member State concerned, and for as long as he or she is not effectively taken into the care of such a person; it includes a minor who is left unaccompanied after he or she entered the territory of the Member State.<sup>506</sup>

*“Unaccompanied minors shall be detained only in exceptional circumstances. All efforts shall be made to release the detained unaccompanied minor as soon as possible.”<sup>507</sup>*

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<sup>502</sup>Those needs have to be considered also in the light of the right to primary education under Article 28 of the UN Convention on the Rights of the Child.

<sup>503</sup>Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) Art 37(c)-(d).

<sup>504</sup>Third sub-paragraph of Article 11(2) of the Recast Reception Directive in conjunction with Article 28(4) of the Dublin III Regulation.

<sup>505</sup>*A.B. and Others v France* App no 11593/12 (ECtHR 12 July 2016), paras 109-115; *Rahimi v Greece* App no 8687/08 (ECtHR 5 June 2011) para 59; *Mubilanzila Mayeka and Kaniki Mitunga v Belgium* App no 13178/03 (ECtHR 12 October 2006), para 48. See concrete examples of violation of Article 3 of the ECHR in the Explanatory note.

<sup>506</sup>Article 2(e) of the Recast Reception Directive.

<sup>507</sup>First sub-paragraph of Article 11(3) of the Recast Reception Directive in conjunction with Article 28(4) of the Dublin III Regulation.

Unaccompanied minors have to be accommodated separately from adults<sup>508</sup> and shall never be detained in prison accommodation.<sup>509</sup> As far as possible, they shall be provided with accommodation in institutions provided with personnel and facilities which take into account the needs of persons of their age.<sup>510</sup>

#### **Standard 34.7. Ill-health and special medical conditions**

As regards detention of persons with special medical needs, the case-law of the ECtHR has considered the situation of detainees with mental illness, suicidal tendencies, detainees who are HIV-positive, paraplegics who are confined to a wheelchair and pregnant women. Besides, the UN Convention on the Rights of Persons with Disabilities<sup>511</sup>, to which the EU became a party, provides “programmatically” standards that need to be implemented by the adoption of subsequent measures which are the responsibility of the Contracting Parties in relation to the detention of people with disabilities.<sup>512</sup>

#### **Standard 34.8. Elderly**

The ECtHR has not expressly considered the detention of elderly persons in the expulsion context. However, the ECtHR has routinely stated that age and state of health will be relevant to the assessment of the level of severity of ill-treatment, and there are a number of cases in which the ECtHR has addressed the vulnerability of this group within the domestic prison regime.<sup>513</sup>

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<sup>508</sup>Fourth sub-paragraph of Article 11(3) of the Recast Reception Directive in conjunction with Article 28(4) of the Dublin III Regulation.

<sup>509</sup>Second sub-paragraph of Article 11(3) of the Recast Reception Directive in conjunction with Article 28(4) of the Dublin III Regulation.

<sup>510</sup>Third sub-paragraph of Article 11(3) of the Recast Reception Directive in conjunction with Article 28(4) of the Dublin III Regulation. See also standard 33.4. on minors and the Explanatory note on examples of detention of unaccompanied minors in the case-law of the ECtHR.

<sup>511</sup>Council Decision (2010/48/EC) Council Decision of 26 November 2009 concerning the conclusion, by the European Community, of the United Nations Convention on the Rights of Persons with Disabilities [2010] OJ L 23/35.

<sup>512</sup>See also the Explanatory note of standard no 34.7 of this Check-list on ill-health (special medical conditions).

<sup>513</sup>See, for example: *Sawoniuk v United Kingdom* App no 63716/00 (ECtHR 29 May 2001), *Papon v France* App no 54210/00 (ECtHR 25 July 2002); *Farbtuhs v Latvia* App no 4672/02 (ECtHR 2 December 2004), and *Enea v*

**Standard 34.9. Other vulnerable persons (female applicants, mothers, LGBT etc.)**

“Where female applicants are detained, Member States shall ensure that they are accommodated separately from male applicants, unless the latter are family members and all individuals concerned consent thereto.” Exceptions may apply to the use of common spaces designated for recreational or social activities, including the provision of meals.<sup>514</sup>

“Where vulnerable persons are detained, Member States shall ensure regular monitoring and adequate support taking into account their particular situation, including their health.”<sup>515</sup> In case of female detainees, a lack of female staff in the centre, may be relevant, too.<sup>516</sup> In the case of *Mahamad Jama v Malta*, irrespective of health concerns or age factor the ECtHR considered the female applicant more vulnerable than any other adult asylum seeker detained at the time.<sup>517</sup> Detained families shall be provided with separate accommodation guaranteeing adequate privacy.<sup>518</sup>

In the case of *O.M. v Hungary* the ECtHR decided that the authorities failed to exercise particular care in order to avoid situations which may reproduce the conditions that forced that person to flee in the first place. The authorities ordered the applicant's detention without considering the extent to which vulnerable individuals - for instance, LGBT were safe or unsafe in custody among other detained persons, many of whom had come from countries with widespread cultural or religious prejudice against such persons.<sup>519</sup> For further concrete examples in the case-law of the ECtHR on the detention of vulnerable persons, see the Explanatory Note.

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*Italy* App no 74912/01 (ECtHR 17 September 2009), *Haidn v Germany* App no 6587/04 (ECtHR 13 January 2011), *Contrada (no2) v Italy* App no 7509/08 (ECtHR 11 February 2014) and Explanatory note.

<sup>514</sup>Article 11(5) of the Recast Reception Directive in conjunction with Article 28(4) of the Dublin III Regulation.

<sup>515</sup>Second sub-paragraph of Article 11(1) of the Recast Reception Directive in conjunction with Article 28(4) of the Dublin III Regulation.

<sup>516</sup>See, for example: *Mahamed Jama v Malta* App no 10290/13 (ECtHR 26 November 2016), para 97; *Abdi Mahamud v Malta* App no 56796/13 (ECtHR 3 May 2016), paras 84, 86, 89.

<sup>517</sup>*Ibid.* para 100.

<sup>518</sup>Article 11(4) of the Recast Reception Directive in conjunction with Article 28(4) of the Dublin III Regulation.

<sup>519</sup>*O.M. v Hungary* App no 9912/15 (ECtHR 5 July 2016) para 53.



## Explanatory Note to the Basic Judicial Check-List 1

### Standard 2. Definition of detention

In the case of detention, the right to freedom of movement under Article 45 (2) of the Charter of Fundamental Rights of the EU (hereinafter: the Charter) or under Article 2(1) of Protocol No. 4 to the ECHR cannot be applicable to asylum-seekers or irregular migrants, because these categories of third country nationals do not have the status of lawful residents on the territory of the Member States.<sup>520</sup> Asylum seekers only have a right to remain, which does not constitute an entitlement to a residence permit<sup>521</sup>; they only have the right not to be “*regarded as staying illegally*” on the territory of a Member State.<sup>522</sup> The CJEU adds that “*Article 7(1) of the Directive 2003/9 lays down the principle that asylum seekers may move freely within the territory of the host Member State or within an area assigned to them by that Member State /.../*.”<sup>523</sup> This is in line with Article 26 of the 1951 Convention relating to the Status of Refugees, which states that each Contracting State shall accord to refugees lawfully in its territory the right to choose their place of residence and to move freely within its territory, subject to any regulations applicable to aliens generally in the same circumstances.<sup>524</sup>

In its case law (until 2016), the CJEU uses solely the term “*detention*” without making a distinction between deprivation of freedom of movement and deprivation of liberty. However, in the *Mahdi* case, which refers to detention under the Return Directive, the CJEU

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<sup>520</sup>Article 45(2) states that freedom of movement and residence may be granted, in accordance with the Treaties, to nationals of third countries legally resident in the territory of a Member State. Article 2(1) of the Protocol No 4 to the ECHR states that “*everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence*”.

<sup>521</sup>Article 9(1) of the 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) (OJEU, L 180, 29. 6. 2013; hereinafter the Recast Procedures Directive). See also: C-534/11 *Arslan* EU:C:2013:343, para 44.

<sup>522</sup>Recital 9 of the Return Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals (Official Journal of the EU, L 348, 24. 12. 2008; hereinafter the Return Directive); C-357/09 PPU *Kadzoev* (Grand Chamber) EU:C:2009:741, para 41; C-534/11 *Arslan* EU:C:2013:343, para 48.

<sup>523</sup>*Ibid.* para 53; C-357/09 PPU *Kadzoev* (Grand Chamber) EU:C:2009:741, para 42.

<sup>524</sup>See also: C-443/14 and C-444/14 *Alo and Osso*, EU:C:2016:127, paras 35, 44.

briefly refers to Article 6 of the Charter.<sup>525</sup> In the *Alo and Osso* case, the resident permits were issued to the applicants with subsidiary protection with a condition requiring them to take up residence, in Mr Alo's case in the town of Ahlen (Germany), and in Ms Osso's case in Hannover Region (Germany), with the exception of the capital of the Land of Lower Saxony. The CJEU delivered its preliminary ruling based on the provision on freedom of movement.<sup>526</sup> The CJEU states that the fact that Article 33 of the Recast Qualifications Directive (2011/95)<sup>527</sup> is entitled "*Freedom of Movement*" is not sufficient to dispel the ambiguities of its wording.<sup>528</sup> Similarly, the ECtHR states that "*it is often necessary to look beyond the appearances and the language used and concentrate on the realities of the situation.*"<sup>529</sup>

In the case of *Nada v Switzerland*, the ECtHR states in general terms that "*the requirement to take account of the type and manner of implementation of the measure in question /.../ enables it to have regard to the specific context and circumstances surrounding types of restriction other than the paradigm of confinement in a cell /.../. Indeed, the context in which the measure is taken is an important factor, since situations commonly occur in modern society where the public may be called on to endure restrictions on freedom of movement or liberty in the interest of the common good*" /.../.<sup>530</sup> In this case, the ECtHR observed that the area in which the applicant was not allowed to travel was the territory of a third country, Switzerland. The restrictions in question did not prevent the applicant from living and moving freely within the territory of his permanent residence, where he had chosen of his own free will to live and carry on his activities. These circumstances differ radically from the

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<sup>525</sup>C-146/14 PPU *Mahdi* EU:C:2014:1320, para 52 and point 1 of the operative part of the judgment.

<sup>526</sup>C-443/14 and C-444/14 *Alo and Osso* EU:C:2016:127, paras 15-16, 22-24.

<sup>527</sup>Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) (OJEU EU, L 337/9, 20. 12. 2011; hereinafter: the Recast Qualifications Directive).

<sup>528</sup>C-443/14 and C-444/14 *Alo and Osso* EU:C:2016:127, para 25. For distinctions between the notions of restriction of person's liberty of movement, restriction of liberty and deprivation of liberty in the context of detention under the European arrest warrant, see judgment of the CJEU in the case of C-294/16 PPU *JZ v Prokuratura Rejonowa Łódź* EU:C:2016:610.

<sup>529</sup>*Kasparov v Russia* App no 53659/07 (ECtHR 13 September 2016), para 36. See also: *Ilias and Ahmed v Hungary* App no 47287/15 (ECtHR 14 March 2017), para 66.

<sup>530</sup>*Nada v Switzerland* (Grand Chamber) App no 10593/08 (ECtHR 12 September 2012), para 226.

factual situation in the *Guzzardi* case.<sup>531</sup>

In the case of *Guzzardi v Italy*, the applicant was suspected of belonging to a “band of mafiosi” and had been forced to live in an island within an (unfenced) area of 2.5 km<sup>2</sup>, together with other residents in a similar situation and supervisory staff. The ECtHR found that the applicant had been deprived of his liberty within the meaning of Article 5 of the ECHR.

In the case of *Raimondo v Italy*<sup>532</sup> the applicant was suspected of involvement with mafia and he had been confined to his home in the evenings. He had an obligation to inform the police when he planned to leave his home; however, he did not require permission from the police to leave his home. Thus, the ECtHR concluded that this amounted to a restriction of freedom of movement and not to deprivation of liberty. When a border official stops a passenger during border control in an airport in order to clarify his/her situation and where a detention has not exceeded the time strictly necessary to comply with relevant formalities, no issue arises under Article 5 of the ECHR.<sup>533</sup>

In the case of *Khlaifia and Others v Italy* the Italian authorities had kept the *Centro di Soccorso e Prima Accoglienza* (CSPA) on the island of Lampedusa, where after giving migrants first aid the authorities proceeded with their identification “under surveillance” and the applicants were “prohibited from leaving the centre and the ships *Vincent* and *Audace*”. Despite the fact that detainees were not in cells, the conditions to which they were subjected were similar to detention and deprivation of freedom. They were subject to prolonged confinement, unable to communicate with the outside world and there was a lack of freedom of movement for the migrants placed in the Lampedusa reception centres. They were not free to leave the CSPA. “When they have managed to evade the police surveillance

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<sup>531</sup>*Guzzardi v Italy* App no 7367/76 (ECtHR 6 November 1980), paras 26-29.

<sup>532</sup>*Raimondo v Italy* App no 12954/87 (ECtHR 22 February 1994).

<sup>533</sup>*Gahramanov v Azerbaijan* App no 26291/06 (ECtHR 15 October 2013), para 41. For further examples, see also: *Cyprus v Turkey* App no 25781/94 (ECtHR 10 May 2001); *Djavit An v Turkey* App no 20652/92 (ECtHR 20 Feb 2003); *Hajibeyli v Azerbaijan* App no 16528/05 (10 July 2008); *Streletz, Kessler and Krenz v Germany* App no 34044/96, 35532/97, 44801/98 (ECtHR 22 March 2001), *Ashingdane v United Kingdom* App no 8225/78 (ECtHR 28 May 1985); *Beghal v the UK* (pending) (no 4755/16).

*and reach the village of Lampedusa, they were stopped by the police and taken back to the reception centre. This suggests that the applicants were being held at the CSPA involuntarily. The duration of the applicants' confinement in the CSPA and on the ships, lasting for about twelve days in the case of the first applicant and about nine days in that of the second and the third applicants, was not insignificant. Classification of the applicants' confinement in domestic law cannot alter the nature of the constraining measures imposed on them. Moreover, the applicability of Article 5 of the ECHR cannot be excluded by the fact, relied on by the Government, that the authorities' aim had been to assist the applicants and ensure their safety. Even measures intended for protection or taken in the interest of the person concerned may be regarded as a deprivation of liberty.”<sup>534</sup>*

Depending on the factual circumstances, under the case-law of the ECtHR detention during the period of 9 hours,<sup>535</sup> 12 hours,<sup>536</sup> or even only 2 hours<sup>537</sup> or 3 hours<sup>538</sup> can mean a deprivation of liberty.

#### **Standard 4. Persons who can be subject to detention**

In its case-law, the CJEU also dealt with a situation in which a third country national was detained on the basis of the Return Directive on the ground of the risk of absconding, after which he also applied for asylum with the sole intention of delaying or even jeopardising enforcement of the return decision, which must be based on a case-by-case assessment of all relevant circumstances. Such a situation does not mean that the return procedure is definitely terminated, as it may continue if the applicant is not transferred based on the Dublin III Regulation and his/her asylum application is examined and rejected by that Member State.<sup>539</sup>

As regards the judgment in the case of *Ghezelbash*, it is important to note that in this case the CJEU developed an interpretation that is relevant also for the grounds for detention

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<sup>534</sup> *Khlaifia and Others v Italy*, (Grand Chamber) App no 16483/12 (ECtHR, 15 December 2016), paras 65-71.

<sup>535</sup> *Tiba v Romania* App no 36188/09 (ECtHR 13 December 2016), para 45.

<sup>536</sup> *Iustin Robertino Micu v Romania* App no 41040/11 (ECtHR 13 January 2015), para 109.

<sup>537</sup> *Tomaszewscy c. Pologne* App no 8933/05 (ECtHR 15 April 2014), para 129.

<sup>538</sup> *Baisuev and Anzorov v Georgia* App no 39804/04 (ECtHR 18 December 2012), para 53.

<sup>539</sup> C-534/11 *Arslan* EU:C:2013:343, paras 60-62; see also: C-601/15 PPU, *J.N.* (Grand Chamber), EU:C:2016:84, paras 75, 79-80; *Nabil and Others v Hungary* App no 62116/12 (ECtHR 22 September 2015), para 38.

based on the Dublin III Regulation. Regulation No 604/2013 differs in essential respects from Regulation No 343/2003. The legal remedy provided for in Article 27(1) of the Dublin III Regulation must be effective and cover questions of both fact and law. The drafting of that provision makes no reference to any limitation of the arguments that may be raised by the asylum-seeker when availing himself of that remedy. The EU legislature did not provide for any specific link or, *a fortiori*, any exclusive link between the legal remedies established in Article 27 of the Dublin III Regulation and the rule, now set out in Article 3(2) of that Regulation, which limits possibilities for transferring an applicant to the Member State initially designated as responsible where there are systemic flaws in the asylum procedure and in the reception conditions resulting in a risk of inhuman or degrading treatment.<sup>540</sup>

In the opinion of the CJEU, the EU legislature has introduced or enhanced various rights and mechanisms guaranteeing the involvement of asylum-seekers in the process for determining the Member State responsible. Thus, Regulation No 604/2013 differs, to a significant degree, from Regulation No 343/2003, which was applicable in the case which gave rise to the judgment in the case of *Abdullahi*.<sup>541</sup> The EU legislature did not confine itself to introducing organisational rules simply governing relations between Member States, but decided to involve asylum-seekers in that process by obliging Member States to inform them of the criteria for determining responsibility and to provide them with an opportunity to submit information relevant to the correct interpretation of those criteria, and by conferring on asylum-seekers the right to an effective remedy in respect of any transfer decision that might be taken at the conclusion of that process.<sup>542</sup>

### **Standard 6. Permissible grounds for detention: significant risk of absconding linked to the purpose of securing transfer procedures**

In the past, the ECtHR mostly examined the ground for detention of asylum-seekers or immigrants under the first limb of Article 5(1)(f), which states that “*no one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by*

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<sup>540</sup> C-63/15 *Ghezelbash*, EU:C:2016:186, paras 34, 36, 37.

<sup>541</sup> *Ibid.* para 46.

<sup>542</sup> *Ibid.* para 51.

*law to prevent his effecting an unauthorised entry into the country.*<sup>543</sup> However, taking EU law into account, the other possible ground for detention under the ECHR<sup>544</sup> is Article 5(1)(b) of the ECHR.<sup>545</sup> For example, in the context of Greece, the ECtHR stated in general terms that *“the Court examined and found a violation of Article 5(1) under its second limb on the basis that the applicant's detention pending asylum proceedings could not have been undertaken for the purposes of deportation, given that national law did not allow for deportation pending a decision on asylum”*.<sup>546</sup> Additionally, the ECtHR adds that, if a State enacts legislation (of its own motion or pursuant to EU law) explicitly authorising the entry or stay of immigrants pending an asylum application, *“it would be hard to consider the measure as being closely connected to the purpose of the detention and to regard the situation as being in accordance with domestic law. In fact, it would be arbitrary and thus run counter to the purpose of Article 5(1)(f) of the Convention to interpret clear and precise domestic law provisions in a manner contrary to their meaning. The Court notes that in Saadi the national law /.../did not provide for the applicant to be granted formal authorisation to stay or to enter the territory, and therefore no such issue arose. The Court therefore considers that the question as to when the first limb of Article 5 ceases to apply, because the individual has been granted formal authorisation to enter or stay, is largely dependent on national law.”*<sup>547</sup> Thus, in the case of *S.D. c. Greece*, the ECtHR established that a detention was unlawful from the standpoint of Article 5(1)(f) of the ECHR, because under the legal circumstances in Greece, as long as the asylum application is pending, a deportation order cannot be

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<sup>543</sup>For example: *Saadi v United Kingdom* (Grand Chamber) App no 13229/03 (ECtHR 29 January 2008), paras 44-66; *Mikolenko v Estonia* App no 10664/05, (ECtHR 8 August 2009) paras 56-58; *Rusu v Austria* App no 34082/02 (ECtHR 2 October 2008) paras 47-60; *Aden Ahmed v Malta* App no 55352/12 (ECtHR 23 July 2013) paras 125-146; *Lokpo and Touré v Hungary* App no 10816/10 (ECtHR 20 September 2011), paras 10-25; *L.M. and Others v Russia* App no 40081/14 (ECtHR 15 October 2015) paras 137-152; *Gebremedhin v France* App no 25389/05 (ECtHR 26 April 2007), para 75. None of these cases relate to detention in relation to Dublin Regulation.

<sup>544</sup>See the first paragraph of the Explanatory note on definition of detention as regards the right of asylum seekers to remain.

<sup>545</sup>Under this article no one shall be deprived of his liberty save in procedure prescribed by law *“in order to secure the fulfilment of any obligation prescribed by law.”* Such an obligation prescribed by law could be a necessary cooperation of the applicant in order to effective conduct of a transfer procedure.

<sup>546</sup>*Ahmade v Greece* App no 50520/09 (ECtHR 25 September 2012) paras 142-144; *R.U. v Greece* App no 2237/08 (ECtHR 7 June 2011) paras 88-96; *Suso Musa v Malta* App no 42337/12 (ECtHR 23 July 2013) para 96.

<sup>547</sup>*Suso Musa v Malta* App no 42337/12 (ECtHR, 23 July 2013), para 97.

executed.<sup>548</sup>

However, in the later case of *Nabil and Others* (22 September 2015), which was decided by the former second section, the ECtHR first cited relevant paragraphs from the judgments of the *Ahmade* and *R.U.* cases,<sup>549</sup> but later added that “*for the Court the pending asylum case does not as such imply that the detention was no longer with a view to deportation – since an eventual dismissal of the asylum applications could have opened the way to the execution of the deportation orders.*”<sup>550</sup> The Guide on Article 5 of the Convention clarifies this with the reference to the case of *Suso Musa v Malta* (para. 97) by saying that the question as to when the first limb of Article 5(1)(f) of the ECHR (detention to prevent unauthorised entry into country) ceases to apply, because the individual has been granted formal authorisation to enter or stay, is largely dependent on national law.<sup>551</sup>

In the later case of *O.M. v Hungary*, the ECtHR examined permissible grounds for detention under Article 5(1)(b) of the ECHR. It observed that detention is only authorised under subparagraph (b) of Article 5(1) to secure the fulfilment of the obligation prescribed by law. “*At the very least, there must be an unfulfilled obligation incumbent on the person concerned, and the arrest and detention must be for the purpose of securing its fulfilment and must not be punitive in character. As soon as the relevant obligation has been fulfilled, the basis for detention under Article 5(1)(b) ceases to exist. Moreover, this obligation should not be given a wide interpretation. It has to be specific and concrete, and the arrest and detention must be truly necessary for the purpose of ensuring its fulfilment. An arrest will only be acceptable under the ECHR if the obligation prescribed by law cannot be fulfilled by milder means. The principle of proportionality further dictates that a balance must be struck between the importance in a democratic society of securing the immediate fulfilment of the obligation in question and the importance of the right to liberty. In its assessment the ECtHR considers the*

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<sup>548</sup>*S.D. v Greece* App no 53541/07 (ECtHR, 11 June 2009), paras 62, 67; see also: *R.U. v Greece* App no 2237/08 (ECtHR 7 June 2011) paras 94, 96; *Ahmade v Greece* App no 50520/09 (ECtHR 25 September 2012) paras 142-144. These are judgments of the first section of the ECtHR.

<sup>549</sup>*Nabil and Others v Hungary* App no 62116/12 (ECtHR 22 September 2015), para 35.

<sup>550</sup>*Ibid.* para 38.

<sup>551</sup>Guide on Article 5 of the Convention, European Court of Human Rights, 2014  
[http://www.echr.coe.int/Documents/Guide\\_Art\\_5\\_ENG.pdf](http://www.echr.coe.int/Documents/Guide_Art_5_ENG.pdf), p. 19/point100.

*following points relevant: the nature of the obligation arising from the relevant legislation, including its underlying object and purpose; the person being detained and the particular circumstances leading to the detention; and the length of the detention.*<sup>552</sup>

### **Standard 7. Objective criteria for assessing the risk of absconding**

Article 3(7) of the Return Directive corresponds to Article 2(n) of the Dublin III Regulation. The Return Handbook (draft) on page 11 (point 1.6.) says that frequently used criteria for risk of absconding based on the Return Directive that are defined in national law are, for instance: lack of documentation; absence of cooperation to determine identity; use of false documentation or destroying existing documents; failing repeatedly to report to relevant authorities; explicit expression of intent of non-compliance; conviction of a criminal offence; violation of a return decision; non-compliance with an existing entry ban; prior conduct (i.e. escaping); and being the subject of a return decision made in another Member State. However, it needs to be pointed out that based on the judgment in the case of *Mahdi* the State may consider, for example, a lack of identity documents as objective criteria for the risk of absconding. But the mere fact that the person concerned has no identity documents cannot, on its own, be a ground for detention or extending detention, since any assessment relating to the risk of the person concerned must be based on an individual examination of that person's case.<sup>553</sup> Where national legislation has not introduced objective criteria for the risk of absconding in relation to the Dublin III Regulation, the German Federal High Court<sup>554</sup> and the Austrian High Administrative Court<sup>555</sup> ruled that detention lacked sufficient legal basis and could not be applied.

### **Standard 9. Control of the quality of law on detention**

In the cases of *Abdolkhani and Karimnia* (para. 125-135) and *Keshmiri v Turkey* ((no.2), para. 33), the Government sought to rely on certain legal provisions to justify the applicants' detention, but the ECtHR held that these provisions were not concerned with a deprivation

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<sup>552</sup>*O.M. v Hungary* App no 9912/15 (ECtHR 5 July 2016) paras 42-44.

<sup>553</sup>C-146/14 PPU *Mahdi* EU:C:2014:1320, paras 70-74.

<sup>554</sup>Bundesgerichtshof, Beschl. v 26. 6. 2014, ZB 31/14.

<sup>555</sup>Verwaltungsgerichtshof (VwGH), 19 February 2015, ZI. Ro 2014/21/0075-5.



of liberty in the context of deportation proceedings, but rather the regulation of the residence of certain groups of foreigners in Turkey. Consequently, it found that the applicants' detention had no legal basis. Likewise, in the case of *Khlaifia v Italy* the ECtHR held that there had been no legal basis for the applicants' detention in a reception centre in Lampedusa as domestic law only permitted foreigners to be detained if they needed special assistance or where additional identity checks or documentation were required. Furthermore, even if these criteria were met, they should have been detained in a different centre pursuant to an administrative decision. The ECtHR also considered whether the power to detain existed under a bilateral agreement between Italy and Tunisia. However, it noted that even if such a power had existed, the content of this agreement was not public. It was therefore not accessible to the interested parties and they could not have foreseen the consequences of its application.<sup>556</sup>

In the case of *Ilias and Ahmed v Hungary* detention in a transit zone was based on "elastically interpreted general provision of the law. Thus, according to Article 71/A(1) and (2) of the Asylum Act asylum seekers who were subjected to the border procedure were not entitled to stay in the territory of Hungary or to seek accommodation at a designated facility and the ECtHR was not persuaded that these rules circumscribe with sufficient precision and foreseeability. Furthermore, no special grounds for detention in the transit zone were provided for in Article 71/A of the Asylum Act. These were important elements in argumentation that detention was not lawful for the purposes of Article 5(1) of the ECHR.<sup>557</sup>

### **Standard 10. The right to information and a personal interview before the detention order is issued**

Although Article 5(3) of the Dublin III Regulation states that a personal interview shall take place before any decision is taken to transfer the applicant, this does not mean that the personal interview is a procedural guarantee applicable only before a transfer decision is taken and not before a detention order is issued. Article 5 of the Dublin III Regulation is part

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<sup>556</sup> *Khlaifia and Others v Italy*, (Grand Chamber) App no 16483/12 (ECtHR 15 December 2016), paras 69, 71. The Grand Chamber had confirmed that decision of the ECtHR from September 2015 (*Khlaifia and Others v Italy*, Grand Chamber, 16483/12, 15. 12. 2016, paras 102-108).

<sup>557</sup> *Ilias and Ahmed v Hungary* App no 47287/15 (ECtHR 14 March 2017), paras 65-69.

of the “*general principles and safeguards*”. The personal interview may be omitted in only two situations.<sup>558</sup> The requirement of an individual assessment both of the relevant facts and of proportionality (necessity) after the application for international protection is lodged can hardly be exercised effectively without a personal interview, especially since Member States shall not hold a person in detention for the sole reason that he/she is subject to the procedure established by the Dublin III Regulation.<sup>559</sup> Furthermore, the right to good administration includes, as a general principle of EU law, the right of every person to be heard before any individual measure which would affect him or her adversely is taken.<sup>560</sup> “*The right to be heard guarantees every person the opportunity to make known his views effectively during an administrative procedure and before the adoption of any decision liable to affect his interests adversely*”.<sup>561</sup> “*Observance of the right to be heard is required even where the applicable legislation does not expressly provide for such a procedural requirement*.”<sup>562</sup>

However, “*fundamental rights, such as respect for the rights of the defence, do not constitute unfettered prerogatives and may be restricted, provided that the restrictions in fact correspond to objectives of general interest pursued by the measure in question and that they do not involve, with regard to the objectives pursued, a disproportionate and intolerable interference which infringes upon the very substance of the rights guaranteed*.”<sup>563</sup> Therefore, not every irregularity in the exercise of the rights of the defence in an administrative procedure on detention will constitute an infringement of those rights. Not every breach of the right to be heard will systematically render unlawful the decision taken and therefore not every such breach will automatically require the release of the person concerned.<sup>564</sup> “*To make such a finding of unlawfulness, the national court must – where it considers that a procedural irregularity affecting the right to be heard has occurred – assess whether, in the light of the factual and legal circumstances of the case, the outcome of the*

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<sup>558</sup> Article 5(2) of the Dublin III Regulation.

<sup>559</sup> Article 28(1) of the Dublin III Regulation, Article 26(1) of the Recast Procedures Directive.

<sup>560</sup> See Article 41 of the Charter and *mutatis mutandis* a right to defence or to be heard in the case-law of the CJEU (C-277/11 M.M., EU:C:2012:744, paras 75-87; C-249/13 *Boudjlida* EU:C:2014:2431, para 34).

<sup>561</sup> C-249/13 *Boudjlida* EU:C:2014:2431, para 36; C-166/13 *Mukarubega* EU:C:2014:2336, para 46.

<sup>562</sup> C-249/13 *Boudjlida* EU:C:2014:2431, para 39.

<sup>563</sup> *Ibid.* para 43.

<sup>564</sup> See C-383/13 PPU, *M.G. and N.R.* EU:C:2013:533, paras 39, 41.

*administrative procedure at issue could have been different if the third-country nationals in question had been able to put forward information which might show that their detention should be brought to an end.”*<sup>565</sup> However, in this respect it needs to be borne in mind that under the case-law of the ECtHR an infringement of the right to a personal interview (to be heard and to defence) before a detention is prolonged may constitute a gross or a manifest violation of Article 5(1)(f) of the ECHR.<sup>566</sup>

## **Standard 12. Best interests of a child**

In the case of *MA, BT, DA*, the CJEU refers to the best interests of a child as a fundamental right and not as a general principle of law. The CJEU says that */.../ “those fundamental rights include, in particular, that set out in Article 24(2) of the Charter /.../ Thus, the second paragraph of Article 6 of the Dublin III Regulation cannot be interpreted in such a way that it disregards that fundamental right”.*<sup>567</sup> The difference between a right and a general principle of law in the light of the Charter is significant, because “*principles*” may be implemented by legislative and executive acts taken by institutions of the Union, and by acts of Member States when they are implementing Union law, in the exercise of their respective powers and “*they shall be judicially cognisable only in the interpretation of such acts in the ruling on their legality.*”<sup>568</sup> Such limitation, therefore, does not exist in case of judicial interpretation of “*rights.*”

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<sup>565</sup>*Ibid.* para 40.

<sup>566</sup>*Richmond Yaw and Others v Italy* App nos 3342/11, 3391/11, 3408/11 and 3447/11 (ECtHR 6 October 2016), paras 74-78.

<sup>567</sup>C-648/11 *MA, BT, DA*, EU:C:2013:367, paras 57-58. In the earlier case of C-427/12 *Commission v the Parliament* EU:C:2014:170, where the judgment was delivered before the Charter came into force, the Grand Chamber of the CJEU stated that the right to respect for private or family life from Article 7 of the Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification (OJEU, L 251/12, 3. 10. 2003) must be read in conjunction with the obligation to have regard to the child's best interests, which is recognised in Article 24(2) of the Charter. The CJEU adds that various instruments that stress the importance to a child of family life recommend that the State has regard to the child's interests, but “*they do not create for the members of a family an individual right*” to be allowed to enter the territory of a State and cannot be interpreted as denying States a certain margin of appreciation when they examine applications for family reunification (C-540/03, *Parliament v Council* (Grand Chamber) EU:C:2006:429, paras 58-59). Member States must have due regard to the best interests of minor children when weighing those interest (*ibid.* paras 63, 73).

<sup>568</sup>Article 52(5) of the Charter.

The general position of the ECtHR as regards best interests of a child is 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*”.<sup>569</sup> The following concrete examples show how this principle can affect the outcome of the court proceedings: *Rahimi v Greece, Popov v France*,<sup>570</sup> *Tarakhel v Switzerland*.<sup>571</sup>

### **Standard 13. Consideration of the effectiveness and less coercive alternative measures to detention**

The EU Fundamental Rights Agency mentions the following alternatives to detention: an obligation to surrender passports or travel documents; residence restrictions combined with regular reporting requirements in designated places, open or semi-open facilities run by the government or NGOs, as well as hotels, hostels or private addresses; release on bail and provision of sureties by third parties, regular reporting to the authorities; placement in open facilities with caseworker support; and electronic monitoring.<sup>572</sup> The UNHCR lists in its publication “*Alternatives to Detention*”<sup>573</sup> very similar, less coercive alternative measures to detention: deposit or surrender of travel or identity documentation; reporting at periodic intervals by using new technologies; use of a designated or directed residence; bail or bond systems – financial deposit that may be forfeited in the event the individuals abscond; community supervision and case management; and child and family appropriate alternatives to detention (foster care, supervised independent living, group care, collective residential youth villages etc.).<sup>574</sup> The UNHCR lists five elements that have been widely found to contribute to the success of alternatives to detention. These are: 1) treating asylum-seekers (and migrants) with dignity, humanity and respect throughout the relevant asylum or migration procedure; 2) providing clear and concise information about rights and duties

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<sup>569</sup>*Neulinger and Shuruk v Switzerland* (Grand Chamber) App no 41615/07 (ECtHR 6. July 2010), para 135.

<sup>570</sup>See Explanatory note concerning standards under points 34.5. and 34.6.

<sup>571</sup>*Tarakhel v Switzerland* (Grand Chamber) App no 29217/12 (ECtHR 4 November 2014), paras 116-122. See also the Explanatory note on standard no 14 on principle of proportionality and the necessity test.

<sup>572</sup>Fundamental Rights Agency, *Alternatives to detention for asylum seekers and people in return procedures*: <http://fra.europa.eu/en/publication/2015/alternatives-detention-asylum-seekers-and-people-return-procedures>.

<sup>573</sup>*Alternatives to Detention*, Executive Committee of the High Commissioner's Programme EC/66/SC/CRP.12, 3 June 2015, <http://www.unhcr.org/559643e59.pdf>, p.7, point 4.

<sup>574</sup>*Ibid.* points 8-19.

under the alternative to detention and the consequences of non-compliance; 3) providing asylum-seekers with legal advice, including on their asylum applications and options available to them should their asylum claim be rejected. Such advice is most effective when made available at the outset of and continuing throughout relevant procedures; 4) providing access to adequate material support, accommodation and other reception conditions; and 5) offering individualized “coaching” or case management services.<sup>575</sup> Also the research of the Odysseus network in Europe confirmed that alternatives were less successful when they did not incorporate one or more of those five elements.<sup>576</sup> The UNHCR stresses the importance of developing and implementing alternatives to detention in a way that is context-specific. No single alternative to detention will be fully replicable in every context. However, there are elements that remain constant through the many examples that exist.<sup>577</sup>

Regarding the availability of effective, less coercive measures to detention, it is relevant to note that Regulation (EU) No 516/2014 establishing the Asylum, Migration and Integration Fund<sup>578</sup> provides in the second sub-paragraph of Article 5(1)(g) and in the second sub-paragraph of Article 11(a) that this fund shall support actions focusing on the establishment, development and improvement of alternatives in relation to the categories of persons mentioned in the first sub-paragraph of the aforementioned provisions. The report of the Special Rapporteur on the human rights of migrants (Francois Crèpeau, 2 April 2012, A/HRC/20/24) pointed to research which had found that over 90% compliance or cooperation rates can be achieved when persons are released with proper supervision and assistance. The alternatives have also proved to be considerably less expensive than detention, not only in direct costs but also when it comes to longer-term costs associated with detention, such as the impact on health services, integration problems and other social

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<sup>575</sup>*Ibid.* point 20.

<sup>576</sup>*Ibid.* point 20.

<sup>577</sup>*Ibid.* point 21.

<sup>578</sup>Regulation (EU) No 516/2014 of the European Parliament and of the Council of 16 April 2014 establishing the Asylum, Migration and Integration Fund, amending Council Decision 2008/381/EC and repealing Decisions No 573/2007/EC and No 575/2007/EC of the European Parliament and of the Council and Council Decision 2007/435/EC (Official Journal of the EU, L 150/168, 20 May 2014).

challenges.<sup>579</sup>

As regards empirical research, the UNHCR has found that asylum seekers are predisposed to comply with immigration procedures and that perceptions of fairness in the asylum procedure were far more important for ensuring compliance than the use of detention.<sup>580</sup> Empirical findings of the International Detention Coalition show that community-based alternatives to detention programmes had demonstrated cost saving of USD \$49 in the USA, AUD \$86 in Australia and CAD \$167 in Canada per person/per day.<sup>581</sup>

#### **Standard 14. Principle of proportionality and the necessity test**

In the cases of *Chahal* and *Saadi*,<sup>582</sup> The ECtHR examined whether the person has been detained under Article 5(1)(f) of the ECHR with a view to deportation. It held that “*Article 5(1)(f) does not demand that the detention of a person against whom action is being taken with a view to deportation be reasonably considered necessary, for example to prevent his committing an offence or fleeing; in this respect Article 5(1)(f) provides a different level of protection from Article 5(1)(c) of the ECHR*”.<sup>583</sup> “*Any deprivation of liberty under Article 5(1)(f) will be justified only for as long as deportation proceedings are in progress. If such proceedings are not prosecuted with due diligence, the detention will cease to be permissible*.”<sup>584</sup> In some recent cases the ECtHR introduces the necessity test also in the

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<sup>579</sup> Cited in: Fundamental Rights Agency, *Alternatives to detention for asylum seekers and people in return procedures* <http://fra.europa.eu/en/publication/2015/alternatives-detention-asylum-seekers-and-people-return-procedures>.

<sup>580</sup> Costello, Cathryn & Kaytaz, Ezra, ‘Building empirical research into alternatives to detention: perceptions of asylum seekers and refugees in Toronto and Geneva’ UNHCR *Legal and Protection Policy Research Series*, PPLA/2013/02, June 2013, <http://www.unhcr.org/51c1c5cf9.pdf> (cited in: *Alternatives to Detention*, Executive Committee of the High Commissioner's Programme EC/66/SC/CRP.12, 3 June 2015, point 4).

<sup>581</sup> International Detention Coalition, ‘There are alternatives: A handbook for preventing unnecessary immigration detention’ 13 May 2011 (cited in: *Alternatives to Detention*, Executive Committee of the High Commissioner's Programme EC/66/SC/CRP.12, 3 June 2015, point 6).

<sup>582</sup> *Saadi v Italy* App no 37201/06 (ECtHR 28 February 2008); *Chahal v United Kingdom* App no 22414/93 (ECtHR 15 November 1996), 74. It is to be noted that in *Saadi* the ECtHR held that “any arrangement short of detention would not have been as effective”; para 66.

<sup>583</sup> *Chahal v United Kingdom* App no 22414/93 (ECtHR 15 November 1996), para 112.

<sup>584</sup> *Ibid.* para 113. See also: *Saadi v United Kingdom* (Grand Chamber) App no 13229/03 (ECtHR 29 January 2008), para 72; *A and Others v United Kingdom* (Grand Chamber) App no 3455/05 (ECtHR 19 February

sense that it is not sufficient that deprivation of liberty is in line with national law, but it must also be necessary in the circumstances of the case so that less coercive measures to attain legitimate aims should be taken into consideration, too.<sup>585</sup> This is so particularly in cases of detention: minors.<sup>586</sup>

Furthermore, it is a requirement of Article 5(1) of the ECHR that detention be “*in accordance with a procedure prescribed by domestic law*”.<sup>587</sup> Therefore, in considering the question of “*lawfulness*”, the ECtHR may have regard to the “*necessity*” of the measure as well, where “*necessity*” is a requirement of domestic law based on EU secondary law and case-law of the CJEU or national constitutional law. For example, in *Rusu v Austria* (para. 58), while the ECtHR reiterated that “*necessity*” was not normally part of the Article 5(1)(f) test, it noted that in Austria it was part of the domestic law test. In that case, having regard to all the circumstances, the ECtHR found that the applicant’s detention was such a serious measure that – in a context in which the necessity of the detention to achieve the stated aim was required by domestic law – it would be arbitrary unless it was justified as a last resort where other less severe measures had been considered and found to be insufficient to safeguard the individual or public interest which might require that the person concerned be detained. The ECtHR, therefore, found a violation of Article 5(1)(f) of the ECHR in that case. *Mutatis mutandis*, this is relevant for detention under the Dublin III Regulation, since EU secondary law requires the necessity test.<sup>588</sup>

As regards alternatives to detention, in a number of cases the ECtHR has considered relevant the fact that alternatives to detention were available to the authorities,<sup>589</sup> especially if this is

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2009), para 164; *Khlaifia and Others v Italy*, (Grand Chamber) App no 16483/12 (ECtHR 15 December 2016), para 90.

<sup>585</sup>For example: *Richmond Yaw and Others v Italy* App nos 3342/11, 3391/11, 3408/11 and 3447/11 (ECtHR 6 October 2016), para 71.

<sup>586</sup>See: *Abdullahi Elmi and Aweys Abubakar v Malta* App no 25794/13 and 28151/13 (ECtHR 22 November 2016), paras 111, 144, 146.

<sup>587</sup>This includes international law (*Medvedyev and Others v France* (Grand Chamber) App no 3394/03 (ECtHR 29 March 2010) para 79; *Toniolo v San Marino and Italy* App no 44853/10 (ECtHR 26 June 2012), para 46.

<sup>588</sup>See: *Ilias and Ahmed v Hungary* App no 47287/15 (ECtHR 14 March 2017), para 63.

<sup>589</sup>See: *Raza v Bulgaria* App no 31465/08 (ECtHR 11 February 2010), para 74; *Louled Massoud v Malta* App no 24340/08 (ECtHR, 27 July 2010), para 68.

a requirement of domestic law.<sup>590</sup> This is especially - but not exclusively - the case when the detainee is exceptionally vulnerable, for example on account of his or her youth or ill health or sexual orientation.<sup>591</sup> In *Rahimi v Greece*,<sup>592</sup> the ECtHR observed that the authorities had not examined whether it had been necessary as a measure of last resort to place the applicant – an unaccompanied fifteen-year old – in a detention centre or whether less drastic action might not have sufficed to secure his deportation. These factors gave the ECtHR cause to doubt the authorities’ good faith in executing the detention measure. A similar approach was adopted in respect of an HIV-positive applicant in *Yoh-Ekale Mwanje v Belgium*. The ECtHR in the case of *Popov v France* (para. 119) stated that with respect to minors even if accompanied by their parents and even though the detention centre had a special wing for the accommodation of families, the authorities “*did not verify that the placement in administrative detention was a measure of last resort for which no alternative was available.*”<sup>593</sup>

### **Standard 15. Length of detention and due diligence requirement**

As regards the length of the detention under case law of the ECtHR, the general standard based on Article 5(1)(f) of the ECHR is that the detention should not continue for an unreasonable length of time. Deprivation of liberty will be justified only for as long as relevant proceedings are in progress. If such proceedings are not prosecuted with due diligence, the detention will cease to be permissible.<sup>594</sup> This means that the ECtHR will probably examine the activity – or inactivity – of the authorities during the period of the applicant’s detention in order to determine whether or not they could be said to have acted with adequate diligence. The refusal of an applicant to cooperate may be relevant to an assessment of the reasonableness of the length of a period of detention. The reasoning in

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<sup>590</sup>See, for example: *Nabil and Others v Hungary* App no 62116/12 (ECtHR 22 September 2015), para 40.

<sup>591</sup>See: *O.M. v Hungary* App no 9912/15 (ECtHR 5 July 2016), para 53.

<sup>592</sup>*Rahimi v Greece*, Application No 8687/08 (ECtHR 5 April 2011).

<sup>593</sup>For more on this, see concurring opinion of Judge Pinto de Albuquerque in the case of *Abdullahi Elmi and Aweys Abubakar v Malta* App no 25794/13 and 28151/13 (ECtHR 22 November 2016), paras 27-28.

<sup>594</sup>*Saadi v United Kingdom* (Grand Chamber) App no 13229/03 (ECtHR 29 January 2008), para 72; *A and Others v United Kingdom* (Grand Chamber) App no 3455/05 (ECtHR 19 February 2009) para 164. See examples of application of due diligence requirements in cases: *Abdi v Malta* App no 56796/13 (ECtHR 3 May 2016) para 138; *H.A. v Grèce*, App no 58424/11 (ECtHR 21 January 2016) paras 52-53.



the case of *Abdi v the United Kingdom* suggests that not all refusals to transfer voluntarily will be treated equally. A conclusion that the refusal to return voluntarily is relevant to the assessment of the reasonableness of the period of detention could not be drawn in every case. It is necessary to distinguish between cases in which the return to the country of origin was possible and cases where it was not. Where return was not possible, for reasons extraneous to the person detained, the fact that he was not willing to return voluntarily could not be held against him since his refusal had no causal effect. If return was possible, but the detained person was not willing to go, it would be necessary to consider whether or not he had issued proceedings challenging his deportation. If he had done so, it would be entirely reasonable that he should remain in the United Kingdom pending the determination of those proceedings, unless they were an abuse of process, and his refusal to return voluntarily could not be seen as a trump card which enabled the Secretary of State to continue to detain until deportation could be effected, otherwise the refusal would justify as reasonable any period of detention, however, long.<sup>595</sup>

Although in some cases the ECtHR appeared to suggest that fixed domestic time-limits for detention were necessary to comply with the “quality of law” requirement under Article 5(1) of the ECHR<sup>596</sup>, in the recent case of *J.N. v the United Kingdom*<sup>597</sup> the Court expressly rejected the applicant’s assertion that Article 5(1) requires Contracting States to establish a maximum period of immigration detention. Rather, it stated that it would examine the system of immigration detention in the respondent State as a whole, having regard to the particular facts of each individual case. In that case, it concluded that the system in the United Kingdom, by which detainees could challenge their ongoing detention by way of judicial review, having regard to domestic law principles which closely mirrored the requirements of Article 5(1)(f) of the ECHR, in principle complied with the requirements of that Article. Consequently, the absence of domestic time-limits will not, by itself, constitute

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<sup>595</sup>*Abdi v United Kingdom* App no 27770/08 (ECtHR 9 April 2013).

<sup>596</sup>*Azimov v Russia* App no 67474/11 (ECtHR 18 April 2013), para 171; *Ismoilov and Others v Russia* App no 2947/06 (ECtHR 24 April 2008), paras 139-140; *Ryabikin v Russia* App no 8320/04 (ECtHR 10 April 2007), para 129; *Muminov v Russia* App no 42502/06 (ECtHR 11 December 2008) para 121; *Nasrulloev v Russia* App no 656/06 11 (ECtHR October 2007) paras 73-74; *Abdolkhani and Karimnia v Turkey* App no 30471/08 (ECtHR 22 September 2009), para 135; *Garayev v Azerbaijan* App no 53688/08 (ECtHR 10 June 2010), para 99; *Mathloom v Greece* App no 48883/07 (ECtHR 24 April 2012) para 71.

<sup>597</sup>*J.N. v United Kingdom, Application No 37289/12* (ECtHR 19 May 2016).

a breach of Article 5(1) of the ECHR. However, the ECtHR has in some cases suggested that such time-limits might constitute an important procedural safeguard,<sup>598</sup> in which the ECtHR noted that in the absence of time limits the applicant was subject to an undetermined period of detention and consequently the existence of other procedural safeguards (such as an effective remedy by which to contest the lawfulness and length of detention) would become decisive. It is also important to note that where fixed time-limits exist under domestic law, compliance with that time-limit cannot automatically be regarded as bringing the applicant's detention into line with Article 5(1)(f) of the ECHR if the expulsion proceedings were not otherwise prosecuted with due diligence. However, a failure to comply with them may be relevant to the question of "lawfulness", as detention exceeding the period permitted by domestic law is unlikely to be considered "in accordance with the law".<sup>599</sup> It would therefore appear that while time-limits are one of a number of possible safeguards against arbitrariness, by themselves they are neither necessary nor sufficient to ensure compliance with Article 5 (1)(f) of the ECHR.

**Standard 17. Right to be informed "adequately" about the reasons for detention and about procedures laid down in national law for challenging the detention order**

In the case of *Rusu v Austria* (para. 42), the information given to the applicant on the day of her arrest was inexact as to the facts, and incorrect as to the legal basis of her arrest and detention, and the ECtHR found a violation of Article 5(2) of the ECHR. In the case of *T and A v Turkey* (para. 66), the applicant was told she was being held on suspicion of having committed a criminal act, rather than for the purposes of immigration control. The ECtHR thus established that the reasons for the applicant's detention were never communicated to her and decided there had been a violation of Article 5(2) of the ECHR.

**Standard 20. Right to free legal assistance and representation**

In the case of DEB, which does not relate to detention, the CJEU decided that in the context of principle of proportionality and the right to free legal aid the following elements need to be taken into consideration: the subject-matter of litigation; whether the applicant has a

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<sup>598</sup>See, for example, *Louled Massoud v Malta* App no 24340/08 (ECtHR, 27 July 2010), para 71.

<sup>599</sup>*Shamsa v Poland* App no 45355/99 45357/99 (ECtHR, 27 November 2003), paras 57-60.

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reasonable prospect of success; the importance of what is at stake for the applicant in the proceedings; the complexity of the applicable law; the applicant's capacity to represent himself effectively; the amount of the costs of the proceedings and whether those costs might represent an insurmountable obstacle to access to the courts.<sup>600</sup>

Although Article 6 of the ECHR is not directly applicable in detention cases under the Dublin III Regulation, the following standards relating to civil disputes may additionally serve as guidance for considering effective access to judicial review in detention cases. The question whether a particular case implies a requirement to provide legal aid depends, among other factors, on the following: the importance of what is at stake for the applicant;<sup>601</sup> the complexity of the relevant law or procedure;<sup>602</sup> the applicant's capacity to represent him or herself effectively;<sup>603</sup> and the existence of a statutory requirement to have legal representation.<sup>604</sup> However, the right in question is not absolute and it may therefore be permissible to impose conditions on the grant of legal aid based in particular on considerations such as the financial situation of the litigant<sup>605</sup> and his or her prospects of success in the proceedings.<sup>606</sup> It is essential for the court to give reasons for refusing legal aid and to handle requests for legal aid with diligence.<sup>607</sup>

However, assigning a lawyer to represent a party does not in itself guarantee effective assistance.<sup>608</sup> The lawyer appointed for legal aid purposes may be prevented for a protracted period from acting or may shirk his duties. If they are notified of the situation, the competent national authorities must replace him; should they fail to do so, the litigant would be deprived of effective assistance in practice despite the provision of free legal

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<sup>600</sup>C-279/09 DEB EU:C:2010:811, para 61.

<sup>601</sup>*Steel and Morris v United Kingdom* App no 68416/01 (ECtHR 15 February 2005), para 61.

<sup>602</sup>*Airey v Ireland* App no 6289/73 (ECtHR 9 October 1979), para 24.

<sup>603</sup>*McVicar v United Kingdom* App no 46311/99 (ECtHR 7 May 2002), paras 48-62; *Steel and Morris v United Kingdom* App no 68416/01 (ECtHR 15 February 2005), para 61; *P., C. and S. v United Kingdom* App no 56547/00 (ECtHR 16 July 2002), para 100.

<sup>604</sup>*Airey v Ireland* App no 6289/73 (ECtHR 9 October 1979), para 26; *Gnahoré v France* App no 40031/98 (ECtHR 19 September 2000), para 41.

<sup>605</sup>*Steel and Morris v United Kingdom* App no 68416/01 (ECtHR 15 February 2005), para 62.

<sup>606</sup>*Ibid.*, para 62.

<sup>607</sup>*Tabor v Poland* App No 12825/02 (ECtHR 27 June 2006), paras 45-46; *Saoud v France* App no 9375/02 (ECtHR 9 October 2007) paras 133-136.

<sup>608</sup>*Siałkowska v Poland* App no 8932/05 (ECtHR 22 March 2007), paras 110, 116.

aid.<sup>609</sup> It is above all the responsibility of the State to ensure the required balance between the effective enjoyment of access to justice on the one hand and the independence of the legal profession on the other. The ECtHR has stressed that any refusal by a legal aid lawyer to act must meet certain quality requirements. Those requirements will not be met where the shortcomings in the legal aid system deprive individuals of the “*practical and effective*” access to a court to which they are entitled.<sup>610</sup>

### **Standard 21. Other aspects of the practical and effective right to judicial review**

In the case of *L.M. And Others v Russia*, the asylum seeker was detained during the procedure before the ECtHR, and in this case the ECtHR reiterates that it is of the utmost importance for the effective operation of the system of individual petition instituted by Article 34 that applicants or potential applicants should be able to communicate freely with the ECtHR without being subjected to any form of pressure from the authorities to withdraw or modify their complaints. “*In this context, pressure includes not only direct coercion and flagrant acts of intimidation but also other improper indirect acts or instances of contact designed to dissuade or discourage applicants from pursuing a Convention remedy. The fact that an individual has actually managed to pursue his application does not prevent an issue arising under Article 34. The intentions or reasons underlying the acts or omissions in question are of little relevance when assessing whether Article 34 of the ECHR has been complied with; what matters is whether the situation created as a result of the authorities' act or omission conforms to Article 34. The ECtHR has already found in a number of cases that measures limiting an applicant's contact with his representative may constitute interference with the exercise of his right of individual petition (see, for example, Shtukaturov v Russia<sup>611</sup>, where a ban on lawyer's visits, coupled with a ban on telephone calls and correspondence, was held to be incompatible with the respondent State's obligations under Article 34 of the Convention)*” Compliance by a representative with certain formal

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<sup>609</sup>*Bertuzzi v France* App no 36378/97 (ECtHR 13 February 2003), para 30.

<sup>610</sup>*Staroszczyk v Poland* App no 59519/00 (ECtHR 22 March 2007), para 135 *Siatkowska v Poland* App no 8932/05 (ECtHR 22 March 2007), para 114. See also: Guide on Article 6, Right to fair trial (civil limb), European Court of Human Rights, May 2013, [http://www.echr.coe.int/Documents/Guide\\_Art\\_6\\_ENG.pdf](http://www.echr.coe.int/Documents/Guide_Art_6_ENG.pdf), p 17-18.

<sup>611</sup>*Shtukaturov v Russia*, App no 44009/05 (ECtHR, 27 March 2008), para 140.

requirements might be necessary before obtaining access to a detainee, for instance for security reasons or in order to prevent collusion or preventing the course of the investigation or obstructing justice. Excessive formalities in such matters, such as those that could *de facto* prevent a prospective applicant from effectively enjoying his right of individual petition, have been found to be unacceptable.<sup>612</sup>

In the case of *I.M. v France* during detention, the applicant did not have access to a lawyer or a linguistic aid. When he arrived at court, he could talk to his lawyer only shortly before the hearing and his lawyer could not invoke any evidence apart from argumentation already written by the applicant. This and extremely short time-limit to introduce an action, constituted obstacles for the applicant to effectively submit arguments concerning breach of Article 3 of the ECHR.<sup>613</sup>

## **Standard 22. Automatic judicial review or detainee's right to initiate judicial review of the lawfulness of detention (including conditions of detention)**

In *J.N. v the United Kingdom*, the ECtHR held that no requirement of “automatic judicial review” could be read into Articles 5(1)(f) or Article 5(4) of the ECHR.<sup>614</sup> Nevertheless, the ECtHR has found that the fact that an applicant’s detention was subject to automatic periodic judicial review provided an important safeguard against arbitrariness, but could not be regarded as decisive.<sup>615</sup> However, the systems in *Auad* and *Dolinskiy* were of automatic *periodic* review; in order to comply with the ECHR, it is likely that a system of automatic review would have to either be implemented at frequent intervals, or permit the detainee to also institute proceedings, otherwise there would be a risk that detention could become unlawful without the detainee having any means by which to challenge it. For example, in the context of Article 5(1)(e), the ECtHR has found that a person of unsound mind, who is compulsorily confined in a psychiatric institution for a lengthy period of time, is entitled to take proceedings “at reasonable intervals” in order to put the lawfulness of his/her

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<sup>612</sup>See: *L.M. And Others v Russia* App nos 40081/14, 40088/14 and 40127/14 (ECtHR 15 October 2015) paras 153-163.

<sup>613</sup>*I.M. v France* App no 9152/09 (ECtHR 2 February 2012), paras 151-153.

<sup>614</sup>*J.N. v United Kingdom* App no 37289/12 (ECtHR 19 May 2016), paras 87-88.

<sup>615</sup>*Auad v Bulgaria* App no 46390/10 (ECtHR 11 October 2011), para 132; *Dolinskiy v Estonia* App no 14160/08 (ECtHR 2 February 2010).

detention in issue.<sup>616</sup> A system of periodic review in which the initiative lies solely with the authorities is not sufficient on its own.<sup>617</sup> The criteria for “lawful detention” under Article 5(1)(e) of the ECHR entail that the review of lawfulness guaranteed by Article 5(4) in relation to the continuing detention of a mental health patient should be made by reference to the patient’s contemporaneous state of health, including his or her dangerousness, as evidenced by up-to-date medical assessments.<sup>618</sup>

### **Standard 23. Right to judicial review before an “independent and impartial tribunal/court established by law”**

In the case of *H.I.D.*, the CJEU stated that “according to the settled case-law of the CJEU, in order to determine whether a body making a reference is a court or tribunal for the purposes of Article 267 TFEU, which is a question governed by EU law alone, the CJEU takes account of a number of factors, such as whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is *inter partes*, whether it applies rules of law and whether it is independent”.<sup>619</sup> In this particular case, the CJEU established that the Irish Refugee Appeals Tribunal met the criteria of establishment by law, permanence, application of rules of law, that positive decisions of the Refugee Appeals Tribunal had binding force,<sup>620</sup> that the requirement for the procedure to be *inter partes* was not an absolute criterion, and that each party had the opportunity to make the Refugee Appeals Tribunal aware of any information necessary to the success of the application for asylum or to the defence.<sup>621</sup> The CJEU established that the Refugee Appeals Tribunal had a broad discretion, since it took cognisance of both questions of fact and questions of law and

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<sup>616</sup>*M.H. v United Kingdom* App no 11577/06 (ECtHR 22 October 2013), para 77.

<sup>617</sup>*X. v Finland* App no 34806/04 (ECtHR 3 July 2012) para 170; *Raudevs v Latvia* App no 24086/03 (ECtHR 17 December 2013), para 82.

<sup>618</sup>*Juncal v United Kingdom* App no 32357/09, (ECtHR, 17 September 2013), para 30; *Ruiz Rivera v Switzerland* App no 8300/06 (ECtHR 18 February 2014) para 60; *H.W. v Germany* App no 17167/11 (ECtHR 19 September 2013), para 107.

<sup>619</sup>C-175/11, *H.I.D and B.A.*, EU:C:2013:45, para 83.

<sup>620</sup>For example, the CJEU notes that where the Refugee Appeal Tribunal finds in favour of the applicant for asylum, the Minister is bound by the decision of that tribunal and is therefore not empowered to review it (*ibid.* para 98).

<sup>621</sup>*Ibid* paras 84, 85, 87, 88, 91.

ruled on the evidence submitted to it, in relation to which it enjoyed discretion.<sup>622</sup> As regards the contested issue of independence of the Refugee Appeal Tribunal, the CJEU reiterated that independence has external and internal aspects. The external aspect “*entails that the body is protected against external intervention or pressure liable to jeopardise the independent judgment.*” The internal aspect “*is linked to impartiality and seeks to ensure a level playing field for the parties to the proceedings and their respective interests in relation to the subject-matter of those proceedings.*”<sup>623</sup> As for the rules governing the appointment of Members of the Refugee Appeals Tribunal, in the opinion of the CJEU, these were not capable of calling into question the independence of that tribunal. The members were appointed for a specific term from among persons with at least five years of experience as a practising barrister or a practising solicitor, and the circumstances of their appointment by the Minister did not differ substantially from the practice in many other Member States.<sup>624</sup> With regard to the issue of the removal of members of the Refugee Appeals Tribunal, it followed from paragraph 7 of the second schedule to the Refugee Act that the Minister could remove the ordinary members of that Tribunal from office. The Minister's decision had to state the reasons for such removal.<sup>625</sup> The CJEU then noted that the cases in which the members “*may be removed from office are not defined precisely by the Refugee Act. Nor does the Refugee Act specify whether the decision to remove a member of the Refugee Appeals Tribunal is amenable to judicial review.*”<sup>626</sup> Obviously, this was a problematic aspect for the CJEU, because in the next paragraph the CJEU refers to the second sentence of recital 27 of the Procedures Directive (2005/85), which states that the “*effectiveness of the remedy, also with regard to the examination of the relevant facts, depends on the administrative and judicial system of each Member State seen as a whole.*” Based on this recital of secondary EU law, the CJEU then decided that since the applicant in the Irish system could also question the validity of the recommendations of the Refugee Applications Commissioner and decisions of the Refugee Appeals Tribunal before the High Court, the judgments of which could be the subject of an appeal to the Supreme Court, the Irish system “*as a whole*”

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<sup>622</sup>*Ibid* para 93.

<sup>623</sup>*Ibid* para 96.

<sup>624</sup>*Ibid* para 99.

<sup>625</sup>*Ibid* para 100.

<sup>626</sup>*Ibid.* para 101.

respected the right to an effective remedy.<sup>627</sup>

However, in the context of the right to speedy judicial review of detention under Article 9(3) of the Recast Reception Directive in conjunction with Article 28(4) of the Dublin III Regulation or under Article 5(4) of the ECHR, where in case of unlawful detention the applicant must be released immediately,<sup>628</sup> it is not possible to consider the requirements of independence and impartiality of courts or tribunals as a whole. Already at the first instance of judicial procedure, the court or tribunal, which provides speedy judicial review, must meet the requirements of independence and impartiality and must be established by law. Thus, in relation to Article 5(4) of the ECHR, the ECtHR states that the court which reviews the lawfulness of detention must be independent both of the executive and of the parties to the case.<sup>629</sup> Basic standards as regards these requirements in the case-law of the ECtHR are as follows:

The concept of tribunal/court:

*A court or tribunal is characterised in the substantive sense of the term by its judicial function, that is to say, determining matters within its competence on the basis of rules of law and after proceedings conducted in a prescribed manner.*<sup>630</sup> The proceedings must provide the “*determination by a tribunal of the matters in dispute*” which is required by Article 6 (1) of the ECHR.<sup>631</sup> For the purposes of Article 6(1) of the ECHR, a “*tribunal*” need not be a court of law integrated within the standard judicial machinery of the country concerned. It may be set up to deal with a specific subject matter, which can be appropriately administered outside the ordinary court system. The guarantees in place, both substantive and procedural, are important to ensure compliance with Articles 6 § 1. .<sup>632</sup> The fact that it performs many functions (administrative, regulatory, adjudicative, advisory and disciplinary) cannot in itself preclude an institution from being a “*tribunal*”.<sup>633</sup> The power to

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<sup>627</sup>*Ibid.* para 102-105.

<sup>628</sup>See standard no 29 on speedy judicial review.

<sup>629</sup>*Stephens v Malta* (no1) App no 11956/07 (ECtHR 21 April 2009), para 95.

<sup>630</sup>*Sramek v Austria* App no 8790/79 (ECtHR 22 October 1984) para 36; *Cyprus v Turkey* App no 25781/94 (ECtHR 10 May 2001), para 233.

<sup>631</sup>*Bentham v the Netherlands* App no 8848/80 (ECtHR 23 October 1985) para 40.

<sup>632</sup>*Rolf Gustafson v Sweden* App no 23196/94 (ECtHR 1 July 1997), para 45.

<sup>633</sup>*H. v Belgium* App no 8950/80 (ECtHR 30 Nov 1987), para 50.



give a binding decision, which may not be altered by a non-judicial authority to the detriment of an individual party, is inherent in the very notion of a “*tribunal*”.<sup>634</sup>

The court/tribunal established by law:

A “*tribunal*” must always be “*established by law*”, as it would otherwise lack the legitimacy required in a democratic society to hear individual cases.<sup>635</sup> The phrase “*established by law*” covers not only the legal basis for the very existence of a “*tribunal*”, but also compliance by the tribunal with the particular rules that govern it.<sup>636</sup> The lawfulness of a court or tribunal must by definition also encompass its composition.<sup>637</sup> The practice of tacitly renewing judges’ terms of office for an indefinite period after their statutory term of office had expired and pending their reappointment was held to be contrary to the principle of a “*tribunal established by law*”.<sup>638</sup> The procedures governing the appointment of judges could not be relegated to the status of internal practice.<sup>639</sup> “*Law*”, within the meaning of Article 6(1) of the ECHR, thus comprises not only legislation providing for the establishment and competence of judicial organs, but also any other provision of domestic law which, if breached, would render irregular the participation of one or more judges in the examination of a case.<sup>640</sup> This includes, in particular, provisions concerning the independence of the members of a “*tribunal*”, the length of their term of office, impartiality and the existence of procedural safeguards.<sup>641</sup> The object of the term “*established by law*” in Article 6(1) of the ECHR is to ensure that the organisation of the judicial system does not depend on the discretion of the executive, but is regulated by law emanating from Parliament.<sup>642</sup>

An independent tribunal/court:

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<sup>634</sup>*Van de Hurk v the Netherlands* App no 16034/90 (ECtHR 19 April 1994), para 45; *Brumarescu v Romania* App no 28342/95 (ECtHR 23 January 2001), para 61; Guide on Article 6: Right to a fair trial (civil limb), the European Court of Human Rights, May 2013, [http://www.echr.coe.int/Documents/Guide\\_Art\\_6\\_ENG.pdf](http://www.echr.coe.int/Documents/Guide_Art_6_ENG.pdf), pp.18-19.

<sup>635</sup> *Lavents v Latvia* App no 58442/00 (ECtHR 28 November 2002), para 81.

<sup>636</sup> *Sokurenko and Strygun v Ukraine* App no 29458/04 (ECtHR 20 July 2006), para 24.

<sup>637</sup> *Buscarini and Others v San Marino* App no 24645/94 (ECtHR 18 February 1999).

<sup>638</sup> *Oleksandr Volkov v Ukraine* App no 21722/11 (ECtHR 9 January 2013), para 15.

<sup>639</sup> *Ibid.*, paras 154-156.

<sup>640</sup> *DMD Group, A.S. v Slovakia* App no 19334/03 (ECtHR 5 October 2010), para 59.

<sup>641</sup> *Gurov v Moldova* App no 36455/02 (ECtHR 11 July 2006), para 36.

<sup>642</sup> *Savino and Others v Italy* App no 17214/05 (ECtHR 28 April 2009), para 94; Guide on Article 6: Right to a fair trial (civil limb), the European Court of Human Rights, May 2013, [http://www.echr.coe.int/Documents/Guide\\_Art\\_6\\_ENG.pdf](http://www.echr.coe.int/Documents/Guide_Art_6_ENG.pdf), pp. 25-26.

## Explanatory Note to the Basic Judicial Check-List 1

The term “*independent*” refers to independence *vis-à-vis* the other powers (the executive and the Parliament)<sup>643</sup> and also *vis-à-vis* the parties.<sup>644</sup>

The independence of judges will be undermined where the executive intervenes in a case pending before the courts with a view to influencing the outcome.<sup>645</sup> The fact that judges are appointed by the executive and are removable does not *per se* amount to a violation of Article 6(1) of the ECHR.<sup>646</sup> The appointment of judges by the executive is permissible provided that the appointees are free from influence or pressure, that they do not receive any instructions when carrying out their adjudicatory role.<sup>647</sup> In determining whether a body can be considered to be independent, the ECtHR has had regard, *inter alia*, to the following criteria: the manner of appointment of its members;<sup>648</sup> the duration of their term of office;<sup>649</sup> guarantees against outside pressure,<sup>650</sup> including safeguards against the arbitrary exercise of a court president’s duty to (re)assign cases to judges;<sup>651</sup> and appearance of independence.<sup>652</sup>

An impartial tribunal/court:

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<sup>643</sup>*Beaumartin v France* App no 15287/89 (ECtHR 24 November 1994), para 38.

<sup>644</sup>*Sramek v Austria* App no 8790/79 (ECtHR 22 October 1984), para 42.

<sup>645</sup>*Sovtransavto Holding v Ukraine* App no 48553/99 25 July 2002, para 80; *Mosteanu and Others v Romania* App no 33176/96 (ECtHR 26 November 2002), para 42.

<sup>646</sup>*Clarke v United Kingdom* (decision) App no 15767/89 (ECtHR 14 October 1991).

<sup>647</sup>*Flux v Moldova (no 2)* App no 31001/03 (ECtHR 3 July 2007), para 27; *Majorana v Italy*, (dec.); *Sacilor-Lormines v France* App no 65411/01 (ECtHR 9 November 2006), para 67.

<sup>648</sup>*Sramek v Austria* App no 8790/79 (ECtHR 22 October 1984) para 38; *Brudnicka and Others v Poland* App no 54723/00 (ECtHR 3 March 2005), para 41; *Clarke v United Kingdom* (decision) App no 15767/89 (ECtHR 14 October 1991).

<sup>649</sup>*Sacilor-Lormines v France* App no 65411/01 (ECtHR 9 November 2006), para 67; *Luka v Romania* App no 34197/02 (ECtHR 21 July 2009), para 44.

<sup>650</sup>*Parlov-Tkalčić v Croatia* App no 24810/06 (ECtHR 22 December 2009), para 86; *Agrokompleks v Ukraine* App no 23465/03 (ECtHR 6 October 2011), para 137.

<sup>651</sup>*Parlov-Tkalčić v Croatia* App no 24810/06 (ECtHR 22 December 2009), para 88-95.

<sup>652</sup>*Sramek v Austria* App no 8790/79 (ECtHR 22 October 1984), para 42; *Sacilor-Lormines v France* App no 65411/01 (ECtHR 9 November 2006), para 62; Guide on Article 6: Right to a fair trial (civil limb), the European Court of Human Rights, May 2013, [http://www.echr.coe.int/Documents/Guide\\_Art\\_6\\_ENG.pdf](http://www.echr.coe.int/Documents/Guide_Art_6_ENG.pdf) pp. 27-28.

Impartiality normally denotes the absence of prejudice or bias, and its existence can be tested in various ways.<sup>653</sup> The existence of impartiality must be determined on the basis of the following criteria:<sup>654</sup>

- a subjective test, where regard must be had to the personal conviction and behaviour of a particular judge; that is, to whether the judge held any personal prejudice or bias in a given case. In this regard, the personal impartiality of a judge must be presumed until there is proof to the contrary;<sup>655</sup>
- an objective test, that is to say, by ascertaining whether the tribunal itself and, among other aspects, its composition, offered sufficient guarantees to exclude any legitimate doubt in respect of its impartiality.

Under the objective approach, it must be determined whether quite apart from the judge's conduct, there are ascertainable facts, which may raise doubts as to his/her impartiality. When applied to a body sitting as a bench, it means determining whether, apart from the personal conduct of any of the members of that body, there are ascertainable facts which may raise doubts as to the impartiality of the body itself. This implies that, in deciding whether in a given case there is a legitimate reason to fear that a particular judge<sup>656</sup> or a body sitting as a bench<sup>657</sup> lacks impartiality, the standpoint of the person concerned is important but not decisive. What is decisive is whether this fear can be held to be objectively justified.<sup>658</sup> The objective test mostly concerns hierarchical or other links between the judge and other actors in the proceedings.<sup>659</sup> Therefore, it must be decided in each individual case whether the relationship in question is of such a nature and degree as

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<sup>653</sup>*Wettstein v Switzerland* App no 33958/96 (EctHR 21 December 2000), para 43; *Micallef v Malta* App no 17056/06 (EctHR 15 October 2009), para 93.

<sup>654</sup>*Micallef v Malta* App no 17056/06 (EctHR 15 October 2009), para 93.

<sup>655</sup>*Le Compte Van Leuven and De Meyere v Belgium* App nos 6878/75 and 7238/75 (23 June 1981), para 58.

<sup>656</sup>*Morel v France* App no 34130/96 (EctHR 6 June 2000), paras 42-50; *Pescador Valero v Spain* App no 62435/00 (EctHR 17 June 2003), para 23.

<sup>657</sup>*Luka v Romania* App no 34197/02 (EctHR 21 July 2009), para 40.

<sup>658</sup> *Wettstein v Switzerland* App no 33958/96 (EctHR 21 December 2000), para 44; *Pabla Ky v Finland* App no 47221/99 (EctHR 22 June 2004), para 30; *Micallef v Malta* App no 17056/06 (EctHR 15 October 2009), para 96.

<sup>659</sup>*Mežnarić v Croatia* App no 71615/01 (EctHR 20 November 2005), para 36; *Wettstein v Switzerland* App no 33958/96 (EctHR 21 December 2000), para 47.

to indicate a lack of impartiality on the part of the tribunal.<sup>660</sup> In order that the courts may inspire confidence in the public, which is indispensable, account must also be taken of questions of internal organisation. The existence of national procedures for ensuring impartiality, namely rules regulating the withdrawal of judges, is a relevant factor.<sup>661</sup> Such rules manifest the national legislature's concern to remove all reasonable doubts as to the impartiality of the judge or court concerned and constitute an attempt to ensure impartiality by eliminating the causes of such concerns.<sup>662</sup>

#### **Standard 24. Right to “speedy” judicial review of the lawfulness of detention**

In the case of *Khudyakova v Russia* (para. 99), fifty-four (54) days elapsed from the date the application was lodged until the final decision of the appeal court. The Government did not plead that complex issues had been involved in the determination of the lawfulness of the applicant's detention, or otherwise seek to justify the delay, apart from their contradictory statement that the review of the applicant's detention could not have affected her situation as the detention had been authorised by the court and should thus be considered lawful. In the case of *M.D. c. Belgique*, an applicant was detained based on the Dublin Regulation. On 2 July 2010, the applicant's detention was extended and on 12 July 2010 he filed an appeal to the first instance tribunal. On 15 July 2010, the tribunal of first instance decided not to grant his lawsuit. In the next stage of the procedure, on 28 July 2010, the Court of Appeal decided to order an immediate release of the applicant. The Government appealed against that judgment to the *Cour de cassation*. The ECtHR found a violation of Article 5(4) of the ECHR, because the applicant was not released based on the judgment of the Appeal Court, while the *Cour de cassation*, which abrogated the judgment of the Court of Appeal, did not examine substantial issues of the case, but merely procedural issues.<sup>663</sup>

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<sup>660</sup>*Micallef v Malta* App no 17056/06 (ECtHR 15 October 2009), paras 97, 102.

<sup>661</sup>See the specific provisions regarding the challenging of judges in *Micallef v Malta* App no 17056/06 (ECtHR 15 October 2009), paras 99-100.

<sup>662</sup>*Guide on Article 6: Right to a fair trial (civil limb), the European Court of Human Rights, May 2013*, [http://www.echr.coe.int/Documents/Guide\\_Art\\_6\\_ENG.pdf](http://www.echr.coe.int/Documents/Guide_Art_6_ENG.pdf) 29-30. For further standards as regards the exercise of both advisory and judicial functions in the same case, the exercise of both judicial and extra-judicial functions in the same case and exercise of different judicial functions, see: *Guide on Article 6: Right to a fair trial (civil limb), the European Court of Human Rights, May 2013*, pp. 30-32.

<sup>663</sup>*M.D. and M.A v Belgium* App no 58689/12 (ECtHR 19 January 2016), paras 39-47.

The ECtHR also states that where a decision to detain a person has been taken by a non-judicial authority other than a court, the standard of “speediness” of judicial review under Article 5(4) of the ECHR comes closer to the standard of “promptness” under Article 5(3) of the ECHR. Thus, in the case of *Scherbina*, a delay of sixteen (16) days in the judicial review of the applicant’s detention order issued by the prosecutor was found to be excessive.<sup>664</sup> The standard of “speediness” is less stringent when it comes to proceedings before a court of appeal.<sup>665</sup> Where a court in a procedure offering appropriate guarantees of due process imposed the original detention order, the ECtHR is prepared to tolerate longer periods of review in the proceedings before the second instance court.<sup>666</sup>

## **Standard 26. The scope and intensity of judicial review including procedural guarantees**

The CJEU had not yet provided guidelines as regards the scope or intensity of “judicial review” from Article 9(3) of the Recast Reception Directive in the light of Article 47 of the Charter.<sup>667</sup> Thus, from the standpoint of EU law, the basic principle is that “*Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law,*”<sup>668</sup> but the characteristics of such a remedy “*must be determined in a manner that is consistent with Article 47 of the Charter, which constitutes a reaffirmation of the principle of effective judicial protection.*”<sup>669</sup> The principle of effective judicial protection (along with the principle of equivalence) is a general principle of European law stemming from the constitutional traditions common to the Member States, which has been enshrined

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<sup>664</sup>*Shcherbina v Russia* App no 41970/11 (ECtHR 26 June 2014), paras 65-70.

<sup>665</sup>*Pichugin v Russia* App no 38623/03 (ECtHR 23 October 2012), para 151.

<sup>666</sup>*Shcherbina v Russia* App no 41970/11 (ECtHR 26 June 2014), para 65.

<sup>667</sup>In the case of *Tall*, which does not refer to detention, the CJEU states that, “*it is apparent from the explanations relating to Article 47 of the Charter that the first sub-paragraph of that Article is based on Article 13 ECHR (C-239/14 Tall EU:C:2015:824, para 52).* However, in case of detention, Article 47(1) of the Charter corresponds to the provision of Article 5(4) of the ECHR, because Article 5(4) of the ECHR is *lex specialis* in relation to the more general requirements of Article 13 of the ECHR (*A and others v United Kingdom* (Grand Chamber) App no 3455/05 (ECtHR 19 February 2009), para 202).

<sup>668</sup>Article 19(1) of the Consolidated Version of the Treaty on European Union (Official Journal of the EU, C 83/13, 30. 3. 2010).

<sup>669</sup>C-562/13, *Abdida* (Grand Chamber) EU:C:2014:2453, para 45.

in Articles 6 and 13 of the ECHR.<sup>670</sup> The principle of equivalence means that rules applicable in an EU law dispute are not less favourable than those governing similar domestic actions. It requires that the national rule in question be applied without distinction, whether the infringement alleged is of EU law or national law, where the purpose and cause of action are similar.<sup>671</sup> As regards the application of the principle of effectiveness, the CJEU has held that every case in which the question arises as to whether a national procedural provision makes the application of EU law (practically) impossible or excessively difficult must be analysed with reference to the role of that provision in the procedure, its conduct and its special features, viewed as a whole, before the various national bodies. For those purposes, account must be taken, where appropriate, of the basic principles of the domestic judicial system, such as the protection of the rights of the defence, the principle of legal certainty and the proper conduct of procedure.<sup>672</sup> *“In the absence of EU rules concerning the procedural requirements relating to a detention-review measure, the Member States remain competent, in accordance with the principle of procedural autonomy, to determine those requirements, whilst at the same time ensuring that the fundamental rights are observed and that the provisions of EU law relating to that measure are fully effective.”*<sup>673</sup>

The above-cited argumentation was a (general) starting point of the interpretation adopted by the CJEU in the case of *Mahdi*, which deals with judicial review of the extension of detention under the Return Directive. However, in its reasoning in paragraphs 62-64, the CJEU went beyond this general principle of effectiveness by explaining in more detail what the term *“fully effective”* means. Although the CJEU in some other cases stated that detention for the purpose of removal governed by the Return Directive and detention of an asylum-seeker fall under *“different legal rules”*,<sup>674</sup> there seems to be no objective and reasonable justification to think that the standards as regards the scope and intensity of judicial review of the detention of irregular migrants under the Return Directive, as they are explained under standard no. 26 of this check-list, are or should be higher than the

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<sup>670</sup>C-93/12 *Agrokonsulting* EU:C:2013:432, para 59; C-432/05 *Unibet* EU:C:2007:163, para 37.

<sup>671</sup>Joined Cases C-46/93 and C-48/03 *Brasserie du Pêcheur* EU:C:1996:79, para 83; C-246/09, *Bulicke* EU:C:2010:418, para 25-26.

<sup>672</sup>*Ibid.* para 35

<sup>673</sup>*Ibid.* para 50.

<sup>674</sup>C-357/09 PPU *Kadzoev* (Grand Chamber) EU:C:2009:741, para 45; C-534/11 *Arslan* EU:C:2013:343, para 52.

standards in cases of the detention of asylum-seekers under the Dublin III Regulation.<sup>675</sup>

**Standard 27. Restrictions on the right to a defence and/or equality of arms based on national (public) security, public policy or public order**

In the *Kadi* case, the Grand Chamber of the CJEU states that *“according to settled case-law, fundamental rights form an integral part of the general principles of law whose observance the CJEU ensures. For that purpose, the CJEU draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international instruments for the protection of human rights on which the Member States have collaborated or to which they are signatories. In that regard, the ECHR has a special significance /.../ Measures incompatible with respect for human rights are not acceptable in the Community.”*<sup>676</sup> In the context of measures against terrorism in the *Kadi* case, the right to a defence, the right to be heard and the right to effective judicial review were at stake. The CJEU decided *“in such a case, it is none the less the task of the Community judicature to apply, in the course of the judicial review it carries out, techniques which accommodate, on the one hand, legitimate security concerns about the nature and sources of information taken into account in the adoption of the act concerned and, on the other, the need to accord the individual a sufficient measure of procedural justice.”*<sup>677</sup> In the case of *A. and Others v the United Kingdom* (para. 218), the Grand Chamber of the ECtHR formulated the following basic principle: *“It was essential that as much information about the allegations and evidence against each applicant was disclosed as was possible without compromising national security or the safety of others. Where full disclosure was not possible, Article 5(4) of the ECHR required that the difficulties this caused were counterbalanced in such a way that each applicant still had the possibility to effectively challenge the allegations against him.”* This must be decided on a case-by-case basis. Where the evidence was to a large extent disclosed and the open material played a predominant role in the determination, it could not be said that the applicant was denied an opportunity to challenge effectively the reasonableness of the belief and suspicion of the Secretary of State. In other cases, even

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<sup>675</sup>See more on this standard no 30 in the Check-list 2 on the scope and intensity of judicial review under the Return Directive.

<sup>676</sup>C-402/05 P and C-415/05 *Kadi*, EU:C:2008:461, paras 283-284.

<sup>677</sup>*Ibid.* para 344.

where all or most of the underlying evidence remained undisclosed, if the allegations contained in the open material were sufficiently specific, it should have been possible for the applicant to provide his/her representatives and the special advocate with information with which to refute them, if such information existed, without him/her having to know the details or sources of the evidence which formed the basis of the allegations.<sup>678</sup>

The ECtHR states that even in proceedings under Article 6 of the ECtHR for the determination of guilt on criminal charges, there may be restrictions on the right to a fully adversarial procedure where strictly necessary, in the light of a strong countervailing public interest such as national security, the need to keep secret police methods of investigation, or the protection of the fundamental rights of another person. There will not be a fair trial, however, unless any difficulties caused to the defendant by a limitation on his rights are sufficiently counterbalanced by the procedures followed by the judicial authorities.<sup>679</sup> Thus, while the right to a fair criminal trial under Article 6 includes a right to disclosure of all material evidence in the possession of the prosecution, both for and against accused, the ECtHR has held that it might sometimes be necessary to withhold certain evidence from the defence on public-interest grounds.<sup>680</sup>

In the context of detention under the 2013/33/EU Reception Directive, the CJEU developed an interpretation of the concept of “*public order*” that entails, in any event, the existence – in addition to the disturbance of the social order which any infringement of the law involves – of a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society, while the concept of “*public security*” covers both the internal and external security of a Member State and that, consequently, a threat to the functioning of institutions and essential public services and the survival of the population, as well as the risk of a serious disturbance to foreign relations or to peaceful coexistence of nations, or a risk to military interests, may affect public security.<sup>681</sup>

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<sup>678</sup>*A and others v United Kingdom* (Grand Chamber) App no 3455/05 (ECtHR 19 February 2009), para 220.

<sup>679</sup>*Ibid*, para 205.

<sup>680</sup>*Ibid*. para 206.

<sup>681</sup>C-601/15 PPU, *J.N.* (Grand Chamber) EU:C:2016:84, para 65.



It is settled case-law that the meaning and scope of terms for which EU law provides no definition must be determined by considering their usual meaning in everyday language.<sup>682</sup> In the context of the decisions taken under the Return Directive, the concept of the “risk of public policy”, must be determined by considering that term in its usual meaning in everyday language. This needs to be done by taking into account also the context in which that term occurs and the purposes of the rules of which it is part. When such term appears in a provision which constitutes derogation from a principle, it must be read so that that provision can be interpreted strictly<sup>683</sup> and it is a Member State which must be able to prove that the person concerned “in fact constitutes such a risk.”<sup>684</sup> *“While Member States essentially retain the freedom to determine the requirements of public policy in accordance with their national needs, which can vary from one Member State to another and from one era to another, the fact still remains that, in the EU context and particularly when relied upon as a justification for derogating from an obligation designed to ensure that the fundamental rights of third-country nationals are respected when they are removed from the EU, those requirements must be interpreted strictly, so that their scope cannot be determined unilaterally by each Member state without any control by the institutions of the EU.”*<sup>685</sup> According to the general principles of EU law, decisions should be adopted on a case-by-case basis and be based on objective criteria in order to ascertain whether the personal conduct of the third-country nationals concerned “poses a genuine and present risk to public policy”. The principle of proportionality must be observed throughout all the stages of the return procedure.<sup>686</sup> When the State relies on general practice or any assumption in order to determine such a risk, without properly taking into account the national’s personal conduct and the risk that that conduct poses to public policy, a Member State fails to have regard to the requirements relating to an individual examination of the case concerned and to the principle of proportionality. It follows that the fact that a third-country national is suspected, or has been criminally convicted, of an act punishable as a criminal offence under national law cannot, in itself, justify a finding that that national poses a risk to public policy. However, in the event of criminal conviction, a Member State may find that there is a risk to public

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<sup>682</sup>C-554/13, *Z.Zh, and O* EU:C:2015:377, para 42.

<sup>683</sup>*Ibid.* para 42.

<sup>684</sup>*Ibid.* para 46.

<sup>685</sup>*Ibid.* para 48.

<sup>686</sup>*Ibid.* paras, 49, 50.

policy even where that conviction has not become final and absolute, where that conviction, taken together with other circumstances relating to the situation of the person concerned, justifies such a finding. Moreover, the mere suspicion that a third-country national has committed an act punishable as a criminal offence under national law may, together with other factors relating to the case in question (such as the nature and seriousness of that act, and the time which has elapsed since it was committed), be used as a basis for a finding that he poses a risk to public policy.<sup>687</sup>

In the context of decision refusing a citizen of the EU admission to a Member State the CJEU stated that the provisions of Directive 2004/38 oblige the Member States to lay down, in domestic law, the measures necessary to enable Union citizens and members of their families to have access to judicial, and where appropriate, administrative redress procedures to appeal against or seek review of any decision restricting their rights to move and reside freely in the Member States on the grounds of public policy, public security or public health. In order that the person concerned may make effective use of the redress procedures, the competent authority is required, as is laid down as a principle by Article 30(2) of Directive 2004/38, to inform him in the administrative procedure precisely about the facts and circumstances on which the proposed measure is based and in full of the public policy, public security or public health grounds on which the decision in question is based.<sup>688</sup> It is only by way of derogation that Article 30(2) of Directive 2004/83 permits the Member States to limit the information sent to the person concerned in the interests of State security. This provision must be interpreted strictly, but without depriving it of its effectiveness (Article 47 of the Charter). It is in that context that it must be determined whether and to what extent Article 30(2) and 31 of Directive 2004/38 permit the grounds of a decision taken under Article 27 of the directive *“not to be disclosed precisely and in full /.../. It should be taken into account that, whilst Article 52(1) of the Charter admittedly allows limitations on the exercise of the rights enshrined by the Charter, it nevertheless lays down that any limitations must in particular respect the essence of the fundamental right in question and requires, in addition, that subject to the principle of proportionality, the limitation must be necessary and*

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<sup>687</sup>*Ibid.* paras 50-51, 55.

<sup>688</sup>C-300/11, ZZ, EU:C:2013:363, paras 47-48.

*genuinely meet objectives of general interest recognised by the EU.*<sup>689</sup> According to the settled case law of the CJEU, *“if the judicial review guaranteed by Article 47 of the Charter is to be effective, the person concerned must be able to ascertain the reasons upon which the decision taken in relation to him is based, either by reading the decision itself or by requesting and obtaining notification of those reasons, without prejudice to the power of the court with jurisdiction to require the authority concerned to provide that information /.../ so as to make it possible for him to defend his rights in the best possible conditions and to decide, with full knowledge of the relevant facts, whether there is any point in his applying to the court with jurisdiction, and in order to put the latter fully in a position in which it may carry out the review of the lawfulness of the national decision in question. Admittedly, it may prove necessary, both in administrative proceedings and in judicial proceedings, not to disclose certain information to the person concerned, in particular in the light of overriding consideration connected with State security.”*<sup>690</sup> In certain cases, disclosure of that evidence is liable to compromise State security in a direct and specific manner, in that it may, in particular, endanger the life, health or freedom of persons or reveal the methods of investigation specifically used by the national security authorities and thus seriously impede, or even prevent, future performance of the task of those authorities.<sup>691</sup> By invoking reasons for State security, the court of the Member State must have at its disposal and apply techniques and rules of procedural law which accommodate, on the one hand, legitimate State security considerations regarding the nature and sources of the information taken into account in the adoption of such a decision and, on the other hand, the need to ensure sufficient compliance with the person’s procedural rights, such as the right to be heard and the adversarial principle.<sup>692</sup> In the context of that judicial review, it is incumbent upon the Member States to lay down rules enabling the court entrusted with review of the decision’s legality to examine both all the grounds and the related evidence on the basis of which the decision was taken. It is necessary for a court to be entrusted with verifying whether those reasons stand in the way of precise and full disclosure of the grounds on which the decision in question is based and of the related evidence.<sup>693</sup> Thus, the competent national authority

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<sup>689</sup>*Ibid.* paras 49-51.

<sup>690</sup>*Ibid.* paras 53-54.

<sup>691</sup>*Ibid.* para 66.

<sup>692</sup>*Ibid.* para 57.

<sup>693</sup>*Ibid.* para 60.

has the task of proving, in accordance with the national procedural rules that State security would in fact be compromised by precise and full disclosure to the person concerned of the grounds which constitute the basis of a decision taken under Article 27 of Directive 2004/38 and of the related evidence. It follows that there is no presumption that the reasons invoked by a national authority exist and are valid.<sup>694</sup> If that court concludes that State security does not stand in the way of precise and full disclosure to the person concerned, it gives the competent national authority the opportunity to disclose the missing grounds and evidence to the person concerned. If that authority does not authorise their disclosure, the court proceeds to examine the legality of such a decision solely on the basis of the grounds and evidence which have been disclosed.<sup>695</sup> Any limitation of the right to effective judicial protection must be strictly necessary.<sup>696</sup> In particular, the person concerned must be informed, in any event, of the essence of the grounds on which a decision refusing entry taken under Article 27 of Directive 2004/38 is based, as the necessary protection of State security cannot have the effect of denying the person concerned his right to be heard and, therefore, of rendering his right of redress as provided for in Article 31 of that Directive ineffective.<sup>697</sup>

### **Standard 30. Derogation from obligations under Article 5(1) of the ECHR**

The concept of a “public emergency threatening the life of the nation” has a natural and customary meaning. Those words are sufficiently clear and they refer to an exceptional situation of crisis or emergency, which affects the whole population and constitutes a threat to the organised life of the community of which the state is composed. In the Greek case (*Denmark, Norway, Sweden and the Netherlands v Greece*), the Commission held that, in order to justify a derogation, the emergency should be actual and imminent; that is, it should affect the whole nation to the extent that the continuance of the organised life of the community was threatened; and that the crisis or danger should be exceptional, in that the normal measures or restrictions, permitted by the ECHR for the maintenance of public safety, health and order, were plainly inadequate. In the case of *Ireland v the United*

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<sup>694</sup>*Ibid.* para 61.

<sup>695</sup>*Ibid.* para 63.

<sup>696</sup>*Ibid.* para 64.

<sup>697</sup>*Ibid.* para 65.

*Kingdom*, the ECtHR agreed that the Article 15 test was satisfied, since terrorism in Northern Ireland had for a number of years presented a particularly far-reaching and acute danger for the territorial integrity of the United Kingdom, the institutions of the six counties of Northern Ireland and the lives of that province's inhabitants. In the case of *Aksoy*, it accepted that Kurdish separatist violence had given rise to a public emergency in Turkey.<sup>698</sup> The requirement of imminence cannot be interpreted so narrowly as to require a State to wait for a disaster to strike before taking measures to deal with it.<sup>699</sup> Since the purpose of Article 15 is to permit States to take derogating measures to protect their populations from future risks, the existence of a threat to the life of the nation must be assessed primarily with reference to those facts which were known at the time of the derogation.<sup>700</sup> The ECtHR's case-law has never explicitly incorporated the requirement that the emergency be temporary, although the question of the proportionality of the response may be linked to the duration of the emergency.<sup>701</sup> In the past, the ECtHR has accepted that emergency situations have existed even though the institutions of the State did not appear to be imperilled, so that the existence of the institutions of the government or existence of civil society would be threatened.<sup>702</sup>

As regards the question whether "the measures were strictly required by the exigencies of the situation", Article 15 of the ECHR allows the national authorities a wide margin of appreciation. However, in particular, where a derogating measure encroaches upon a fundamental right from the ECHR, such as the right to liberty, the ECtHR must be satisfied that it was a genuine response to the emergency situation, that it was fully justified by the special circumstances of the emergency and that adequate safeguards were provided against abuse.<sup>703</sup> Where the measures are found to be disproportionate to that threat and to be discriminatory in their effect, there is no need to go further and examine their application in the concrete case of each applicant.<sup>704</sup>

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<sup>698</sup>*A and others v United Kingdom (Grand Chamber)* App no 3455/05 (ECtHR 19 February 2009), para 176.

<sup>699</sup>*Ibid.* para 177.

<sup>700</sup>*Ibid.* para 177.

<sup>701</sup>*Ibid.* para 178.

<sup>702</sup>*Ibid.* para 179.

<sup>703</sup>*Ibid.* para 184.

<sup>704</sup>*Ibid.* para 185.

**Standard 33. Protection of inhuman or degrading treatment in relation to conditions of detention in another Member State(s)**

The Grand Chamber, in the case of *Aranyosi*, developed the following criteria that might be used as inspiration or even as analogy<sup>705</sup> for the use of criteria under Article 3(2) of the Dublin III Regulation. The CJEU, in that case, states that, “*where the judicial authority of the executing Member State is in possession of evidence of a real risk of inhuman or degrading treatment of individuals detained in the issuing Member State, having regard to the standard of protection of fundamental rights guaranteed by EU law and, in particular, by Article 4 of the Charter (see, to that effect, judgment in Melloni, C-399/11, EU:C:2013:107, paragraphs 59 and 63, and Opinion 2/13, EU:C:2014:2454, paragraph 192), that judicial authority is bound to assess the existence of that risk when it is called upon to decide on the surrender to the authorities of the issuing Member State of the individual sought by a European arrest warrant. The consequence of the execution of such a warrant must not be that that individual suffers inhuman or degrading treatment. To that end, the executing judicial authority must, initially, rely on information that is objective, reliable, specific and properly updated on the detention conditions prevailing in the issuing Member State and that demonstrates that there are deficiencies, which may be systemic or generalised, or which may affect certain groups of people, or which may affect certain places of detention. That information may be obtained from, inter alia, judgments of international courts, such as judgments of the ECtHR, judgments of courts of the issuing Member State, and also decisions, reports and other documents produced by bodies of the Council of Europe or under the aegis of the UN.*”<sup>706</sup> Nonetheless, a finding that there is a real risk of inhuman or degrading treatment by virtue of general conditions of detention in the issuing Member State cannot lead, in itself, to the refusal to execute a European arrest warrant. Whenever the existence of such a risk is identified, it is then necessary that the executing judicial authority make a further assessment, specific and precise, of whether there are substantial grounds to believe that the individual concerned will be exposed to that risk because of the

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<sup>705</sup>See the judgment of the CJEU in the case of *C.K. and Others* (C-578/16 PPU *C.K. and Others* EU:C:2017:127 para 75), which relates to the second sub-paragraph of Article 3(2) of the Dublin III Regulation, where the CJEU refers to the criteria and standards developed in the judgment in the case of *Aranyosi*.

<sup>706</sup>C-404/15 and C-659/15 PPU *Pál Aranyosi and Robert Căldăraru* EU:C:2016:198, paras 88-89.

*conditions for his detention envisaged in the issuing Member State*".<sup>707</sup> The CJEU in the case of Aranyosi adds that *"the mere existence of evidence that there are deficiencies, which may be systemic or generalised, or which may affect certain groups of people, or which may affect certain places of detention, with respect to detention conditions in the issuing Member State, does not necessarily imply that, in a specific case, the individual concerned will be subject to inhuman or degrading treatment in the event that he is surrendered to the authorities of that Member State. Consequently, in order to ensure respect for Article 4 of the Charter in the individual circumstances of the person who is the subject of the European arrest warrant, the executing judicial authority, when faced with evidence of the existence of such deficiencies that is objective, reliable, specific and properly updated, is bound to determine whether, in the particular circumstances of the case, there are substantial grounds to believe that, following the surrender of that person to the issuing Member State, he will run a real risk of being subject in that Member State to inhuman or degrading treatment, within the meaning of Article 4. To that end, that authority must, pursuant to Article 15(2) of the Framework Decision, request of the judicial authority of the issuing Member State that there be provided as a matter of urgency all necessary supplementary information on the conditions in which it is envisaged that the individual concerned will be detained in that Member State. That request may also relate to the existence, in the issuing Member State, of any national or international procedures and mechanisms for monitoring detention conditions, linked, for example, to visits to prisons, which make it possible to assess the current state of detention conditions in those prisons"*.<sup>708</sup>

The authorities concerned must verify whether the state of health of the applicant may be protected appropriately and sufficiently by taking the precautions envisaged by the Dublin III Regulation and, in affirmative, must implement those precautions.<sup>709</sup> As regards those precautions, both Member States involved must ensure that the person concerned receives

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<sup>707</sup>*Ibid.* para 92. As regards the standard of proof the CJEU in the case of *C.K. and others* uses the term that authorities must "eliminate any serious doubts" concerning the impact of the transfer on the state of health of the person concerned (C-578/16 PPU *C.K. and Others* EU:C:2017:127, para 76).

<sup>708</sup>*Ibid.* paras 91-96.

<sup>709</sup>C-578/16 PPU *C.K. and Others* EU:C:2017:127, para 77. See, for example, decision of the ECtHR in the case *J.A. and Others v Netherlands* App no 21459/14 (ECtHR 3 November 2015), which concerns transfer of mother with special health situation, one adult and one minor to Italy, and decision of the ECtHR in the case of *A.T.H. v Netherlands* App no 54000/11 (ECtHR 17 November 2015) which concerns transfer of HIV diagnosed applicant and five years old child to Italy.

health care during and after the transfer.<sup>710</sup> The Member State carrying out the transfer may, in addition, obtain from the Member State responsible the confirmation that the necessary care will be fully available upon arrival.<sup>711</sup> If there is a risk of inhuman and degrading treatment the execution of a decision must be postponed.<sup>712</sup> If the existence of that risk cannot be discounted within a reasonable time, the executing judicial authority must decide whether surrender procedure should be brought to an end.<sup>713</sup> In the context of Dublin III Regulation this means that Member State may choose to conduct its own examination of that application by making use of the discretionary clause laid down in Article 17(1) of the Dublin III Regulation.<sup>714</sup>

**Standard 34.3. Conditions of detention: overcrowding, ventilation, access to light and natural air or to exercise in the open air, quality of heating, health requirements, basic sanitary and hygiene requirements**

In *S.D. v Greece* (paras. 49-54), an asylum-seeker was confined to a prefabricated cabin for two months without being allowed outdoors or to make a telephone call, and with no clean sheets and insufficient hygiene products. He was also detained for six days, in a confined space, with no possibility of taking a walk, no leisure area, sleeping on dirty mattresses and with no free access to a toilet. The ECtHR found both periods of detention to be in breach of Article 3. In *Tabesh v Greece* (paras. 38-44), the asylum-seeker was detained for three months on police premises pending the application of an administrative measure, with no access to any recreational activities and without proper meals. In *A.A. v Greece* (paras. 57-65), an asylum-seeker was detained for three months in an overcrowded place in appalling conditions of hygiene and cleanliness, with no leisure or catering facilities, where the dilapidated state of repair of the sanitary facilities rendered them virtually unusable and where the detainees slept in extremely filthy and crowded conditions. The Grand Chamber

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<sup>710</sup>*Ibid.* para 80. For example, during transportation, asylum seeker is accompanied by adequate medical staff with necessary equipment, resources and medication, so as to prevent any worsening of his health or any act of violence by him towards himself or other persons (*Ibid.* para 81) and that he/she receives care upon her/his arrival (*Ibid.* para 82).

<sup>711</sup>*Ibid.* para 83. Where necessary, that person's state of health should be reassessed before the transfer is carried out (*Ibid.* para 84).

<sup>712</sup>*Ibid.* paras 85-86. See *mutatis mutandis* C-404/15 and C-659/15 PPU Pál Aranyosi and Robert Căldăraru EU:C:2016:198, para 98.

<sup>713</sup>*Ibid.* para 104.

<sup>714</sup>C-578/16 PPU C.K. and Others EU:C:2017:127, para 88.



considered immigration detention conditions in Greece in the case of *MSS. v Belgium and Greece*. In that case, where the applicant had been detained in a building next to the airport, it found a violation of Article 3 where the sector for asylum-seekers was rarely unlocked, with the consequence that the detainees had no access to the water fountain outside and were obliged to drink water from the toilets. In the sector for arrested persons, there were 145 detainees in a 110 m<sup>2</sup> space. In a number of cells there was only 1 bed for 14 to 17 people. There were not enough mattresses and a number of detainees were sleeping on the bare floor. There was insufficient room for all the detainees to lie down and sleep at the same time. Because of the overcrowding, there was a lack of sufficient ventilation and the cells were unbearably hot. Detainees' access to the toilets was severely restricted and they complained that the police would not let them out into the corridors. The police admitted that the detainees had to urinate in plastic bottles which they emptied when they were allowed to use the toilets. It was observed in all sectors that there was no soap or toilet paper, that sanitary and other facilities were dirty, that the sanitary facilities had no doors and that the detainees were deprived of outdoor exercise. Against this background, the ECtHR found the relatively short periods of detention to be insignificant (4 days and 1 week), especially when the particularly vulnerable position of the applicant (an asylum-seeker) was taken into consideration. The applicant in *MSS* had been detained in Greece in 2009. However, the poor detention conditions there had been a persistent, long-standing and well-documented problem (the Grand Chamber cited reports criticising detention conditions in Greece dating back as far as 2005). The Grand Chamber considered the issue of sudden arrival of a large group of migrants in the case of *Khlaifia v Italy*. The applicants in that case had fled from Tunisia during the "Arab Spring" in 2011. They complained both of their detention in a reception centre on the island of Lampedusa and on board ships moored in Palermo harbour. In considering their detention conditions, the ECtHR expressly accepted that there existed at the relevant time a state of emergency in Lampedusa due to a wave of over 50,000 arrivals after the uprisings in Tunisia and Libya, which placed many obligations on the Italian authorities as to rescue, medical care, reception and maintenance of public order. The Grand Chamber took into consideration the fact that Italy had declared a state of humanitarian emergency on the island of Lampedusa and appealed for solidarity from the Member States of the EU. The arrival *en masse* of North African migrants undoubtedly created organisational, logistical and structural difficulties for the Italian authorities in view

of the combination of requirements to be met, as they had to rescue certain vessels at sea, to receive and accommodate individuals arriving on Italian soil, and to take care of those in particularly vulnerable situations. The ECtHR observed in this connection that according to the data supplied by the Government, there were some 3000 women and 3000 children among the migrants who arrived during the period in question. The ECtHR could not criticise, in itself, the decision to concentrate the initial reception of the migrants on Lampedusa. As a result of its geographical situation, that was where most rudimentary vessels would arrive and it was often necessary to carry out rescues at sea around the island in order to protect the life and health of the migrants. It was therefore not unreasonable, at the initial stage, to transfer the survivors from the Mediterranean crossing to the closest reception facility. In addition to that general situation, there were some specific problems, like a revolt among the migrants, protest marches through the island's streets, clashes between the local community and a group of aliens threatening to explode gas canisters, self-harm and vandalism. While constraints inherent in such crisis could not, in themselves, be used to justify a breach of Article 3, the ECtHR took the view that it would certainly be artificial to examine the facts of the case without considering the general context in which those facts arose.<sup>715</sup> As regards detention in the Contrada Imbriacola CSPA the ECtHR took into account several things and among them the fact that migrants could move around freely within the confines of the facility, communicate by telephone with the outside world, make purchases and contact representatives of humanitarian organisations and lawyers. Even though the number of square metres per person in the centre's rooms had not been established, the ECtHR found that the freedom of movement enjoyed by the applicants in the CSPA must have alleviated in part, or even to a significant extent, the constraints caused by the fact that the centre's maximum capacity was exceeded. The applicants were not asylum-seekers and therefore did not have the specific vulnerability inherent in that status and did not claim to have endured traumatic experiences in their country of origin. They belonged neither to the category of elderly persons nor to that of minors. At the time of the events they were aged between 23 and 28 and did not claim to be suffering from any particular medical condition, nor did they complain of any lack of medical care in the centre. The applicants did not claim that they had been deliberately ill-treated by the authorities in

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<sup>715</sup>*Khlaifia and Others v Italy* (Grand Chamber) App no 16483/12 (ECtHR 15 December 2016), paras 178-186.

the centre, that the food or water had been insufficient or that the climate at the time had affected them negatively when they had had to sleep outside.<sup>716</sup> As regards the conditions on the ships *Vincent and Audace*, the ECtHR also found no violation of Article 3 of the ECHR.<sup>717</sup>

### **Standard 34.5. Minors**

In *Muskhadzhiyeva and Others v Belgium* the ECtHR considered the detention of a mother and four children (asylum-seekers) in the same detention centre as the unaccompanied five-year old applicant in *Mubilanzila Mayeka and Kaniki Mitunga*. In *Muskhadzhiyeva and Others* the ECtHR took into account the children's ages (they were 7 months, 3 and a half, 5 and 7 years old at the relevant time), the fact that they were found to be suffering from psychological problems and the fact that they were detained for more than 1 month with their mother in a centre which was not adjusted to reception of children. It therefore accepted that detention conditions had violated their rights under Article 3 of the ECHR.<sup>718</sup> In the case of *Kanagaratnam and Others v Belgium*, the children were also detained with their mother. They did not have specific health concerns and they were older than the children in *Muskhadzhiyeva and Others v Belgium*. Nevertheless, the ECtHR took into account a traumatic situation they had experienced in the past and the fact that they were detained for a longer period (4 months). The ECtHR found a violation of the children's rights under Article 3 of the ECHR.<sup>719</sup>

In *Popov v France*, the ECtHR considered the detention for fifteen days of two infants - three years and five months old (asylum-seekers). During this period, they were detained with their parents at a centre authorised to receive families. In finding a violation of Article 3, the ECtHR noted that although the authorities had been careful to separate families from other detainees, the facilities available in the "families" area of the centre were nevertheless ill-adapted to the presence of children: there were no children's beds and adult beds had

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<sup>716</sup>*Ibid.* paras 187-198.

<sup>717</sup>*Ibid.* paras 202-211.

<sup>718</sup>*Muskhadzhiyeva and Others v Belgium App no 41442/07* (ECtHR 19 January 2010), paras 55-63.

<sup>719</sup>*Kanagaratnam and Others v Belgium App no 15297/09* (ECtHR 13 December 2011), paras 66-69.

pointed metal corners; there were no activities for children; there was a very basic play area on a small piece of carpet; there was a concreted courtyard of 20 m<sup>2</sup> with a view of the sky through wire netting; there was a tight grill over the bedroom windows obscuring the view outside; and there were automatically closing bedroom doors with consequent danger for children. The ECtHR had regard to the international Convention on the Rights of the Child, which provided in Article 37 that “[e]very child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age”. It accepted that confinement in conditions such as these caused “great emotional and mental suffering” to minors, and that the “abnormal living conditions” imposed on very small children “exceeded the threshold of seriousness for the purposes of Article 3 of the Convention”. However, as in *Muskhadzhiyeva*, the ECtHR declined to find an additional violation of Article 3 in respect of the parents.

In the case of *A. B. et autres v France*, the ECtHR found a violation of Article 3 of the ECHR in respect of a four-year old child detained together with his parents for 18 days in the centre Toulouse-Cornebarrieu, where he was exposed to extreme and constant noise from the nearby airport.<sup>720</sup> In the case of *A. M. et autres c. France*, the ECtHR found a violation of Article 3 of the ECHR in respect of two children aged 2 and a half and 4 months who were detained together with their mother for 8 hours in the centre Metz-Queuleu, where conditions were not suitable for young children.<sup>721</sup>

### **Standard 34.6. Unaccompanied minors**

In *Rahimi v Greece*, the applicant was a fifteen-year old unaccompanied minor (asylum-seeker) from Afghanistan. He was placed in a detention centre for a couple of days before being housed in a hostel. Although the ECtHR could not say with certainty that the applicant was placed in a detention centre with adults, it found that the conditions in the centre generally were so bad as to undermine the very meaning of human dignity. As he had been both an unaccompanied minor and an illegal alien, he had been extremely vulnerable and it

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<sup>720</sup>*A.B. and Others v France* App no 11593/12 (ECtHR 12 July 2016), paras 110-115; see also circumstances in the case of *A.M. et autres c. France* App no 24587/12 (12 July 2016), paras 48-53.

<sup>721</sup>*A.M. et autres c. France* App no 24587/12 (12 July 2016), paras 44-53.

had therefore been incumbent on the Contracting State to protect and care for him by taking appropriate measures in the light of its positive obligations under Article 3 of the ECHR.<sup>722</sup>

In *Mubilanzila Mayeka and Kaniki Mitunga v Belgium*<sup>723</sup>, a five-year old child (asylum seeker) from DRC had been detained alone for nearly two months in a transit centre for adults. In finding a violation of Article 3 of the ECHR, the ECtHR had regard to the child's extreme vulnerability on account of her age and the fact that she was alone in a foreign country. In finding a violation of her rights under Article 3, it had regard to the fact that no one had been assigned to look after her; no measures were taken to ensure that she received proper counselling and educational assistance from qualified personnel; the place of detention was not adapted to her needs; and there was a legal void in respect of unaccompanied foreign minors. In respect of the last point, the ECtHR noted that there was virtually no possibility of accommodating a child such as the applicant in more suitable conditions (existing detention centres were not adapted to afford adequate protection to minors) and the domestic courts could only consider the lawfulness of her detention and not its appropriateness. The child had received legal assistance, had daily telephone contact with her mother or uncle, and staff and residents at the centre did their best for her. However, the ECtHR found that this "uncoordinated attention" could not be regarded as sufficient to meet all her needs as a five-year-old child.<sup>724</sup>

### **Standard 34.7. Ill-health and special medical conditions**

In the case of *Z v A Government Department and the Board of management of a community school*, the CJEU states that following the ratification by the EU of the UN Convention on the Rights of Persons with Disabilities, the concept of "disability" within the meaning of the Framework Directive (2000/78)<sup>725</sup> had to be understood as referring to a "*limitation which results in particular from long-term physical, mental or psychological impairments which in*

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<sup>722</sup>*Rahimi v Greece*, App No 8687/08 (ECtHR 5 April 2011); See also violation of Article 3, Article 13 in conjunction with Article 3 and Article 5(1) of the ECHR in the case of *Mohamad v Greece* App no70586/11 (ECtHR 11 December 2014).

<sup>723</sup>*Mubilanzila Mayeka and Kaniki Mitunga v Belgium* App no 13178/03 (ECtHR 12 October 2006).

<sup>724</sup>*Ibid.* paras 48-63.

<sup>725</sup>Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJEU, L303, 2. 12. 2000).

*interaction with various barriers may hinder the full and effective participation of the person concerned in professional life on an equal basis with other workers.”* However, the provisions of that Convention are not, as regards their content, unconditional and sufficiently precise; they are programmatic and therefore do not have direct effect. The validity of the directive cannot be assessed in the light of the UN Convention.<sup>726</sup>

In the case of *Mahmundi v Greece*, one of the applicants had been detained pending her deportation while she was heavily pregnant. The ECtHR was critical of the fact that, according to a report on detention conditions, several pregnant women, in the last month of pregnancy, had been held in inhumane conditions in overcrowded cells. The report noted that in addition to the suffering caused by the emotional and psychological impact of detention, these women were often not examined by a doctor. The fact of not knowing where they were going to give birth and what would happen to them and their children increased their anxiety. However, although the ECtHR found a violation of Article 3, it based its decision on a combination of factors, including the poor detention conditions generally.

In *Aden Ahmed v Malta*, the ECtHR found a violation of Article 3 in a case concerning the detention of a pregnant woman who miscarried in detention. In finding a violation, the ECtHR found “disconcerting” the lack of female staff in the centre. It accepted that this must have caused a degree of discomfort to the female detainees, particularly the applicant, who suffered from specific medical conditions related to her miscarriage.

The applicant in *Asalya v Turkey* was paraplegic and confined to a wheelchair. He was detained (pending his deportation) for seven days in a regular detention facility which was not adapted for wheelchair users. No special arrangements were made to alleviate the subsequent hardship. As a consequence, the applicant experienced serious difficulties in meeting his most basic needs, such as using the toilet. He was dependent entirely on the good will of the police officers to assist him. In finding a violation of Article 3, the ECtHR reiterated that, where authorities decide to place and keep a person with a disability in

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<sup>726</sup>C-363/12, *Z v A Government Department and the Board of management of a community school* (Grand Chamber), EU:C:2013:604, paras 88 and 90.

detention, they should demonstrate special care in guaranteeing such conditions as correspond to the special needs resulting from his disability.<sup>727</sup>

In *Yoh-Ekale Mwanje v Belgium*, the ECtHR found a violation of Article 3 where an HIV-positive woman had been detained, while being subject to removal. The authorities were aware of her condition and there was evidence that her health had worsened and the infection had progressed while she was in detention. However, a number of weeks passed before she was examined by hospital specialists, and when treatment was eventually prescribed it was not administered until one week later. Accordingly, the ECtHR found that in failing to take at an earlier stage all the measures that could reasonably have been expected of them to protect the applicant's health and prevent a worsening of her condition, the authorities had not acted with the requisite diligence. That situation had impaired the applicant's dignity and, combined with the distress caused by the prospect of being deported, had subjected her to particularly acute hardship causing suffering beyond that inevitably associated with detention and with her condition. It had therefore amounted to inhuman and degrading treatment.

The ECtHR has consistently held that detained persons with mental health problems should be detained in places appropriate to their pathology and be provided with the necessary treatment. For example, the ECtHR has found a violation of Article 3 where an applicant with a severe mental illness was placed in a normal prison and treated the same as other inmates.<sup>728</sup> It has also recognized that persons with mental health problems might be more vulnerable within the detention regime and therefore conditions of detention might be more likely to undermine the detainee's human dignity and aroused in him or her feelings of humiliation and debasement.<sup>729</sup> However, in order to find a violation of Article 3, the ECtHR

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<sup>727</sup>See: *Price v United Kingdom* App no 33394/96 (ECtHR 12 September 2000), para 30; *Farbtuhs v Latvia* App no 4672/02 (ECtHR 2 December 2004), para 56; *Jasinskis v Latvia* App no 45744/08 (21 December 2010) para 59, and *Z.H. v Hungary* App no 28973/11 (ECtHR 8 November 2012) para 29.

<sup>728</sup>*Dvbeku v Albania* App no 41153/06 (ECtHR 18 December 2007); *Musial v Poland* App no 28300/06 (ECtHR 20 January 2009).

<sup>729</sup>See *Romanov v Russia* App no 63993/00 (ECtHR 20 October 2005) in respect of overcrowding; see also *Kucheruk v Ukraine* App no 2570/04 (ECtHR 6 September 2007) in respect of handcuffing and solitary confinement.

requires that the conditions of detention caused a deterioration in the applicant's mental health.<sup>730</sup>

Where detained persons have committed suicide, the ECtHR has found there to be a breach of the positive obligation under Article 2 where the authorities were aware of their suicidal tendencies and failed to either provide adequate treatment or monitoring/supervision.<sup>731</sup> In the case of *Keenan v the United Kingdom*, which does not refer to detention of asylum seekers or irregular migrants, the ECtHR stated that, in the case of mentally ill persons, the assessment of whether the treatment or punishment concerned is incompatible with the standards of Article 3 has to take into consideration their vulnerability and their inability, in some cases, to complain coherently or at all about how they are being affected by any particular treatment. Treatment of mentally ill persons may be incompatible with the standards imposed by Article 3 on the protection of fundamental human dignity, even though that person may not be able or capable of pointing to any specific ill-effects. In this case, the ECtHR was struck by the lack of medical notes concerning the applicant, who was an identifiable suicide risk and undergoing the additional stresses that could be foreseen from segregation and, later, disciplinary punishment. The ECtHR ascertained an inadequate concern to maintain full and detailed records of his mental state and ineffectiveness of any monitoring or supervision process.<sup>732</sup>

### **Standard 34.8. Elderly**

In *Contrada (No. 2) v Italy*, the ECtHR considered the detention of an 82-year old man who suffered from a number of serious and complex medical disorders. As it found that his state of health was incompatible with the prison regime to which he was subjected, it accepted that his continued detention had been incompatible with the prohibition of inhuman or degrading treatment under Article 3 of the ECHR. However, it would appear that in such

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<sup>730</sup>See *Novak v Croatia* App no 8883/04 (ECtHR 14 September 2007).

<sup>731</sup>*Renolde v France* App no 5608/05 (ECtHR 16 October 2008); *Jasinska v Poland* App no 28326/05 (ECtHR 1 June 2010) and *Ketreb v France* App no 38447/09 (ECtHR 19 July 2012).

<sup>732</sup>*Keenan v United Kingdom* App no 27229/95 (ECtHR 3 April 2011), paras 111, 113, 114, 116. As regards the monitoring requirements in case of drug addicted prisoner, see also: *McGlinchey and Others v United Kingdom* App no 50390/99 (ECtHR 29 July 2003), paras 57-58.



cases the state of health of the detained person will be a relevant factor. In *Haidn v Germany*,<sup>733</sup> the ECtHR found that the applicant's relatively advanced, but not particularly old age (he was 70), combined with his state of health, which could not be considered as critical, did not as such attain a minimum level of severity so as to fall within the scope of Article 3 of the ECHR.

**Standard 34.9. Other vulnerable persons (female applicants, mothers, LGBT etc.)**

In *Mubilanzila Mayeka and Kaniki Mitunga v Belgium*, in addition to finding a violation of Article 3 in respect of the child, the ECtHR also found a violation of the Article 3 rights of her mother in DRC. In doing so, it noted that the only action the Belgian authorities took was to inform her that her daughter had been detained and to provide her with a telephone number where she could be reached. The ECtHR therefore recognised that, as a mother, she would have suffered deep distress and anxiety as a result of her daughter's detention, and this suffering reached the level of severity required for a violation of Article 3 of the ECHR.<sup>734</sup>

In *Muskhadziyeva and Others v Belgium*, in respect of the children's mother, the ECtHR found that as she had not been separated from her children, and their constant presence would have somewhat appeased the distress and frustration she must have felt at being unable to protect them against the conditions of their detention. Any suffering or distress she would have experienced did not reach the level of severity required to constitute inhuman treatment. Like in *Muskhadziyeva and Others v Belgium* in *Popov v France*, the ECtHR also declined to find a violation of Article 3 of the ECHR in respects of parents.<sup>735</sup>

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<sup>733</sup>*Haidn v Germany* App no 6587/04 (ECtHR 13 January 2011), para 108.

<sup>734</sup>*Mubilanzila Mayeka and Kaniki Mitunga v Belgium* App no 13178/03 (ECtHR 12 October 2006), paras 41-71.

<sup>735</sup>The same type of judgment as regards the mother of detained children was taken in the case of *Kanagaratnam and Others v Belgium* App no 15297/09 (ECtHR 13 December 2011), paras 70-72.

## Section 5: Detention under the Return Directive and the ECHR: Basic Judicial Check-List 2

### Standard 1. Direct effect of Article 15 of the Return Directive<sup>736</sup> and a more favourable clause

The Return Directive is binding as to the result to be achieved, upon each Member State, but shall leave to the national authorities the choice of form<sup>737</sup> and methods. However, the CJEU decided in the cases of *El Dridi* and reiterated in *Mahdi* that Article 15 of the Return Directive regulating detention is unconditional and sufficiently precise, so that no other specific elements are required for it to be implemented by the Member State.<sup>738</sup> As regards implementation of EU regulations, the CJEU states that methods of implementation which “*would have the result of creating an obstacle to the direct effect of the Regulation and of jeopardizing its simultaneous and uniform application in the whole of the EU*” “*.../ can be considered contrary to the TFEU.*”<sup>739</sup> The CJEU further adds that “*it cannot be accepted that a Member State apply in an incomplete or selective manner provisions of a Community Regulation so as to render abortive certain aspects of Community legislation/.../.*”<sup>740</sup>

The first sentence of recital 17 of the Return Directive states that third-country nationals in detention should be treated in a humane and dignified manner with respect for their fundamental rights and in compliance with international and national law.<sup>741</sup>

Recital 24 of the Return Directive states that “*the Directive respects the principles recognised in particular by the Charter of Fundamental Rights of the EU*”.<sup>742</sup> Article 1 of the Return Directive defines the subject matter as follows: “*This Directive sets out common standards and procedures to be applied in Member States for returning illegally staying third-country*

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<sup>736</sup>Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, Official Journal of the EU, L 348, 24. 12. 2008; hereinafter: the Return Directive.

<sup>737</sup>Article 288(3) of the TFEU, Article 20 of the Return Directive.

<sup>738</sup>C-61/11, *El Dridi* EU:C:2011:268, para 47; C-146/14 PPU, *Mahdi* EU:C:2014:1320, para 54.

<sup>739</sup>C-39/72 *Commission v Italy* EU:C:1973:13, para 17.

<sup>740</sup>*Ibid.* para 20. See also para 8 in the section 3.3. of the ELI Statement on the importance of »full implementation« of provision from a directive.

<sup>741</sup>*Ibid.*

<sup>742</sup>Charter of Fundamental Rights of the European Union [2012] OJ C 326/ 02; hereinafter the Charter.

*nationals, in accordance with fundamental rights as general principles of Community law as well as international law, including refugee protection and human rights obligations.”*<sup>743</sup> In this sense, in the case of detention under the Return Directive, a relevant provision is Article 6 of the Charter of Fundamental Rights of the EU (hereinafter: the Charter),<sup>744</sup> which corresponds to Article 5 of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: the ECHR).<sup>745</sup> In the case of *Al Chodor*, which refers to detention under the Dublin III Regulation, the CJEU decided that for the purpose of interpreting Article 6 of the Charter account must be taken of Article 5 of the ECHR as the “*minimum threshold of protection.*”<sup>746</sup> In regards to the methods of interpretation of the Return Directive, it needs to be pointed out that according to the CJEU, as far deprivation of liberty measures are concerned, Articles 15 and 16 of the Return Directive are strictly regulated in order to ensure observance of the fundamental rights with regard to the third-country nationals (TCN).<sup>747</sup>

Article 1 of the Return Directive provides that the level of harmonisation of national laws is not limited to minimum standards, but to “*common*” standards related to asylum system, legal immigration policy, and the fight against illegal immigration, “*which must be applied by each Member State*”.<sup>748</sup> However, Article 4 of the Return Directive is without prejudice to more favourable provisions of bilateral or multilateral agreements between the Community or between the Community and its Member States, and one or more third countries, or bilateral or multilateral agreements between one or more Member States and one or more third countries. Furthermore, the Return Directive is without prejudice to more favourable provisions on the right of Member States to adopt or maintain provisions that are more

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<sup>743</sup>See also: C-534/11 *Arslan* EU:C:2013:343, para 4.

<sup>744</sup>In the case of *Kadzoev*, the CJEU uses the terminology of deprivation of a persons's liberty (C-357/09 PPU *Kadzoev* (Grand Chamber) EU:C:2009:741, para 56. Article 6 of the Charter of Fundamental Rights of the EU (hereinafter: the Charter) states that everyone has a right to liberty and security of person.

<sup>745</sup>In the case of *J.N.*, the CJEU established that rights laid down in Article 6 of the Charter correspond to those guaranteed by Article 5 of the ECHR (C-601/15 PPU, 15. 2. 2016, para 47).

<sup>746</sup>C-528/15 *Al Chodor* EU:C:2017:213, paras 36-37.

<sup>747</sup>C-47/15 *Affium* EU:C:2016:408, para 62.

<sup>748</sup>Recital 1 of the Return Directive; C-534/11 *Arslan* EU:C:2013:343, para 42; C-146/14 PPU *Mahdi* EU:C:2014:1320, para 39. In relation to the concept of “*common standards*”, the CJEU also adds that the “*Member States enjoy, in a number of respects, a discretion with regard to the implementation of the provisions of the directive in the light of the particular features of national law*” (*Ibid.* para 39).

favourable to persons, to whom it applies, provided that such provisions are compatible with this Directive. *“More favourable”* provisions refer to illegally staying third-country nationals, since the Return Directive *“does not allow those States to apply stricter standards in the area that it governs.”*<sup>749</sup>

## Standard 2. Definition of detention

Unlike the Recast Reception Directive,<sup>750</sup> the Return Directive does not use such specific terminology as *“deprivation of freedom of movement”* or *“deprivation of liberty”*. However, in the early cases of *Kadzoev* and *El Dridi*<sup>751</sup>, the CJEU had used the term *“person's liberty”*.<sup>752</sup> The ECtHR explained the distinction between the right to liberty of movement (Article 2(1) of Protocol 4 to the ECHR), and the right to liberty and security of person (Article 5 of the ECHR), leading to the application of different procedural safeguards under the ECHR the following way: *“to determine whether someone has been deprived of his liberty /.../ the starting-point must be his concrete situation, and account must be taken of a whole range of criteria such as the type, duration, effects and manner of implementation of the measure in question. The difference between deprivation of and restriction upon liberty is merely one of degree or intensity, and not one of nature or substance /.../. The mere fact that it is possible for asylum seekers to leave voluntarily the country where they wish to take refuge cannot exclude a restriction on liberty /.../.”*<sup>753</sup>

The notion of deprivation of liberty within the meaning of Article 5(1) of the ECHR contains

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<sup>749</sup>C-61/11 *El Dridi* EU:C:2011:268, para 33.

<sup>750</sup>Article 2(h) of the Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast) (Official Journal of the EU, L 180, 29. 6. 2013; hereinafter: the Recast Reception Directive) stated that detention means confinement of an applicant by a Member State within a particular place, where the applicant is deprived of his or her *»freedom of movement«*.

<sup>751</sup>C-357/09 PPU *Kadzoev* (Grand Chamber) EU:C:2009:741; C-61/11 *El Dridi* EU:C:2011:268.

<sup>752</sup>C-357/09 PPU *Kadzoev* (Grand Chamber) EU:C:2009:741, para 56; C-61/11 *El Dridi* EU:C:2011:268, paras 39, 40, 41. For more on this, see the Explanatory note.

<sup>753</sup>*Amuur v France* App no 19776/92 (ECtHR 25 June 1996), paras 42 and 48. See also: *Rantsev v Cyprus and Russia* App no 25965/04 (ECtHR 7 January 2010), para 314; *Stanev v Bulgaria* (Grand Chamber) App no 36760/06 (ECtHR 7 January 2012), para 115., *Medvedyev and Others v France* (Grand Chamber) App no 3394/03 (ECtHR 29 March 2010), para 73, *Creangă v Romania* (Grand Chamber), App no 29226/03 (ECtHR 23 February 2012), para 91; *Khlaifia and others v Italy* (Grand Chamber) App no 16483/12 (ECtHR 15 December 2016), para 64.

both an *objective element* of a person's confinement in a particular restricted space for a non-negligible length of time, and a *subjective element* providing that a person has not validly consented to the confinement in question.<sup>754</sup> However, the ECtHR also decided that the right to liberty is too significant in a democratic society for a person to lose the benefit of the protection for the mere reason that he/she may have given himself/herself up to be taken into detention, especially when that person is legally incapable of consenting to, or disagreeing with, the proposed action.<sup>755</sup> In another ruling, the ECtHR provided that "*Detention may violate Article 5 of the ECHR even though the person concerned has agreed to it.*"<sup>756</sup> Additionally, where the facts indicate a deprivation of liberty within Article 5(1) of the ECHR, a relatively short duration of detention does not affect this conclusion.<sup>757</sup> For concrete examples of deprivation of liberty or restriction of freedom of movement in the case-law of the CJEU and the ECtHR, see the Explanatory note to this check-list.

### **Standard 3. Special needs of vulnerable persons**

In order to effectively implement Article 16(3) and 17 of the Return Directive, which addresses the special situation of vulnerable persons, Member States shall assess whether an irregular migrant has special needs concerning health care, child and family protection.<sup>758</sup> The category vulnerable persons includes unaccompanied minors, disabled persons, elderly persons, pregnant women, single parents with minor(s) and persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual

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<sup>754</sup>*Storck v Germany* App no 61603/00 (ECtHR 16 June 2005), para 74; *Stanev v Bulgaria (Grand Chamber)* App no 36760/06 (ECtHR 17 January 2012), para 117.

<sup>755</sup>*H.L. v United Kingdom* App no 45508/99 (ECtHR 5 October 2004), para 90; *Stanev v Bulgaria (Grand Chamber)* App no 36760/06 (ECtHR 17 January 2012), para 119.

<sup>756</sup>*Kasparov v Russia* App no 53659/07 (ECtHR 11 October 2016), para 36.

<sup>757</sup>*Ransteve v Cyprus and Russia* App no 25965/04 (ECtHR 7 January 2010), para 317; *Iskandarov v Russia* App no 17185/05 (ECtHR 23 September 2010), para 140; European Court of Human Rights, *Guide on Article 5 – Right to Liberty and Security* (Council of Europe/European Court of Human Rights, 2014), pp. 5-6/points 7, 9, 12. Since measures of the Member States on detention under the Return Directive in most cases interfere with the right to personal liberty, this check-list further refers to standards and rules in relation to Article 5 of the ECHR and Article 6 of the Charter.

<sup>758</sup>Article 17 regulates special conditions concerning detention of minors and families, while Article 16(3) of the Return Directive states that particular attention shall be paid to the situation of vulnerable persons; emergency health care and essential treatment of illness shall be provided.

violence.<sup>759</sup> If taken as analogy, under the Recast Reception Directive 2013/33/EU, such an assessment should be initiated “within a reasonable period of time” after the detention procedure was launched and may be integrated into existing national procedures, but does not need to take the form of an administrative procedure.<sup>760</sup> However, “*reasonable period of time*” could mean as soon as possible and without delay if age assessment is at stake and asylum a person concerned is detained.<sup>761</sup> Member States shall provide for appropriate monitoring of the situation of persons with special needs throughout the duration of the detention order.<sup>762</sup> Likewise Member States shall ensure that those special needs are also addressed, if they become apparent at a later stage in the procedure.<sup>763</sup>

#### **Standard 4. Persons who can be subject to detention**

Rules on detention under the Return Directive are applicable to third country nationals, who do not or who no longer fulfil the conditions for entry, stay or residence in a Member State and are the subject of return.<sup>764</sup> This means that the Return Directive does not preclude a third-country national being placed in detention “*with a view to determining whether or not his stay is lawful.*”<sup>765</sup>

“Illegal stay” is defined as the presence of a third- country national on the territory of a Member State, which does not fulfil, or no longer fulfils the conditions of entry as set out in Article 5 of the Schengen Borders Code or other conditions for entry, stay or residence in

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<sup>759</sup>Article 3(9) of the Return Directive.

<sup>760</sup>See Article 22(1) and (2) of the Recast Reception Directive 2013/33/EU.

<sup>761</sup>See, for example, *Mahamed Jama v Malta* App no 10290/13 (ECtHR 26 November 2015), paras 148-150; *Aarabi v Greece* App no 39766/09, (ECtHR 2 April 2015), paras 43-45.

<sup>762</sup>See mutatis mutandis the third sub-paragraph of Article 22(1) of the Recast Reception Directive 2013/33/EU.

<sup>763</sup>See mutatis mutandis the second sub-paragraph of Article 22(1) of the Recast Reception Directive 2013/33/EU. As regards the importance of early and proper examination of whether a child is accompanied or unaccompanied see *Rahimi v Greece* App no 8687/08 (ECtHR 5 July 2011), paras 63-73; as regards an appointment of child's representative, see also standard 14 on best interests of a child.

<sup>764</sup>Recital 5, Article 3(7) and Article 15(1) of the Return Directive.

<sup>765</sup>C-329/11 *Achughbabian* EU:C:2011:807, paras 29-30; see also the first sentence of Recital 17 of the Return Directive.

that Member State.<sup>766</sup> “Third-country national” is defined as any person, who is not an EU citizen of the Union within the meaning of Article 20 of the Treaty on the Functioning of the European Union (hereinafter; TFEU), and who is not a person enjoying the Community right of free movement, as defined in Article 2(5) of the Schengen Borders Code.<sup>767</sup> Article 2(2)(a) of the Return Directive does not permit Member States to exclude certain illegally staying third-country nationals from the Directive's scope on the ground of illegal entry across an internal border.<sup>768</sup>

The Member States “*may decide*”<sup>769</sup>, however, not to apply the Return Directive to those third-country nationals who are subject to a refusal of entry in accordance with Article 13 of the Schengen Borders Code<sup>770</sup>, or who are apprehended or intercepted by the competent authorities in connection with the irregular crossing by land, sea or air of the external border of a Member State, and who have not subsequently obtained an authorisation or a right to stay in that Member State, or who are subject to return as a consequence of a criminal law sanction, according to national law, or who are subject of extradition procedures.<sup>771</sup> As regards the possible interpretation(s) of the term “*apprehended or intercepted*” in connection with the irregular crossing the external border of a Member State, the legal implications of extraterritorial interceptions under the case-law of the ECtHR, and a possible situation when a detained irregular migrant files an asylum application, see the Explanatory Note.

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<sup>766</sup>Article 3(2) of the Return Directive; see also Article 2(1) of the Return Directive and the last paragraph under standard no 5 of this check-list.

<sup>767</sup>Article 3(1) of the Return Directive; see also Article 2(3) of the Return Directive.

<sup>768</sup>C-47/15 *Affium* EU:C:2016:408, para 77.

<sup>769</sup>In the light of the standard no 12 of this Check-list, the aforementioned decision should be expressly provided in national legislation implementing EU law.

<sup>770</sup>Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code).

<sup>771</sup>Article 2(2)(a) and (b) of the Return Directive; C-297/12, *Filevu in Osmani* EU:C:2013:569, para 50. However, Article 2(2)(b) of the Return Directive is not applicable to third-country nationals who have committed “*only the offence of illegal staying*” (C-329/11 *Achughbabian* EU:C:2011:807, para 41).

### **Standard 5. Identifying the illegality of stay as a pre-condition for detention**

The second sentence of Recital 17 of the Return Directive distinguishes between “*apprehension by law-enforcement authorities, regulated by national legislation,*” and “*detention under the Return Directive*”. Therefore, since the Return Directive does not preclude the placement of a third-country national in a detention facility “*with a view to determining whether or not his stay is legal,*”<sup>772</sup> in order to guarantee the effective implementation of the Return Directive the CJEU provides that competent authorities “*must have a brief but reasonable time to identify the person under constraint and to research the information enabling it to be determined whether that person is an illegally-staying third-country national.*” They must act with “*diligence and take a position without delay on the legality or otherwise of the stay of the persons concerned. Once it has been established that the stay is illegal, the said authorities must, pursuant to Article 6(1) of the said directive and without prejudice to the exceptions laid down by the latter adopt a return decision.*”<sup>773</sup> An exception to this situation is regulated by Article 6(3) of the Return Directive.<sup>774</sup>

The concept of “*illegal stay*” is defined in Article 3(2) of the Return Directive. The CJEU further provides that “*by virtue of that fact alone, staying there illegally, without such presence being subject to a condition requiring a minimum duration or an intention to remain on that territory,*” such a person is to be considered illegally staying in the sense of the Return Directive. “[*However, if*] (...) *such presence is merely temporary or by way of transit among the grounds listed in Article 2(2) of the Return Directive, (...) Member States may decide to exclude an illegally staying third-country national from the Directive's scope.*”<sup>775</sup>

### **Standard 6. Authorities who can order a detention**

Detention of applicants shall be ordered by judicial or administrative authorities.<sup>776</sup>

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<sup>772</sup>C-329/11 *Achughbabian* EU:C:2011:807, paras 29-30; C-47/15 *Affium* EU:C:2016:408, para 53.

<sup>773</sup>*Ibid.* para 79; C-329/11 *Achughbabian* ECLI:EU:C:2011:807, para 31.

<sup>774</sup>C-47/15 *Affium* EU:C:2016:408, para 80, see also para 84.

<sup>775</sup>*Ibid.* paras 47-48.

<sup>776</sup>Article 15(2) of the Return Directive.



**Standard 7. Permissible grounds for detention (“*in particular*” when there is a risk of absconding or a person avoids or hampers the preparation of return or removal)**

A Member State may only keep a third-country national in detention in order to prepare the return and/or carry out the removal process (as long as removal arrangements are in progress), “*in particular*” when there is a risk of absconding or the third-country national concerned avoids or hampers the preparation of the return or the removal process.<sup>777</sup> In the case of *Kadzoev*<sup>778</sup> the CJEU states that the “*possibility of detaining a person on grounds of public order and public safety cannot be based on the Return Directive. None of the circumstances mentioned by the referring court can therefore constitute in itself a ground for detention under the provisions of that directive*”.<sup>779</sup> It might happen, however, that in a given case the issue of public order, public safety, or national security is connected with the risk of absconding.<sup>780</sup>

Article 5(1) sub-paragraphs (a) to (f) of the ECHR contain an exhaustive list of permissible grounds for deprivation of liberty. Thus, no deprivation of liberty is lawful unless it falls within one of those grounds.<sup>781</sup> Only a narrow interpretation of those exceptions is consistent with the aim of that provision which enshrines a fundamental human right, namely: the protection of the individual against arbitrary interference by the state with his or her right to liberty.<sup>782</sup> The risk of absconding in the context of the Return Directive should be linked to Article 5(1)(f) of the ECHR.<sup>783</sup>

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<sup>777</sup>Article 15(1) of the Return Directive.

<sup>778</sup>*Op. cit.* ...

<sup>779</sup>C-357/09 PPU *Kadzoev* (Grand Chamber) EU:C:2009:741, para 70. In this context, see also the right to non-discrimination from Article 21 of the Charter, which prohibits any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, birth, political or any other opinion, membership of national minority, property, birth, disability, age or sexual orientation; within the scope of application of the Treaties and without prejudice to any of their specific provisions, any discrimination on grounds of nationality shall be prohibited, too.

<sup>780</sup>See Article 7(4) of the Return Directive and further discussion standard no 31 on restrictions on the right to defence and/or equality of arms based on national (public) security, public policy or public order.

<sup>781</sup>*Saadi v United Kingdom* (Grand Chamber) App no 13229/03 (ECtHR 29 January 2008), para 43; *A and Others v United Kingdom* (Grand Chamber) App no 3455/05 (ECtHR 19 February 2009), para 163.

<sup>782</sup>*Khalaifia and others v Italy* (Grand Chamber) App no 16483/12 (ECtHR 15 December 2016), para 88.

<sup>783</sup>The second limb of Article 5(1)(f) regulates a situation of lawful arrest or detention of a person against whom action is being taken with a view to deportation or extradition.

### **Standard 8. Objective criteria for assessing the risk of absconding**

Based on Article 3(7) of the Return Directive, Member States have a legal obligation to define objective criteria for the risk of absconding in national law. Under this provision, the “risk of absconding” means the existence of reasons in an individual case which are based on objective criteria defined by law to believe that the third-country national may abscond. This should go beyond the mere fact of an illegal stay.<sup>784</sup> Furthermore, according to the case-law of the CJEU, the lack of identity documents cannot, on its own, form the grounds for extending detention under Article 15(6) of the Return Directive.<sup>785</sup> In the light of the standard no. 12 of this check-list and based on the case-law of the CJEU related to other sorts of disputes, guidelines or circulars should not be considered as adequate instruments for implementing Article 3(7) of the Return Directive. The provisions of directives “*must be implemented with unquestionable binding force, and the specificity, precision and clarity necessary to satisfy the requirements of legal certainty; mere administrative practices, which by their nature are alterable at will by the authorities and are not given the appropriate publicity, cannot be regarded as constituting the proper fulfilment of a Member State’s obligation under the Treaty.*”<sup>786</sup> In the case of *Al Chodor*, the CJEU has decided that objective criteria for the risk of absconding in the context of Dublin III Regulation have to be defined in a binding provision of general application and that settled case-law confirming a consistent administrative practice cannot suffice.<sup>787</sup>

### **Standard 9. Proof and burden of proof concerning the risk of absconding**

According to Article 3(7) of the Return Directive, the “*risk of absconding*” may be defined as

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<sup>784</sup>Recital 6 of the Return Directive; C-146/14 PPU *Mahdi* EU:C:2014:1320, para 40.

<sup>785</sup>C-146/14 PPU *Mahdi* EU:C:2014:1320, para 73.

<sup>786</sup>C-159/99 *Commission v Italy* EU:C:2001:278, para 32; C-315/98, *Commission v Italy* EU:C:1999:551, para 10.

<sup>787</sup>C-528/15 *Al Chodor* EU:C:2017:213, para 45; mutatis mutandis C-601/15 PPU, *J.N.* (Grand Chamber) EU:C:2016:84, para 60. See also standard no 9 of this Check-list. For concrete examples of criteria for the risk of absconding that are defined in national law of the Member States along with the possible legal consequences if objective criteria are not defined in national law, see the Explanatory note on objective criteria for a risk of absconding. Factors which under case-law of the ECtHR might speak against the risk of absconding in relation to Article 5(1)(c) of the ECHR are state of health, stable place of residence, no attempt to escape, strong family ties, no previous criminal record of the applicant (*Segeda v Russia* App no 41545/06 (ECtHR 19 December 2013), para 65).

the existence of reasons in an individual case, which are based on objective criteria defined by law, “to believe” that a person concerned “*may abscond*”. The burden of proof lies with a State. The nature of the assessment of the risk of absconding may be compared to the nature of assessment of real risk that an asylum seeker would be tortured or ill-treated if returned or extradited to his/her country of origin. In both those cases, any such allegation always concerns “*something which may or may not occur in the future. Consequently, such allegations cannot be proven in the same way as past events.*”<sup>788</sup>

### **Standard 10. Avoiding or hampering the preparation of the return or the removal process and reasonable prospects of removal**

The EU Commission’s Return Handbook<sup>789</sup> does not differentiate between such grounds as the “risk of absconding” and the “circumstances of avoiding or hampering removal procedure”. The European Synthesis Report on the Judicial Implementation of Chapter III of the Return Directive had identified that some Member States’ legislation does not differentiate between the risk of absconding and avoiding removal procedures, while in some other Member States, the legislation clearly differentiates between the risk of absconding and avoiding or hampering the preparation of return or the removal process. Among the circumstances of avoiding or hampering the preparation of the return or the removal process, the following circumstances from some national legislations or jurisprudences are mentioned: a refusal to board the plane; giving false information on one’s identity; concealing documents; previous failures to depart.<sup>790</sup> According to the ECtHR, in cases where the deportation is no longer possible, the detention would cease to be lawful,

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<sup>788</sup>*Fozil Nazarov v Russia App no 74759/13 (ECtHR 20 April 2015)*, para 38. In his concurring opinion in the case of *Saadi v Italy App no 37201/06 (ECtHR 28 February 2008)*, Judge Zupančič says “the cognitive approach to future events may be only a rational probabilistic assessment in the spectrum of experiment which moves from abstract probability to concrete probability. The correctness of that probabilistic assessment – one might use the word prognosis – critically depends on the nature of information (not evidence!) adduced in a particular situation.”

<sup>789</sup>*Return Handbook*, available at: [https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/proposal-implementation-package/docs/return\\_handbook\\_en.pdf](https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/proposal-implementation-package/docs/return_handbook_en.pdf)

<sup>790</sup>Project Redial, 2016, European University Institute, the European Synthesis Report on the Judicial Implementation of Chapter III of the Return Directive - Procedural safeguards, authors: Madalina Moraru and Geraldine Renaudiere, pp. 12-13.

even if the person detained fails to cooperate in his or her removal process.<sup>791</sup>

### **Standard 11. Reasonable prospects of removal**

Similarly to the decisions of the ECtHR in the aforementioned cases of *Mikolenko v Estonia*<sup>792</sup> and *Louled Massoud v Malta*,<sup>793</sup> the Return Directive provides that “*when it appears that a reasonable prospect of removal no longer exists for legal or other considerations or the conditions laid down in paragraph 1 no longer exist, detention ceases to be justified and the person concerned shall be released immediately.*”<sup>794</sup> It must, therefore, be apparent “*at the time of the national court's review of the lawfulness of detention that a real prospect exists that the removal can be carried out successfully*” /.../.<sup>795</sup> A reasonable prospect of removal does not exist where it appears unlikely that the person concerned will be admitted to a third country, having regard to those periods.”<sup>796</sup>

### **Standard 12. Control of the quality of law on detention**

Article 5(1) of the ECHR requires that any deprivation of liberty must be “*lawful*”; it must conform to the substantive and procedural rules of national law.<sup>797</sup> The law must satisfy the principle of legal certainty. It must be “*sufficiently accessible and precise, in order to avoid all risk of arbitrariness.*”<sup>798</sup> It must also be foreseeable.<sup>799</sup> This is reiterated by the Grand

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<sup>791</sup>*Mikolenko v Estonia* App no 10664/05 (ECtHR 8 August 2009), para 65; *Louled Massoud v Malta* App no 24340/08 (ECtHR 27 July 2010), para 67.

<sup>792</sup>*Mikolenko v Estonia* App no 10664/05 (ECtHR 8 August 2009), paras 65-68.

<sup>793</sup>*Louled Massoud v Malta* App no 24340/08 (ECtHR 27 July 2010), para 67.

<sup>794</sup>Article 15(4) of the Return Directive.

<sup>795</sup>C-357/09 PPU *Kadzoev* (Grand Chamber) EU:C:2009:741, para 65.

<sup>796</sup>C-357/09 PPU *Kadzoev* (Grand Chamber) EU:C:2009:741, paras 65-67. For example, under the case law of the ECtHR, if the country of return does not confirm the nationality of the person concerned, the realistic prospect of removal ceases to exist (*Tabesh v Greece* App no 8256/07 (ECtHR 26 November 2009), para 62). See also standard no 18 of this Check-list on length of detention and conditions for extension of detention.

<sup>797</sup>*Amuur v France* (1996) App no 19776/92 (ECtHR, 25 June 1996), para 50; *Abdolkhani and Karimnia v Turkey* App no 30471/08 (ECtHR 22 September 2009), para 130.

<sup>798</sup>*Amuur v France* (1996) App no 19776/92 (ECtHR, 25 June 1996), para 50.

<sup>799</sup>*Nasrullojev v Russia* App no 656/06 11 (ECtHR October 2007), para 71; C-528/15; *Al Chodor* EU:C:2017:213, paras 38-40.

Chamber in the case of *Khlaifia and others v Italy*<sup>800</sup>, where the ECtHR provides that “*where deprivation of liberty is concerned it is particularly important that the general principle of legal certainty be satisfied. It is therefore essential that the conditions for deprivation of liberty under domestic law be clearly defined and that the law itself be foreseeable in its application, so that it meets the standard of lawfulness set by the ECHR, a standard which requires that all law be sufficiently precise to allow the person – if need be, with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail*”.<sup>801</sup> The standards on the quality of law relate not only to clearly regulated grounds for detention, but also to time limit for detention or for extending detention and for the existence of a legal remedy by which the lawfulness of detention may be challenged.<sup>802</sup> Therefore, “*at the time of the national court's review*” of the lawfulness of detention, there must be a “*real prospect that the removal can be carried out successfully, having regard to the periods laid down in Article 15(5) and (6) of the Return Directive*.”<sup>803</sup>

### **Standard 13. Right to information and a personal interview before detention order is issued**

Under EU secondary law, procedural safeguards are regulated only in relation to return decisions, entry-ban decisions, and decisions on removal (Chapter III of the Return Directive). However, the right to information and to a personal interview during the administrative procedure and before the detention order is issued are expressions of the general principles of EU law (the right to be heard, or the right to a defence (to good administration). Effective realisation of those rights will often be indispensable for the effective fulfilment of other standards such as individual assessment, consideration of less coercive alternative measures to detention and the principle of proportionality. “*The right to be heard guarantees every person the opportunity to make known his views effectively during an administrative procedure and before the adoption of any decision liable to affect*

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<sup>800</sup>*Op. cit.* ...

<sup>801</sup>*Khlaifia and others v Italy* (Grand Chamber) App no 16483/12 (ECtHR 15 December 2016), para 92.

<sup>802</sup>See the Explanatory note to this Check-list.

<sup>803</sup>C-146/14 PPU *Mahdi* EU:C:2014:1320, para 60; C-357/09 PPU *Kadzoev* (Grand Chamber) EU:C:2009:741, para 65.

*his interests adversely*".<sup>804</sup> *"Observance of the right to be heard is required even where the applicable legislation does not expressly provide for such a procedural requirement."*<sup>805</sup>

However, *"fundamental rights, such as respect for the rights of the defence, do not constitute unfettered prerogatives and may be restricted, provided that the restrictions in fact correspond to objectives of general interest pursued by the measure in question and that they do not involve, with regard to the objectives pursued, a disproportionate and intolerable interference which infringes upon the very substance of the rights guaranteed."*<sup>806</sup> Not every irregularity in the exercise of the rights of the defence in an administrative procedure on detention will constitute and infringement of those rights. Not every breach, in particular, of the right to be heard, will systematically render unlawful the decision taken and therefore not every such breach will automatically require the release of the person concerned.<sup>807</sup> *"To make such a finding of unlawfulness, the national court must – where it considers that a procedural irregularity affecting the right to be heard has occurred – assess whether, in the light of the factual and legal circumstances of the case, the outcome of the administrative procedure at issue could have been different if the third-country nationals in question had been able to put forward information which might show that their detention should be brought to an end."*<sup>808</sup> In this respect, however, regard should be had for the case-law of the ECtHR providing that an infringement of the right to a personal interview (to be heard and to a defence) before the extension of a period of detention may constitute a gross or a manifest violation of Article 5(1)(f) of the ECHR.<sup>809</sup>

Furthermore, under the case-law of the ECtHR, certain obligations of the Contracting State regarding effective access to the relevant procedures (access to information, interpreters, legal advisers) in relation to Article 3 of the ECHR (or Article 4 of Protocol No. 4) exist also outside the territory of that contracting State. For example, on the high seas, when aliens

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<sup>804</sup>C-357/09 PPU *Boudjlida* (Grand Chamber) EU:C:2014:2431, para 36; C-166/13 *Mukarubega* EU:C:2014:2336, para 46.

<sup>805</sup>C-249/13, *Boudjlida*, para 39.

<sup>806</sup>*Ibid.* para 43.

<sup>807</sup>See C-383/13 PPU *M.G. and N.R.* EU:C:2013:533, paras 39, 41.

<sup>808</sup>*Ibid.* para 40.

<sup>809</sup>*Richmond Yaw and others v Italy* App nos 3342/11, 3391/11, 3408/11 and 3447/11 (ECtHR 6 October 2016), paras 74-78.

are intercepted by that contracting State for the purpose of their return to a third country.<sup>810</sup>

#### **Standard 14. Requirement of individual assessment**

Detention may be ordered only in an “*individual*” case,<sup>811</sup> and based on a “*specific*” assessment of the circumstances of a third-country national concerned, in relation to objective criteria that should be defined by national law, and unless other sufficient but less coercive measures can be applied effectively.<sup>812</sup> 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. “*It is only where, in the light of an assessment of each specific situation, the enforcement of the return decision in the form of removal risks being compromised by the conduct of the person concerned that the Member States may deprive that persons of his liberty and detain him.*”<sup>813</sup>

#### **Standard 15. Best interests of a child**

Recital 22 of the Return Directive states that “*in line with the 1989 UN Convention on the Rights of the Child the best interests of the child should be a primary consideration of Member States when implementing this Directive. In line with the ECHR, respect for family life should be a primary consideration of Member States when implementing this Directive.*” The principle of the best interest of a child is mentioned also in Article 5(a) and Article 17(5) of the Return Directive. However, in the case of *MA, BT, DA*, the CJEU states that “*although express mention of the best interest of the minor is made only in the first paragraph of*

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<sup>810</sup>*Hirsi Jamaa and Others v Italy (Grand Chamber)* App no 27765/09 (ECtHR 23 February 2012), para 201-207; *Sharifi and Others v Italy and Greece* App no 16643/09 (ECtHR 21 January 2015), para 242.

<sup>811</sup>Article 15(1) of the Return Directive. Recital 6 uses the expression that a decision must be adopted on a “*case-by case basis*”. The same expression is used by the CJEU in the case of *Mahdi* (C-146/14 PPU *Mahdi* EU:C:2014:1320, para 40).

<sup>812</sup>Article 3(7) of the Return Directive; see also: *O.M. v Hungary* App no 9912/15 (ECtHR 5 July 2016), para 52.

<sup>813</sup>C-61/11 *El Dridi* EU:C:2011:268, para 39; C-146/14 PPU *Mahdi* EU:C:2014:1320, para 70-73; Recital 6 of the Return Directive.

*Article 6 of the Dublin III Regulation,<sup>814</sup> the effect of Article 24(2) of the Charter,<sup>815</sup> in conjunction with Article 51(1) of the Charter thereof, is that the child's best interests must also be a primary consideration in all decisions adopted by the Member States on the basis of the second paragraph of Article 6 of the Dublin III Regulation.<sup>816</sup> This means – taking into account also the fact that the CJEU refers to Article 24(2) of the Charter as being a right and not a principle<sup>817</sup> – the principle of the best interests of a child extends beyond the requirements of legal representation of an unaccompanied minor, family reunification,<sup>818</sup> access to the basic education system,<sup>819</sup> emergency health care and essential treatment of illness,<sup>820</sup> leisure, recreational activities, privacy, separate accommodation and other requirements from Article 17 of the Return Directive. In regards to unaccompanied child, his/her representative must be appointed before any administrative proceedings are undertaken. The best interests of a child extend to all sorts of decisions taken during the procedures carried out under the Return Directive, including detention. The ECHR operates from the standpoint that in all actions relating to children, an in-depth examination of the child's best interests must be undertaken prior to a decision that will impact that child's life.<sup>821</sup> Where children are seeking asylum their extreme vulnerability is compounded. Such double vulnerability must take precedence over a child's irregular status.<sup>822</sup> When considering the detention of children, the principle of proportionality in the application of Article 5(1)(f) of the ECHR is relevant in the sense that less coercive measures or alternatives*

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<sup>814</sup>Regulation (EU) No 604/2013 of the European parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast), 2013 OJ L 180.

<sup>815</sup>Article 24(2) of the Charter states that “*in all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration.*”

<sup>816</sup>C-648/11 MA, BT, DA, EU:C:2013:367, para 59.

<sup>817</sup>For more on this, see the Explanatory note.

<sup>818</sup>Article 14(a) of the Return Directive.

<sup>819</sup>Article 14(c) of the Return Directive.

<sup>820</sup>Article 16(3) of the Return Directive.

<sup>821</sup>*Rahimi v Greece* App no 8687/08 (ECtHR 5 April 2011), paras 51-96; *Mubilanzila, Mayeka and Kaniki Mitunga v Belgium* App no 13178/03 (ECtHR 12 Jan 2007), para 53; *Muskhadziyeva and Others v Belgium*, 41442/07 App no 41442/07 (19 January 2010), paras 61-62 *Popov v France* App nos 39472/07 and 39474/07 (ECtHR 19 January 2012), paras 92-103.

<sup>822</sup>*Mubilanzila, Mayeka and Kaniki Mitunga v Belgium*, para 55; *Popov v France* App nos 39472/07 and 39474/07 (ECtHR 19 January 2012), para 91; *Tarakhel v Switzerland* (Grand Chamber) App no 29217/12 (ECtHR 4 November 2014), para 99; *A.B. and Others v France* App no 11593/12 (ECtHR 12 July 2016), para 110.



to detention, need to be taken into consideration.<sup>823</sup>

### **Standard 16. Consideration of the effectiveness of less coercive alternative measures to detention**

As alternatives to detention Article 7(3) of the Return Directive mentions regular reporting to the authorities, the deposit of an adequate financial guarantee, the submission of documents or the obligation to stay at a certain place.<sup>824</sup> The CJEU states in the case of *El Dridi* that “the order in which the stages of the return procedure established by the Return Directive are to take place corresponds to a gradation of the measures to be taken in order to enforce the return decision /.../ A gradation goes “from the measure which allows the person concerned the most liberty, namely granting a period for his voluntary departure, to measures which restrict that liberty the most, namely detention in a specialised facility, the principle of proportionality must be observed throughout those stages.”<sup>825</sup> The less coercive alternative measures to detention must be defined in national law.<sup>826</sup> In the case of *Mahdi*, the CJEU states that the administrative authority must assess whether other sufficient but less coercive measures to detention can be applied effectively in a specific case.<sup>827</sup> 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.<sup>828</sup>

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<sup>823</sup>*Popov v France* App nos 39472/07 and 39474/07 (ECtHR 19 January 2012), para 119; *A.B. and Others v France* App no 11593/12 (ECtHR 12 July 2016), para 110. For further discussion on the best interests of a child, see the Explanatory note and standards nos. 37.1, 37.5 and 37.6 of this Check-list.

<sup>824</sup>See also: C-61/11 *El Dridi* EU:C:2011:268, para 37. In this context, Article 8(4) of the Recast Reception Directive mentions regular reporting to the authorities, the deposit of a financial guarantee, or an obligation to stay at an assigned place.

<sup>825</sup>C-61/11 *El Dridi* EU:C:2011:268, para 41. See also standard no 17 of this Check-list on the principle of proportionality.

<sup>826</sup>Article 15(1) of the Return Directive; see also *mutatis mutandis* C-601/15 PPU, *J.N.* (Grand Chamber) EU:C:2016:84, para 61.

<sup>827</sup>C-146/14 PPU *Mahdi* EU:C:2014:1320, paras 61, 67. As regards possible less coercive measures to detention, see the Explanatory note to this Check-list. For the relevance of alternative measures for detention from the standpoint of case-law of the ECtHR, see the last paragraph of the Explanatory note on the standard no 17 on principle of proportionality and the necessity test of this Check-list.

<sup>828</sup>The term “necessary” is used in Article 15(5) of the Return Directive, while the principle of proportionality is mentioned in Recital 16 of the Return Directive, which states that “the use of detention for the purpose of removal should be limited to the principle of proportionality with regards to the means used and objectives pursued.”

### **Standard 17. Principle of proportionality and the necessity test**

Recital 16 of the Return Directive states that *“the use of detention for the purpose of removal should be limited to the principle of proportionality with regards to the means used and objectives pursued.”*<sup>829</sup> The principle of proportionality contains the so-called “necessity test”, which is integrated into Article 15(1) of the Return Directive (*“unless other sufficient but less coercive measures can be applied effectively”*) and in Article 15(5) of the Return Directive (*“detention shall be maintained as long as it is necessary to ensure successful removal, but may not exceed 6 months or under exceptional circumstances 18 months”*).

Article 52(1) of the Charter, which regulates the general principle of proportionality, states that *“any limitations on the exercise of the rights and freedoms recognized by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognized by the Union on the need to protect the rights and freedoms of others.”*<sup>830</sup> In case of detention under the Return Directive, the objective of the general interest recognised by the EU is the *“establishment of an effective removal and repatriation policy, based on common standards, for persons to be returned in a humane manner and with full respect for their fundamental rights and dignity”*.<sup>831</sup> As regards proportionality and the length of detention, the CJEU states that the Return Directive is intended to take account of the case-law of the ECtHR, which sets limits for the length of detention of a person against whom a deportation or extradition procedure is under way (proportionality principle).<sup>832</sup>

In regards to aspects of the proportionality and the necessity test, the case-law of the ECtHR – if taken in conjunction with applicable EU law – is not less stringent.<sup>833</sup>

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<sup>829</sup>See also Recital 13 of the Return Directive and C-61/11 *El Dridi* EU:C:2011:268 , para 57.

<sup>830</sup>See also: C-601/15 PPU, *J.N.* (Grand Chamber) EU:C:2016:84, para 50 and C-61/11 *El Dridi* EU:C:2011:268, para 38, 41, 42.

<sup>831</sup>Recital 2 of the Return Directive.

<sup>832</sup>C-61/11 *El Dridi* EU:C:2011:268, para 43.

<sup>833</sup>See the Explanatory note to this Check-list.

**Standard 18. Length of detention and conditions for extension of detention, including due diligence requirement**

*“Any detention shall be for as short a period as possible and only maintained as long as removal arrangements are in progress and executed with due diligence.”<sup>834</sup> When it appears that a reasonable prospect of removal no longer exists for legal or other considerations or the conditions laid down in paragraph 1 no longer exist, detention ceased to be justified and the person concerned shall be released immediately.<sup>835</sup> Each Member State shall set a limited period of detention, which may not exceed six months.<sup>836</sup> In two exceptional cases (lack of cooperation, and delays in obtaining the necessary documentation), which are set out in Article 15(6) of the Return Directive, a detention lasting for 6 months may be extended for an additional 12 months, but it cannot last more than 18 months.<sup>837</sup> When assessing “a lack of cooperation by the third-country national” within the meaning of Article 15(6) of the Return Directive, the CJEU developed an interpretation that the national authority must examine, on the one hand, whether a person “during the initial period of detention has failed to cooperate with the competent authorities as regards implementation of the removal operation and, on the other, the likelihood of the removal operation lasting longer than anticipated because of the conduct of the person concerned. If the removal of the third-country national is taking, or has taken, longer than anticipated for another reason, no causal link may be established between the latter's conduct and the duration of the operation in question and therefore no lack of cooperation on his part can be established. Furthermore, Article 15(6) of the Return Directive requires that before it considers whether the third-country national concerned has shown that he has failed to cooperate, the authority concerned should be able to demonstrate that the removal operation is lasting longer than anticipated, despite all reasonable efforts: that means that, in the case before the referring court, the Member State in question should have sought, and should still actively be seeking, to secure the issue of identity documents for the third-country national.”<sup>838</sup> The CJEU further held that a third-country national, “who, in circumstances*

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<sup>834</sup>Second sub-paragraph of Article 15(1) of the Return Directive. See also Article 15(5) of the Return directive.

<sup>835</sup>Article 15(4) of the Return Directive; C-146/14 PPU *Mahdi* EU:C:2014:1320, para 59.

<sup>836</sup>Article 15(5) of the Return Directive.

<sup>837</sup>Article 15(5) and (6) of the Return Directive. For the length of detention under case-law of the ECtHR, see the Explanatory note.

<sup>838</sup>C-146/14 PPU *Mahdi* EU:C:2014:1320, paras 82-83.

*such as those in issue in the main proceedings, has not obtained an identity document which would have made it possible for him to be removed from the Member State concerned may be regarded as having demonstrated a lack of cooperation within the meaning of that provision only if an examination of his conduct during the period of detention shows that he has not cooperated in the implementation of the removal operation and that it is likely that that operation lasts longer than anticipated because of that conduct, a matter which falls to be determined by the determining court.”<sup>839</sup>*

*“Article 15(5) and (6) fix the maximum period of detention for the purpose of removal”<sup>840</sup> and “no case authorises the maximum period defined in that provision to be exceeded.”<sup>841</sup> A period during which a person has been held in detention on the basis of a decision taken pursuant to the provisions concerning asylum-seekers may not be regarded as detention for the purpose of removal within the meaning of the Return Directive.<sup>842</sup> The period of detention completed by the person concerned during the procedure in which the lawfulness of the removal decision is subject of judicial review, must be taken into account for calculating the maximum duration of detention.<sup>843</sup> The maximum duration of detention must be common to the Member States.<sup>844</sup>*

For some concrete examples of due diligence standards under case-law of the ECtHR, see the Explanatory note. See also standard no. 33 of this check-list on impact of interim measures issued by courts on the lawfulness of detention.

### **Standard 19. Due diligence requirement and criminal sanctions**

*“Any detention shall be /.../ maintained [only] as long as removal arrangements are in progress and executed with due diligence.”<sup>845</sup> The due diligence requirement and the Return Directive, preclude providing a sentence of imprisonment of an illegally staying third-country national on the sole ground that he/she remains without valid grounds on the territory of*

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<sup>839</sup>*Ibid.* para 85.

<sup>840</sup>C-357/09 PPU *Kadzoev* (Grand Chamber) EU:C:2009:741, para 35.

<sup>841</sup>*Ibid.* para 69.

<sup>842</sup>*Ibid.* para 48.

<sup>843</sup>*Ibid.* para 53.

<sup>844</sup>*Ibid.* para 54.

<sup>845</sup>Second sub-paragraph of Article 15(1) of the Return Directive.

that state. The sentence based on merely these grounds is contrary to an order to leave that territory within a given period of time.<sup>846</sup> In the case of *Achughbabian*<sup>847</sup> the CJEU further stated that “*the removal must be fulfilled as soon as possible. That would clearly not be the case if, after establishing that a third-country national is staying illegally, the Member State were to preface the implementation of the return decision, or even the adoption of that decision, with a criminal prosecution, followed, in appropriate cases, by a term of imprisonment. Such a step would delay the removal.*”<sup>848</sup> That does not exclude the possibility of using other measures of a criminal nature, as long as they are in accordance with the principles and the objectives of the Return Directive, and that they are subject to full observance of fundamental rights, particularly those guaranteed by the ECHR.<sup>849</sup> Such measures of a criminal nature may be, for example, a fine or replacing a fine with an expulsion order accompanied by an entry ban.<sup>850</sup> The Return Directive, however, does not preclude Member States from adopting legislation which provides for the imposition of a term of imprisonment on an illegally staying third-country national, who, after having been returned to his country of origin in the context of an earlier return procedure, unlawfully re-enters the territory of that state in breach of an entry ban.<sup>851</sup>

### **Standard 20. Right to be informed “promptly” about the reasons for detention after a detention order is issued**

Where a Member State grants a third-country national the right to take proceedings by means of which the lawfulness of detention shall be subject to a speedy judicial review, Article 15(2)(b) of the Return Directive provides that a Member State shall “*immediately*” inform the third-country national concerned about the “*possibility of taking such proceedings*”. This provision could not be effective if this information did not include the reasons for detention. More specifically, Article 5(2) of the ECHR states that “*everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons*

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<sup>846</sup>C-61/11 *El Dridi* EU:C:2011:268, para 62; C-329/11 *Achughbabian* EU:C:2011:807, paras 37-40.

<sup>847</sup>C-329/11 *Achughbabian* EU:C:2011:807.

<sup>848</sup>*Ibid.* para 45. This includes a criminal measure of fine for which a home detention order may be substituted (C-430/11, *Sagor* EU:C:2012:777, para 33).

<sup>849</sup>C-329/11, *Achughbabian* EU:C:2011:807, paras 28, 46-49.

<sup>850</sup>C-430/11 *Sagor* EU:C:2012:777, paras 36-42.

<sup>851</sup>C-290/14 *Celaj* EU:C:2015:640 operative part of the judgment in conjunction with paragraph 32.

*for his arrest.*” The requirement of “prompt information” means being provided with an autonomous explanation extending beyond the realm of criminal law measures.<sup>852</sup> The standards of “*immediate*” information under EU law and of “*promptness*” under the case-law of the ECtHR may differ slightly because of the different obligatory content and form of the information that should be provided to the applicants.<sup>853</sup> The requirement of “*promptness*” under the case-law of the ECtHR means that the “*reasons*” for detention should be provided to the applicant within a few hours after detention began,<sup>854</sup> because if information is provided after 76 hours of detention,<sup>855</sup> after 4 days of detention<sup>856</sup> or after 10 days of detention,<sup>857</sup> there will likely be a breach of the requirement that such reasons should be given promptly. If the applicant is incapable of receiving the information, the relevant details must be given to those persons who represent his/her interests, such as a lawyer or a guardian.<sup>858</sup>

### **Standard 21. Right to be informed “adequately” about the reasons for detention and about procedures laid down in national law for challenging the detention order**

In case of detention of asylum seekers, EU secondary law explicitly requires that detained asylum-seekers must be informed immediately “*in writing, in a language which they understand or are reasonably supposed to understand*”, not only about “*the procedures laid down in national law for challenging the detention order, as well as of the possibility to request free legal assistance and representation*”, but also about the reasons of detention.<sup>859</sup> However, in case of detention under the Return and where a Member State grants a third-country national the right to take proceedings by means of which the lawfulness of

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<sup>852</sup>*Khlaifia and Others v Italy*, (Grand Chamber) App no 16483/12 (ECtHR 15 December 2016), para 116.

<sup>853</sup>See standard no 21 of this Check-list.

<sup>854</sup>*Fox, Campbell and Hartley v United Kingdom* App nos 12244/86; 12245/86; 12383/86 (ECtHR 30 August 1990), paras 41-42; *M.A. v Cyprus* App no 41872/10 (ECtHR 23 July 2013), para 228; *Kerr v United Kingdom* App no 40451/98 (ECtHR 7 December 1999).

<sup>855</sup>*Saadi v United Kingdom* (Grand Chamber) App no 13229/03 (ECtHR 29 January 2008), paras 81-85.

<sup>856</sup>*Shamayev and Others v Georgia and Russia* App no 36378/02 (ECtHR 12 April 2015), para 416; *Khlaifia and others v Italy*, (Grand Chamber) App no 16483/12 (ECtHR 15 December 2016), para 120.

<sup>857</sup>*Rusu v Austria* App no 34082/02 (ECtHR 2 October 2008), para 43.

<sup>858</sup>*X. v United Kingdom* App no 7215/75 (ECtHR 5 November 1981), para 16; *Z.H. v Hungary* App no 28973/11 (ECtHR 8 November 2012), paras 42-43; European Court of Human Rights, *Guide on Article 5 – Right to Liberty and Security* (Council of Europe/European Court of Human Rights, 2014), p. 22/point 116.

<sup>859</sup>Article 9(4) of the Reception Directive in conjunction with Article 28(4) of the Dublin III Regulation.

detention shall be subject to a speedy judicial review only Article 15(2)(b) of the Return Directive provides that a Member State shall immediately inform the third-country national concerned about the *“possibility of taking such proceedings.”*

As regards the manner of communicating the reasons for the detention, the ECtHR more specifically states that *“any person arrested must be told in simple, non-technical language that he can understand, the essential legal and factual grounds for his arrest, so as to be able, if he sees fit, to apply to a court to challenge its lawfulness in accordance with Article 5(4) of the ECHR /.../. This information “need[s] not be related in its entirety by the arresting officer at the very moment of arrest. Whether the content and promptness of the information conveyed were sufficient is to be assessed in each case according to its special features,”*<sup>860</sup> but the information provided must be correct.<sup>861</sup> The information on the legal status of a migrant, or on possible removal measures does not provide the sufficient level of detail, and thus cannot form the legal basis for the migrant’s deprivation of liberty.<sup>862</sup> *“A bare indication of the legal basis”* for the arrest, taken on its own, is insufficient for the purposes of Article 5(2) of the ECHR.<sup>863</sup> In *M.A. v Cyprus* (para. 229), the ECtHR has accepted that (correct) information does not necessarily have to be provided in writing. *“In cases where detainees had not been informed of the reasons for their deprivation of liberty, the ECtHR has found that their right to appeal against their detention was deprived of all effective substance”*.<sup>864</sup>

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<sup>860</sup>*Shamayev and Others v Georgia and Russia* App no 36378/02 (ECtHR 12 April 2015), para 413; *Khalafifa and Others v Italy*, (Grand Chamber) App no 16483/12 (ECtHR 15 December 2016), para 115.

<sup>861</sup>*Rusu v Austria* App no 34082/02 (ECtHR 2 October 2008), para 42.

<sup>862</sup>*Khalafifa and Others v Italy*, (Grand Chamber) App no 16483/12 (ECtHR 15 December 2016), para 118.

<sup>863</sup>European Court of Human Rights, *Guide on Article 5 – Right to Liberty and Security* (Council of Europe/European Court of Human Rights, 2014), p. 22/point 122; *Fox, Campbell and Hartley v United Kingdom* App nos 12244/86; 12245/86; 12383/86 (ECtHR 30 August 1990), para 41; *Murray v United Kingdom* (Grand Chamber) App no 14310/88 (ECtHR 28 October 1994), para 76; *Kortesis v Greece* App no 60593/10 (ECtHR 12 June 2012), paras 61-62.

<sup>864</sup>*Khalafifa and Others v Italy*, (Grand Chamber) App no 16483/12 (ECtHR 15 December 2016), para 132. For further examples on this issue, see the Explanatory note to this Check-list.

**Standard 22. Written decision on detention (and its extension)<sup>865</sup> must be delivered to the applicant/legal representative and must contain reasons closely connected to the grounds of detention**

Detention and the extension of the detention period of third-country nationals shall be ordered in writing. A detention order shall provide the factual and legal reasons on which it was issued.<sup>866</sup> Similarly, under ECHR de facto detention must be “*incarnated by a formal decision of legal relevance, complete with reasoning.*”<sup>867</sup> If the express (or even underlying) reason for detention is other than to prevent the person effecting an unauthorised entry or to take action with a view to deportation or extradition, it cannot be justified under Article 5(1)(f).<sup>868</sup> The detention will be arbitrary where there has been bad faith or deception.<sup>869</sup>

**Standard 23. An obligation to keep records on detention cases**

Article 5(1) of the ECHR includes a special requirement on the obligation to keep records of matters of detention. The ECtHR considers that the unacknowledged detention of an individual is a complete negation of the fundamentally important guarantees contained in Article 5 of the ECHR and discloses the gravest violation of that provision.<sup>870</sup> The absence of a record of information such as the date, time and location of detention, the name of a detainee, the reasons for the detention and the name of the person effecting it, must be seen as incompatible, *inter alia*, with the very purpose of Article 5 of the ECHR. This requirement is also necessary due to Article 15(3) of the Return Directive, which provides that “*in every case, detention shall be reviewed at reasonable intervals of time either on application by the third-country national concerned or ex officio. In the case of prolonged*

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<sup>865</sup>“Detention and extension of detention are similar in nature since both deprive the third-country national concerned of his liberty” /.../ (C-146/14 PPU *Mahdi* EU:C:2014:1320, para 44).

<sup>866</sup>Second sub-paragraph of Article 15(2) of the Return Directive; C-146/14 PPU, *Mahdi*, 5. 6. 2014, paras 41, 44, 52. The obligation of the administration to give reasons for its decisions is a general principle of EU law (see: Article 41(2)(c) of the Charter; see also: C-601/15 PPU, *J.N.* (Grand Chamber) EU:C:2016:84, para 62).

<sup>867</sup>*Ilias and Ahmed v Hungary* App no 47287/15 (ECtHR 14 March 2017), para 67.

<sup>868</sup>See *mutatis mutandis*: *Bozano v France* App no 9990/82 (ECtHR 18 December 1986), para 60; *Čonka v Belgium* App no 51564/99 (ECtHR 5 February 2002), para 42; *Khodorkovskiy v Russia* App no 5829/04 (ECtHR 31 May 2011), para 142; *Azimov v Russia* App no 67474/11 (ECtHR 28 April 2013), para 164.

<sup>869</sup>*Bozano v France* App no 9990/82 (ECtHR 18 December 1986), para 55; *Čonka v Belgium* App no 51564/99 (ECtHR 5 February 2002), para 42.

<sup>870</sup>*El-Masri v the Former Yugoslav Republic of Macedonia* (Grand Chamber) App no 39630/09 (ECtHR 13 December 2012), para 233; *Kurt v Turkey* App no 15/1997/799/1002 (ECtHR 25 May 1998), para 125.



*detention periods, reviews shall be subject to the supervision of a judicial authority.”*

#### **Standard 24. Right to (free) legal assistance and/or representation**

A third-country national concerned “shall” have the possibility to obtain legal advice, representation and, where necessary, linguistic assistance.<sup>871</sup> Member States “shall” ensure that the necessary “legal assistance and/or representation” is granted upon request, free of charge, in accordance with the relevant national legislation or rules regarding legal aid, and “may” provide that any free legal assistance and/or representation is subject to conditions as set out in Article 21(3) to (5) of Directive 2013/32 of the European parliament and of the Council of 16 June 2013 on common procedures for granting and withdrawing international protection (recast) (O J L 180/60, 29. 6. 2013, hereinafter: the Recast Procedures Directive).<sup>872</sup> This means that Member States may provide that free legal assistance and/or representation in detention cases is subject to conditions as set out in Articles 21(3) to (5) of the Recast Procedure Directive. This standard is an expression of the second sentence of Article 47(2) of the Charter which states that “everyone shall have the possibility of being advised, defended and represented.” Article 47(3) of the Charter states that “legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice”. Procedures for access to legal assistance and representation shall be laid down in national law. From the standpoint of the case-law of the ECtHR, the ECHR “is intended to guarantee rights that are not theoretical or illusory, but practical and effective.”<sup>873</sup> In the case of *Čonka*, the ECtHR held that the accessibility of a remedy implies, *inter alia*, that the circumstances voluntarily created by the authorities must be such as to afford applicants a realistic possibility of using the remedy.<sup>874</sup> In the context of detention proceedings, the ECtHR has held that the authorities are not obliged to provide free legal aid.<sup>875</sup> However, if the absence of legal aid raises an issue concerning the accessibility of a remedy (for example, where legal representation is required in the

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<sup>871</sup>Article 13(3) of the Return Directive.

<sup>872</sup>See Article 13(4) of the Return Directive in conjunction with Article 53 of the Recast Procedure Directive.

<sup>873</sup>*Čonka v Belgium* App no 51564/99 (ECtHR 5 February 2002), para 46.

<sup>874</sup>*Ibid.* para 46.

<sup>875</sup>*Lebedev v Russia* App no 4493/04 (ECtHR 25 October 2007), para 84; *Suso Musa v Malta* App no 42337/12 (ECtHR 23 July 2013), para 61.

domestic context) an issue could arise under Article 5(4) of the ECHR<sup>876</sup> or under Article 13 in conjunction with Article 3 of the ECHR.<sup>877</sup>

### **Standard 25. Other aspects of the practical and effective right to judicial review**

Apart from the issues of free legal aid and representation,<sup>878</sup> there may be certain other aspects of effective access to court which are relevant in detention cases. Further guidance may be taken from the case-law of the ECtHR as regards general standards for practical and effective access to court in civil disputes. The right of access to a court must be “*practical and effective*”.<sup>879</sup> For the right of access to be effective, an individual must “*have a clear, practical opportunity to challenge an act that is an interference with his rights*”.<sup>880</sup> The rules governing the formal steps to be taken, and the time-limits to be complied with in lodging an appeal or an application for judicial review are aimed at ensuring the proper administration of justice and compliance, in particular, with the principle of legal certainty.<sup>881</sup> The rules in question, or the application of these rules, should not prevent litigants from using an available remedy.<sup>882</sup> The practical and effective nature of this right may be impaired by the inhibitive nature of the costs of the proceedings in relation to the individuals financial capacity,<sup>883</sup> by issues relating to time limits,<sup>884</sup> and by the existence of procedural bars

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<sup>876</sup>*Ibid.* para 61; *Abdolkhani and Karimnia v Turkey* App no 30471/08 (ECtHR 22 September 2009), para 141.

<sup>877</sup>*Alimov v Turkey* App no 14344/13 (ECtHR 6 September 2016), para 66. For further standards as regards free legal aid under EU law and under the ECHR, see the Explanatory note to this Check-list.

<sup>878</sup>For the example of violation of the right of individual petition under Article 34 of the ECHR due to measures limiting an asylum applicant's contact with his representative, see quotation from the judgment in the case of *L.M. And Others v Russia* App nos 40081/14, 40088/14 and 40127/14 (ECtHR 15 October 2015), paras 153-163) in the Explanatory note to this Check-list.

<sup>879</sup>*Bellet v France* App no 23805/94 (ECtHR 4 December 1995), para 38.

<sup>880</sup>*Ibid.* para 36. See also: *Stoichkov v Bulgaria* App no 9808/02 (ECtHR 24 March 2005), para 66; *Vachev v Bulgaria* App no 42987/98 (ECtHR 8 July 2004), para 71; *Ismoilov and others v Russia* App no 2947/06 (ECtHR 24 April 2008), para 45; *Nunes Dias v Portugal* App no 69829/01, 2672/03 (ECtHR 10 April 2003).

<sup>881</sup>*Cañete de Goñi v Spain* App no 55782/00 (ECtHR 15 October 2002), para 36.

<sup>882</sup>*Miragall Escolano v Spain* (ECtHR 25 January 2000); *Zvolosky and Zvoloska v the Czech Republic* App no 46129/99 (ECtHR 12 November 2002), para 51.

<sup>883</sup>*Ait-Mouhoub v France* App no 103/1997/887/1099 (ECtHR 28 October 1998), paras 57-58; *Garcia Manibardo v Spain* App no 38695/97 (ECtHR 15 February 2000), paras 38-45; *Kreuz v Poland* (no1) App no 28249/95 (ECtHR 19 June 2001), paras 60-67, *Podbielski and PPU PolPure v Poland* App no 39199/98 (ECtHR 26 July 2005), paras 65-66; *Weissman and Others v Romania* App no 63945/00 (ECtHR 24 May 2006) para 42.

preventing or limiting the possibility of applying to a court.<sup>885</sup> The right of access to the courts is not absolute, but may be subject to limitations permitted by implication.<sup>886</sup> The limitations applied must not restrict or reduce the access of an individual in such a way or to such an extent that the very essence of the right is impaired. The limitation must pursue a legitimate aim and maintain a reasonable relationship of proportionality between the means employed and the aim sought to be achieved.<sup>887</sup>

### **Standard 26. Automatic judicial review or detainee's right to initiate judicial review (including conditions of detention)**

According to EU secondary law, when detention is ordered by administrative authorities, Member States “shall” either provide a judicial review of the lawfulness of detention (including the issues of material conditions of detention) to be decided as speedily as possible from the beginning of detention,<sup>888</sup> “or” grant the third-country national concerned “the right to take proceedings” by means of which the lawfulness of detention shall be subject to judicial review to be decided as speedily as possible after the launch of the relevant proceedings. In the latter case, Member States shall immediately inform a third-country national concerned about the possibility of taking such proceedings.<sup>889</sup>

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<sup>884</sup>*Melnyk v Ukraine* App no 23436/03 (ECtHR 28 March 2006), para 26; *Yagtzilar and Others v Greece* App no 41727/98 (ECtHR 6 December 2001), para 27.

<sup>885</sup>*Perez de Rada Cavanilles v Spain* App no 28090/95 (ECtHR 28 October 1998), para 49; *Miragall Escolano And Others v Spain* App nos 38366/97, 38688/97, 40777/98, 40843/98, 41015/98, 41400/98, 41446/98, 41484/98, 41487/98 and 41509/98) (ECtHR 25 January 2000), para 38; *Case of Sotiris and Nikos Koutras Attee v Greece* App no 39442/98 (ECtHR 16 February 2001), para 20; *Beles and Others v Czech Republic* App no 47273/99 (ECtHR 12 November 2002), para 50; *RTBF v Belgium* App no 50084/06 (ECtHR 29 March 2011), paras 71, 72, 74; *Annoni di Gussola and Others v France* App nos 31819/96 and 33293/96 (ECtHR 14 November 2000), para 56; *The Holy Monasteries v Greece* App nos 13092/87, 13984/88 (ECtHR 9 December 1994), para 83, *Philis v Greece*, App nos 12750/87 13780/88, 14003/88 (ECtHR 27 August 1981), para 65.

<sup>886</sup>*Golder v United Kingdom* App no 4451/70 (ECtHR 21 February 1975), para 38; *Stanev v Bulgaria* App no 36760/06 (ECtHR 17 January 2012), para 230.

<sup>887</sup>*Ashingdane v United Kingdom* App no 8225/78 (ECtHR 28 May 1985); para 65, *Markovic and Others v Italy* App no 1398/03 (ECtHR 14 December 2006), para 99. For more details about aspects of effective and practical right to access to court, including possibility of effective contact of applicant with a lawyer, see the European Court of Human Rights Guide on Article 6, Right to a fair trial (civil limb), (Council of Europe/European Court of Human Rights, May 2013) 13-14.

<sup>888</sup>The third sub-paragraph of Article 15(a) of the Return Directive.

<sup>889</sup>The third sub-paragraph of Article 15(b) of the Return Directive.

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However, according to Article 5(4) of the ECHR, everyone who is deprived of his/her liberty by arrest or detention “*shall be entitled to take proceedings*” by which the lawfulness of his/her detention shall be decided. According to the case-law of the ECtHR, a detainee is entitled to apply to a court having jurisdiction to speedily decide whether or not his or her detention has become unlawful in the light of new factors which have emerged subsequent to the initial detention decision.<sup>890</sup> The question of whether periods comply with the requirement of “a reasonable interval” is determined by the ECtHR in light of the circumstances of each case, while the main focus remains on the question of whether any new relevant factors have arisen during the time between periodic reviews.<sup>891</sup>

A difference between EU law and the ECHR could imply that the ECtHR may find a breach of Article 5(4) of the ECHR if proceedings could only be initiated *ex officio*, for example, by a prosecutor, meaning that the applicant himself had no right to bring proceedings.<sup>892</sup> Article 5(4) is the *lex specialis* which cannot be bypassed by relying on the right to an effective remedy under Article 13 ECHR read together with Article 5. However, where the complaint concerns the conditions of detention, Article 13 can be invoked together with Article 3. However, even if the ECtHR does not find a violation of Article 3 of the ECHR, it may find a violation of Article 13 taken together with Article 3 of the ECHR.<sup>893</sup>

While the ECtHR has generally held that Article 5(4) can only be invoked while the person remains in detention, which means that that Article 5(4) had no application for the purpose “*of obtaining, after release, a declaration that a previous detention or arrest was unlawful,*”<sup>894</sup> Article 3 complaints can be invoked any time. Nevertheless, Article 5(4) complaint might be admissible if lodged while the applicant is still in detention, even if he/she is subsequently released, if the applicant did not have an effective remedy to challenge the lawfulness of his/her detention during the time he/she was detained; likewise,

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<sup>890</sup>*Abdulkhakov v Russia* App no 14743/11 (ECtHR 2 October 2012), para 215.

<sup>891</sup>*Ibid.* para 208.

<sup>892</sup>See, for example: *Nasrulloev v Russia* App no 656/06 (ECtHR 11 October 2007)

<sup>893</sup>See, for example: *Ilias and Ahmed v Hungary* App no 47287/15 (ECtHR 14 March 2017) paras 98-101.

<sup>894</sup>*Stephens v Malta (no1)* App no 11956/07 (ECtHR 21 April 2009) para 102; *Fox, Hartley and Campbell v United Kingdom* App nos 12244/86, 12245/86, 12383/86 (ECtHR 30 August 1990), para 45; *Slivenko v Latvia* App no 48321/99 (ECtHR 9 October 2003) para 155; *X v Sweden* App no 10230/82 (Commission decision, 11 May 1983); *Richmond Yaw and Others v Italy* App no (ECtHR 6 October 2016) para 82.

the Court has recognised that a complaint concerning the “speediness” of the review can be raised even after the person has been released.<sup>895</sup> Furthermore, complaints under Article 3 of the ECHR may be raised not just based on Article 5(4) of the ECHR, but also based on Article 13 of the ECHR.<sup>896</sup>

### **Standard 27. Right to judicial review before an “independent and impartial tribunal/court established by law”**

The Return Directive does not define the concrete character of the institution which must provide a “*judicial review*”.<sup>897</sup> However, as opposed to the review of the return decisions, judicial review of detention cannot be done alternatively by an “*administrative authority or a competent body composed of members who are impartial and who enjoy safeguards of independence.*”<sup>898</sup> The judicial review of detention may only be carried-out by a judicial authority.<sup>899</sup> Articles 15(2)(a) and (b) and 15(3) of the Return Directive taken in conjunction with Article 47(1) and (2) of the Charter provide guarantees for the “judicial review” of detention by an “*independent and impartial tribunal.*”<sup>900</sup> Furthermore, Article 6 of the Charter corresponds to Article 5(4) of the ECHR, which is a *lex specialis* to Article 13 of the ECHR, and Article 5(4) of the ECHR gives a right to take proceedings by which the lawfulness of detention will be decided by a “*court.*” The CJEU has already stated that “*limitations which may legitimately be imposed on the exercise of the rights laid down in Article 6 of the Charter may not exceed those permitted by the ECtHR.*”<sup>901</sup> Since the standards on the notions of “*tribunal/court*”, “*established by law*”, and “*independence and impartiality*” in the related case-law of the CJEU are limited to the interpretation provided by the preliminary ruling in the case of *H.I.D.*, additional guidance for the aforementioned standards may be taken from

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<sup>895</sup>*Abdullahi Elmi and Aweys Abubakar v Malta* App 25794/13 and 28151/13 (ECtHR 22 November 2016) paras 117-119.

<sup>896</sup>*Khlaifia and Others v Italy* (Grand Chamber), App no 16483/12 (ECtHR 15 December 2016), para 267.

<sup>897</sup>Article 15(2)(a) and (b) of the Return Directive.

<sup>898</sup>See Article 13(1) of the Return Directive.

<sup>899</sup>Article 15(2) and (3) of the Return Directive; C-146/14 PPU *Mahdi* EU:C:2014:1320 [2014] paras 56-57.

<sup>900</sup>“*Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in a compliance with the conditions laid down in this Article*” (Charter of Fundamental Rights of the European Union art 47(1)) “*Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law*” (first sentence of Charter of Fundamental Rights of the European Union art 47(2)).

<sup>901</sup>C-601/15 PPU *J.N.* (Grand Chamber) EU:C:2016:84 para 47.

the case-law of the ECtHR.<sup>902</sup>

### **Standard 28. Right to “speedy” judicial review of the lawfulness of detention**

Under both options, whether a third-country national has a right to initiate court proceedings or if there is an established system of *ex officio* judicial review of the lawfulness of detention, judicial review must be conducted “*as speedily as possible.*”<sup>903</sup> Exceptionally, when a large number of third-country nationals to be returned imposes an unforeseen heavy burden on administrative or judicial staff, a Member State may, as long as the exceptional situation persists, decide to allow for periods of judicial review to exceed those periods in the third sub-paragraph of Article 15(2) of the Return Directive.<sup>904</sup>

Under the standards of ECHR, “*speediness*” is in itself a virtue of value to be protected regardless of the outcome of the proceedings in question.<sup>905</sup> The ECtHR has as a starting point taken the moment when the application for release was made/proceedings were instituted. The relevant period ends with the final determination of the legality of the applicant’s detention, including any appeal.<sup>906</sup> If an administrative remedy is to be exhausted before recourse can be taken to a court, the time starts running when the administrative authority is seized of the matter.<sup>907</sup> If the proceedings have been conducted over two levels of jurisdiction, an overall assessment of speediness of judicial review must be carried out in order to determine whether the requirement of the “*speediness*” has been complied with.<sup>908</sup> There could be a breach of Article 5(4) of the ECHR even if the applicant has not

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<sup>902</sup>For the details concerning the judgment in the case of CJEU - C-175/11 *H.I.D., B.A. v Refugee Applications Commissioner, Refugee Appeals Tribunal, Minister for Justice, Equality and Law Reform, Ireland, Attorney General* EU:C:2013:45 and for concrete standards on “independence” and “impartiality” of courts “established by law”, which are developed by the ECtHR and are relevant for detention cases, as well, see the Explanatory note to this Check-list.

<sup>903</sup>Third sub-paragraph of Article 15(2)(a) and(b) of the Return Directive.

<sup>904</sup>Article 18(1) of the Return Directive.

<sup>905</sup>*Doherty v United Kingdom* App no 76874/11 (ECtHR 18 February 2016), para 80.

<sup>906</sup>*Sanchez-Reisse v Switzerland* App no 9862/82 (ECtHR 21 October 1986), para 54; *E. v Norway* App no 11701/85 (ECtHR 29 August 1990), para 64.

<sup>907</sup>*Sanchez-Reisse v Switzerland* App no 9862/82 (ECtHR 21 October 1986), para 54.

<sup>908</sup>*Hutchison Reid v United Kingdom* App no 50272/99 (ECtHR 20 February 2003), para 78; *Navarra v France* App no 13190/87 (ECtHR 23 November 1993), para 28; European Court of Human Rights, Guide on Article 5 – Right to Liberty and Security (Council of Europe/European Court of Human Rights, 2014) 33/points 211-213.

been prejudiced by the failure to conduct a “speedy” review, where, for example, his/her detention was at all times lawful. The question of whether the right to a speedy decision has been respected must be determined in the light of the circumstances of an individual case.<sup>909</sup> 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.<sup>910</sup> Any exceptions to the requirement of a “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 is not to be addressed in the abstract but in the context of a general assessment of the information, taking into account the circumstances of the case, particularly in the light of the complexity of the case, any specificities of the domestic procedure and the applicant’s behaviour in the course of the proceedings”.<sup>911</sup> In the previous case-law, too, the ECtHR decided that where an individual’s personal liberty is at stake, the ECtHR has very strict standards concerning the State’s compliance with the requirement of a speedy review of the lawfulness of detention. In cases such as *Kadem v Malta* (paras. 44-45) and *Rehbock v Slovenia* (paras. 82-86), the ECtHR considered periods of seventeen (17) and twenty-six (26) days excessive for deciding on the lawfulness of the applicant’s detention. In *Mamedova v Russia*, (para. 96) appeal proceedings lasting twenty six days (26) were found to be in breach of the speediness requirement.<sup>912</sup> In the case of *Karimov v Russia*, the ECtHR held that delays of thirteen (13) to twenty (20) days in examining appeals against a detention order may be incompatible with the “speediness” requirement in Article 5(4) of the ECHR.<sup>913</sup> Thus it is for a State to organise its judicial system in such a way as to enable the courts to comply with the requirements of Article 5(4) of the ECHR.<sup>914</sup> Neither an excessive workload nor a vacation period can justify a period of inactivity on the part of the judicial authorities.<sup>915</sup>

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<sup>909</sup>*Karimov v Russia* App no 54219/08 (ECtHR 29 July 2010), para 123; *Rehbock v Slovenia* App no 29462/95, (ECtHR 28 November 2000), para 84.

<sup>910</sup>*Karimov v Russia* App no 54219/08 (ECtHR 29 July 2010) paras 125-126.

<sup>911</sup>*Khlaifia and others v Italy* App no 16483/12 (ECtHR 15 December 2016), para 131.

<sup>912</sup>*Aden Ahmed v Malta* App no 55352/12 (ECtHR 23 July 2013), para 115.

<sup>913</sup>*Karimov v Russia* App no 54219/08 (ECtHR 29 July 2010), para 127.

<sup>914</sup>*Ibid.* para 123.

<sup>915</sup>*E. v Norway*, 11701/85 (ECtHR 29 August 1990), para 66; *Bezicheri v Italy* App no 11400/85 (ECtHR 25 October 1989), para 25. For further examples of judgments of the ECtHR as regards “speediness” of judicial review, see the Explanatory note to this Check-list.

**Standard 29. Right to judicial review of the continuing detention or of the extension (prolongation) of the detention period**

*“In every case, detention shall be reviewed at reasonable intervals of time either on application by the third-country national concerned or ex officio. In the case of prolonged detention periods, reviews shall be subject to the supervision of a judicial authority.”<sup>916</sup>*

However, in those cases the authorities, who carry out the review of a third-country national’s detention at regular intervals, are not obliged, at the time of each review, to adopt an express measure in writing that states the factual and legal reasons for that measure.<sup>917</sup> Nevertheless, EU law does not preclude national legislation from providing that the authority which reviews the detention at reasonable intervals must adopt, on the conclusion of each review, an express measure containing the factual and legal reasons justifying the measure adopted.<sup>918</sup>

The CJEU states that *“detention and extension of detention are similar in nature since both deprive the third-country national concerned of his liberty in order to prepare his return and/or carry out the removal process and in both cases the person concerned must be in a position to know the reasons for the decision taken concerning him.”* The requirement that a decision be adopted in writing must be understood as necessarily covering all decisions concerning an extension.<sup>919</sup> *Any period of detention which exceeds six months must be regarded, pursuant to Article 15(5), as prolonged detention for the purposes of Article 15(3) of the Directive.”<sup>920</sup>* In such a case, a judicial authority must carry out an examination of the detention even if the authority which brought the matter before the court has not expressly requested it to do so, and even if the detention of a third-country national concerned has already been reviewed by the authority which made the initial detention order.<sup>921</sup>

From the standpoint of the ECHR, too, it is not sufficient that the lawfulness of detention is

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<sup>916</sup>Article 15(3) of the Return Directive; See also: C-146/14 *PPU Mahdi* EU:C:2014:1320 [2014] para 43.

<sup>917</sup>*Ibid.* para 47.

<sup>918</sup>*Ibid.* para 51.

<sup>919</sup>*Ibid.* paras 44 and 48.

<sup>920</sup>*Ibid.* para 42.

<sup>921</sup>*Ibid.* para 56.



determined at the time of an arrest. There must be a possibility of subsequent review to ensure that the continuing detention does not become unlawful or arbitrary. For example, in the case of *Kim v Russia*, the ECtHR expressly recognised that during a long period of detention new factors may come to light, which impact on the lawfulness of detention, and the detained person should have a possibility of bringing new proceedings before a court which has jurisdiction to consider the complaint “*speedily*”.<sup>922</sup>

### **Standard 30. The “scope and intensity” of judicial review including procedural guarantees**

The Return Directive does not regulate specifically the scope or intensity of judicial review of a detention order. However, relevant standards may be gleaned from the general principle of the effectiveness of a legal remedy under EU law, in conjunction with Article 47(1) of the Charter and taking into account the interpretation of the CJEU on the right to an effective legal remedy in existing cases concerning the extension of detention under the Return Directive.<sup>923</sup> Thus, based on the standards developed in the case of *Mahdi*, a judicial authority must be able to rule on “*all relevant matters of fact and of law*” in order to determine whether detention is justified. This requires an “*in-depth examination of the matters of fact specific to each individual case.*” Where detention is no longer justified, the judicial authority must be able to substitute its own decision for that of the administrative authority and to take a decision on whether to order an alternative measure or the release of the third-country national concerned. “*To that end, the judicial authority must be able to take into account both the facts stated and the evidence adduced by the administrative authority and any observations that may be submitted by a third-country national.*” Furthermore, a judicial authority must be able to consider any other elements that are relevant for its decision should it deem it necessary to do so. “*Accordingly, the powers of the judicial authority in the context of an examination can under no circumstances be confined only to the matters adduced by the administrative authority concerned.*”<sup>924</sup> Any other interpretation would result in an ineffective examination by a judicial authority and would

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<sup>922</sup>*Kim v Russia* App no 44260/13 (ECtHR 17 July 2014) para 42.

<sup>923</sup>For details on general standards on effectiveness of judicial review, see the Explanatory note to this Check-list.

<sup>924</sup>C-146/14 PPU *Mahdi* EU:C:2014:1320 [2014] para 62.

thereby jeopardize the achievement of the objectives pursued.<sup>925</sup> Under the case-law of the ECtHR the scope and intensity of the judicial review of detention is explained in a slightly different way from the case of *Mahdi*. “Article 5(4) of the ECHR does not guarantee a right to judicial review of such a scope as to empower the court, on all aspects of the case including questions of pure expediency, to substitute its own discretion for that of the decision-making authority. The review should, however, be wide enough to bear on those conditions, which are essential for the lawful detention of a person according to Article 5(1) of the ECHR. The reviewing court must not have merely advisory functions but must have the competence to decide the lawfulness of the detention and to order release if the detention is unlawful. The requirement of procedural fairness under Article 5(4) does not impose a uniform, unvarying standard to be applied irrespective of the context, facts and circumstances. Although it is not always necessary that an Article 5(4) procedure be attended by the same guarantees as those required under Article 6 for criminal or civil litigation, it must have a judicial character and provide guarantees appropriate to the type of deprivation of liberty in question. Thus, the procedure must be adversarial and must always ensure equality of arms between the parties. An oral hearing may be necessary, for example in cases of detention on remand.”<sup>926</sup> Equality of arms is not ensured if the applicant, or his/her counsel, is denied access to those investigation file documents which are essential in order to challenge effectively the lawfulness of his/her detention.<sup>927</sup> It may also become essential to ensure that the individual concerned has an opportunity to be heard in person, and the effective assistance of his/her lawyer.<sup>928</sup>

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, rather that it should be possible to exercise the right to be heard at reasonable intervals.<sup>929</sup>

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<sup>925</sup>*Ibid* para 63.

<sup>926</sup>*A and Others v United Kingdom* App no 3455/05 (ECtHR 19 February 2009) para 204; *Reinprecht v Austria* App no 67175/01 (ECtHR 15 November 2005) para 31.

<sup>927</sup>*Ovsjannikov v Estonia* App no 1346/12 (ECtHR 20 February 2014), para 72; *Fodale v Italy* App no 70148/01 (ECtHR 1 June 2006), para 41; *Korneykova v Ukraine* App no 56660/12 (ECtHR 24 March 2016), para 68.

<sup>928</sup>*Cernák v Slovakia*, 36997/08 (ECtHR 17 December 2013), para 78.

<sup>929</sup>*Çatal v Turkey* App no 26808/08 (ECtHR 17 April 2012), para 33; *Altınok v Turkey* App no 31610/08 (ECtHR 29 November 2011), para 45.

Under the case law of the ECtHR, the reviewing court must have jurisdiction to decide on whether or not deprivation of liberty has become unlawful in the light of factors which have emerged subsequent to the initial decision depriving a person of his/her liberty.<sup>930</sup>

**Standard 31. Restrictions on the right to a defence and/or equality of arms based on national (public) security, public policy or public order**

If, in a given case, a risk of absconding exists or third -country national avoids or hampers the preparation of return or the removal process and, in addition, a Government establishes the existence of a risk to national (public) security<sup>931</sup>, certain limitations as regards the standards of equality of arms and/or the right to defence, such as restricted access to court file, may be imposed in the procedure during judicial control of detention.<sup>932</sup>

It must be determined whether and to what extent the limitations on judicial review of the lawfulness of detention are compatible with Article 47 in conjunction with Article 52(1) of the Charter.<sup>933</sup> Namely, the CJEU states that *“although it is for Member States to take the appropriate measures to ensure their internal and external security, the mere fact that a decision concerns State security cannot result in EU law being inapplicable.”*<sup>934</sup>

Article 7(4) of the Return Directive refers to *“a risk of public policy”*. In this context the CJEU provides that a risk of public policy is neither foreseen by the concepts defined in Article 3 of the Return Directive, nor defined by other provisions of that Directive.<sup>935</sup> The case *Z.Zh* relates to the possibility to refrain from granting a period for voluntary departure. In this context, the CJEU stated<sup>936</sup> that the meaning and the scope of the term *“risk of public policy”* must be determined by considering its usual meaning in everyday language, while

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<sup>930</sup>*Azimov v Russia* App no 67474/11 (ECtHR 18 April 2013), paras 151-152.

<sup>931</sup>If, for instance, a person had been concerned in the commission, preparation or instigation of acts of international terrorism, and was a member of, belongs to or had links with a terrorist group.

<sup>932</sup>See circumstances of national security concerns in the case of *A and Others v United Kingdom* App no 3455/05 (ECtHR 19 February 2009), para 166.

<sup>933</sup>C-300/11, *ZZ v Secretary of State for the Home Department* EU:C:2013:363 paras 50-51.

<sup>934</sup>C-300/11 *ZZ v Secretary of State for the Home Department* EU:C:2013:363 para 38.

<sup>935</sup>C-554/13, *Z.Zh and O* EU:C:2015:377 para 41.

<sup>936</sup>This might be relevant also in case of restriction on the right to effective remedy.

also taking into account the context in which they occur and the purposes of the rules which they form part of. When those terms appear in a provision, which constitutes derogation from the principle, they must be read so that the provision can be interpreted “*strictly*.”<sup>937</sup> A Member State must be able to prove that the person concerned “in fact” poses such a risk.<sup>938</sup> Such a decision should be adopted on a case-by-case basis; the principle of proportionality must be observed throughout all the stages of the return procedure.<sup>939</sup> A genuine and present risk to public policy must be established.<sup>940</sup> If, however, the assessment is based only on general practice, or any assumption in order to determine such a risk, without proper consideration of the conduct of that person and the risk that that conduct poses to public policy, a Member State fails to have appropriate regard for the requirements relating to an individual examination of the case concerned and to the principle of proportionality.<sup>941</sup> This means that it is not necessary that a criminal conviction is final, and a mere suspicion may, together with other factors relating to the case, be used as a basis for the conclusion that a person concerned poses a risk to public policy.<sup>942</sup> Different expressions in national languages, like “*danger*” or “*risk*”, must be understood in the sense of a “*threat*”.<sup>943</sup>

The concept of “*public order*” entails the existence (in addition to the disturbance of the social order which any infringement of the law involves) of a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society.<sup>944</sup> The concept of “*public security*” covers both the internal security of a Member State and its external security and, consequently, a threat to the functioning of institutions and essential public services and the survival of the population, as well as the risk of a serious disturbance to foreign relations or to the peaceful coexistence of nations, or a risk to military interests

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<sup>937</sup>*Ibid.* paras 42, 49.

<sup>938</sup>*Ibid.* para 46.

<sup>939</sup>*Ibid.* paras 49, 57.

<sup>940</sup>*Ibid.* para 50.

<sup>941</sup>*Ibid.* para 50.

<sup>942</sup>*Ibid.* paras 51-52.

<sup>943</sup>*Ibid.* para 58.

<sup>944</sup>C-601/15 PPU, *J.N v Staatssecretaris voor Veiligheid en Justitie* EU:C:2016:84 para 65.

affecting public security.<sup>945</sup>

### **Standard 32. Right to be released immediately in cases of unlawful detention**

*“The third-country national concerned shall be released immediately if the detention is not lawful”<sup>946</sup> or “when it appears that a reasonable prospect of removal no longer exists for legal or other considerations or the conditions laid down in paragraph 1 no longer exist”.*<sup>947</sup>

*“In such a case the person concerned must in any event be released immediately.”*<sup>948</sup>

However, not every irregularity in the exercise of the right to a defence in an administrative procedure will constitute an infringement of those rights, and therefore, not every such breach will automatically require the release of the person concerned.<sup>949</sup>

Similarly, Article 5(4) of the ECHR states that for “everyone who is deprived of his liberty” the “lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.” The Grand Chamber of the ECtHR in the case of *Stanev v Bulgaria* states that “the reviewing “court” must not have merely advisory functions but must have the competence to “decide” the “lawfulness” of the detention and to order release if the detention is unlawful” (see *Ireland v the United Kingdom*, 18 January 1978, § 200, Series A no. 25; *Weeks v the United Kingdom*, 2 March 1987, § 61, Series A no. 114; *Chahal v the United Kingdom*, 15 November 1996, § 130, Reports of Judgments and Decisions 1996V; and *A. and Others v the United Kingdom [GC]*, no. 3455/05, § 202, ECHR 2009).<sup>950</sup> The court must have the power to order release if it finds that the detention is unlawful, because a

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<sup>945</sup>*Ibid.* para 66. For further comparison on particular aspects of restrictions of the right to effective legal remedy in related fields of law, see the Explanatory note to this Check-list.

<sup>946</sup>Fourth sub-paragraph of Article 15(2) of the Return Directive; C-146/14 PPU *Mahdi* EU:C:2014:1320 [2014] paras 35, 59; C-383/13 PPU, *M.G., N.R. v Staatssecretaris van Veiligheid en Justitie* EU:C:2013:533 paras 25, 31.

<sup>947</sup>Article 15(4) of the Return Directive.

<sup>948</sup>C-357/09 PPU, *Kadzoev* EU:C:2009:741 para 60.

<sup>949</sup>C-383/13 PPU *M. G. and N. R. v Staatssecretaris van Veiligheid en Justitie* EU:C:2013:533 para 39.

<sup>950</sup>*Stanev v Bulgaria* (Grand Chamber) App no 36760/06 (ECtHR 17 January 2012), para 168; see also: *Amie v Bulgaria* App no 58149/08 (ECtHR 12 February 2013), para 80; *A and Others v United Kingdom* App no 3455/05 (ECtHR 19 February 2009), para 202; see also: *Khlaifia and Others v Italy* (Grand Chamber), App no 16483/12 (ECtHR 15 December 2016), para 131.

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mere power of recommendation is insufficient.<sup>951</sup> It is inconceivable that in a State, subject to the rule of law, a person may continue to be deprived of his/her liberty despite the existence of a court order for his/her release.<sup>952</sup> Nevertheless, the ECtHR recognises that some delay in carrying out a decision to release a detainee is understandable and often inevitable. The national authorities must attempt to keep it to a minimum.<sup>953</sup> This rule needs to be applied in conjunction with standards on the right to speedy judicial review.<sup>954</sup> Where a judgment of the first-instance court on the unlawfulness of detention with a judicial order to release a detainee is not final, due to a possibility of the administrative authority to appeal against the judgment of the first instance court to the appellate court, it is highly likely that standards of immediate release and speedy judicial review cannot be guaranteed, unless the first-instance court issues an effective interim measure regarding the release of a detainee, or if the first instance court applies the principle of direct effect of the second subparagraph of Article 15(1) of the Return Directive. In this respect, it is also relevant that from the standpoint of the right to an effective legal remedy (Article 47 of the CFR) “*the principle of effective judicial protection affords an individual a right of access to a court or tribunal but not to a number of levels of jurisdiction.*”<sup>955</sup> Under the case law of the ECtHR, too, States are not obliged to set up a second level of jurisdiction for the examination of the lawfulness of detention.<sup>956</sup> However, if a State creates such a system, it must, in principle, accord to detainees the same guarantees on appeal as at first instance,<sup>957</sup> and this includes the

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<sup>951</sup>*Benjamin and Wilson v United Kingdom* App 28212/95 (ECtHR 26 September 2002), paras 33-34. In case the ECtHR finds a violation of Article 5 of the ECHR, it may decide in the operative part of the judgment that the respondent State must ensure immediate release of applicants from detention (see, for example: *L.M. and Others v Russia* App nos. 40081/14, 40088/14 and 40127/14 (ECtHR 15 October 2015), point 9 of the operative part of the judgment and para 169 and the last paragraph of section 3.5. of the ELI Statement).

<sup>952</sup>*Assanidze v Georgia* (Grand Chamber) App no 71503/01 (ECtHR 8 April 2004), para 173.

<sup>953</sup>*Giulia Manzoni v Italy* App no 19218/91 (ECtHR 1 July 1997), para 25. A delay of eleven hours in executing a decision to release the applicant “forthwith” was found to be incompatible with Article 5(1) of the ECHR (*Quinn v France* App no 18580/91 (ECtHR 22 March 1995), para 39-43; Guide on Article 5 of the Convention, European Court of Human Rights, 2014, p11/point 40). In the case of *Mahamed Jama v Malta* App no 10290/13 (ECtHR 26 November 2015), the applicant remained in detention for five days following a decision granting her subsidiary protection and the ECtHR found violation of article 5(1) of the ECHR.

<sup>954</sup>See standard no 28 of this Check-list.

<sup>955</sup>C-69/10 *Diouf* EU:C:2011:524, para 69.

<sup>956</sup>*A.M. v the Netherlands* App no 29094/09 (ECtHR 5 July 2016), para 70.

<sup>957</sup>*Kučera v Slovakia* App no 48666/99 (ECtHR 17 July 2007), para 107, *Navarra v France* App no 13190/87 , (ECtHR 23 November 1993), para 28; *Toth v Austria* App no 11894/85 (ECtHR 12 December 1991), para 84.

principle of adversarial proceedings and equality of arms.<sup>958</sup>

For the standards on immediate release, in case of infringement in the right to be heard before the detention order is issued, see standard no. 13 of this Check-list on the right to information and to a personal interview before the detention order is issued.

**Standard 33. The impact of interim measures (under Rule 39 and national law) on the lawfulness of detention<sup>959</sup>**

The ECtHR has held that the grant of an interim measure under Rule 39 does not in itself render unlawful the detention of the person concerned.<sup>960</sup> However, the authorities must still envisage expulsion at a later stage.<sup>961</sup> Therefore, in a number of cases where respondent States refrained from deporting applicants in compliance with an interim measure under Rule 39, the ECtHR accepted that expulsion proceedings were temporarily suspended, but nevertheless remained “in progress”, with the consequence that the applicant’s continued detention did not violate Article 5(1) of the ECHR.<sup>962</sup> Similarly, when expulsion is suspended or blocked as a consequence of internal judicial review proceedings, the ECtHR considers them as a part of the deportation proceedings being ‘in progress’.<sup>963</sup> Nevertheless, suspension of the domestic proceedings due to the indication of an interim measure by the ECtHR should not result in a situation where the applicant languishes in detention for an unreasonably long period of time.<sup>964</sup>

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<sup>958</sup>*Catal v Turkey* App no 26808/08 (ECtHR 17 April 2012), paras 33-34.

<sup>959</sup>Rule 39(1) states that Chamber or, where appropriate, the President of the Section or a duty judge appointed pursuant to paragraph 4 of this Rule may, at the request of a party or of any other person concerned, or of their own motion, indicate to the parties any interim measure which they consider should be adopted in the interests of the parties or of the proper conduct of the proceedings (Rules of Court, Registry of the Court, Strasbourg, 1 January 2016).

<sup>960</sup>*Gebremedhin v France* App no 25389/05 (ECtHR 26 April 2007), para 74.

<sup>961</sup>*S.P. v Belgium* (decision) App no 12572/08 (ECtHR 14 June 2011).

<sup>962</sup>*Al Hanchi v Bosnia and Herzegovina* App no 48205/09 (ECtHR 15 November 2011), paras 49-51; *Al Husin v Bosnia and Herzegovina* App no 3727/08 (ECtHR 7 February 2012), paras 67-69; *Umirov v Russia*, 17455/11 (ECtHR 11 February 2013), paras 138-42.

<sup>963</sup>*Alim v Russia* App 39417/07 (ECtHR 27 September 2011), para 60.

<sup>964</sup>*A.H. and J.K. v Cyprus*, 41903/10 and 41911/10 (ECtHR 21 July 2015), para 188.

### **Standard 34. Derogation from obligations under Article 5(1) of the ECHR<sup>965</sup>**

As regards Article 15 of the ECHR, the ECtHR states that by reason of their direct and continuous contact with the pressing needs of the moment, the national authorities are in principle, better placed than an international Judge to decide both on the presence of such an emergency and on the nature and scope of the derogations necessary to avert it. Accordingly, a wide margin of appreciation should be left to the national authorities in this matter. Nonetheless, Contracting Parties do not enjoy an unlimited discretion. It is for the ECtHR to rule whether, *inter alia*, the States have gone beyond the extent strictly required by the exigencies of the crisis. The domestic margin of appreciation is thus accompanied by European supervision. In exercising this supervision, the ECtHR must give appropriate weight to such relevant factors as the nature of the rights affected by the derogation and the circumstances leading to, and the duration of, the emergency situation.<sup>966</sup> Where the highest domestic court has examined the issues relating to the State's derogation, the ECtHR considers that it would only be justified in reaching a contrary conclusion if it were satisfied that the national court had misinterpreted or misapplied Article 15 or the ECtHR's jurisprudence under that Article, or had reached a conclusion which was manifestly unreasonable.<sup>967</sup>

### **Standard 35. Right to compensation in the case of unlawful detention**

The Explanations Relating to the Charter provides that *"the rights in Article 6 are the rights guaranteed by Article 5 of the ECHR, and in accordance with Article 52(3) of the Charter, they have the same meaning and scope. Consequently, the limitations which may legitimately be imposed on them, may not exceed those permitted by the ECHR."*<sup>968</sup> Article 5(5) of the ECHR

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<sup>965</sup>Article 15 of the ECHR states that *"in time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law."*

<sup>966</sup>*A and Others v United Kingdom* App no 3455/05 (ECtHR 19 February 2009), para 173.

<sup>967</sup>*Ibid.* para 174. For the standards on "public emergency threatening the life of the nation" and on the measures "strictly required by the exigencies of the situation", see the Explanatory note to this Check-list.

<sup>968</sup>Explanations Relating to the Charter of Fundamental Rights of the EU. The third sub-paragraph of Article 6(1) of the Treaty of the Consolidated Version of the Treaty on European Union states that the rights



states that “everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation.” In the case of *Richmond Yaw et Autres c. Italie* the ECtHR established that mere recognition given by the Supreme Court of the irregularity of the prolongation of detention does not constitute a sufficient redress for the victim of a violation of Article 5(1)(f) of the ECHR.<sup>969</sup> Under the case law of the ECtHR, the right to compensation set forth in paragraph 5 presupposes that a violation of one of the paragraphs has been established, either by a domestic authority or by the Court.<sup>970</sup> Article 5(5) of the ECHR is complied with where it is possible to apply for compensation in respect of a deprivation of liberty affected in conditions contrary to paragraphs 1, 2, 3 or 4.<sup>971</sup> The arrest or detention may be deemed lawful under domestic law, but still be in breach of Article 5, which makes Article 5(5) of the ECHR applicable.<sup>972</sup> Article 5(5) creates a direct and enforceable right to compensation before the national courts.<sup>973</sup> The enforceable right to compensation must be accessible either before or after the ECtHR’s judgment.<sup>974</sup> The effective enjoyment of the right to compensation must be ensured with a sufficient degree of certainty.<sup>975</sup> Compensation must be available both in theory<sup>976</sup> and practice.<sup>977</sup> In considering compensation claims, the domestic authorities are required to interpret and apply domestic law in the spirit of Article 5, without excessive

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freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions. For general EU rules and standards on state liability in case that individual has suffered loss or damage as a result of the breach of EU law by a Member State, see paragraph 13 in the section 3.3. of the ELI Statement.

<sup>969</sup>*Richmond Yaw and Others v Italy* App nos 3342/11, 3391/11, 3408/11, 3447/11 (ECtHR 6 October 2016), para 50.

<sup>970</sup>*N.C. v Italy (Grand Chamber)* App no 24952/94 (ECtHR 18 December 2012) para 49; *Pantea v Romania* App no 33343/96 (ECtHR 3 June 2003), para 262; *Vachev v Bulgaria* App no 42987/98 (ECtHR 8 July 2004), para 78.

<sup>971</sup>*Michalák v Slovakia* App no 30157/03 (ECtHR 8 February 2011), para 204; *Lobanov v Russia* App no 15578/03 (ECtHR 2 December 2010), para 54.

<sup>972</sup>*Harkmann v Estonia*, 2192/03 (ECtHR 11 July 2006), para 50.

<sup>973</sup>*A and Others v United Kingdom (Grand Chamber)* App no 3455/05 (ECtHR 19 February 2009), para 229; *Storck v Germany* App no 61603/00 (ECtHR 16 June 2006) para 122.

<sup>974</sup>*Stanev v Bulgaria (Grand Chamber)* App no 36760/06 (ECtHR 17 January 2012), paras 183-84; *Brogan and Others v United Kingdom* App nos 11209/84; 11234/84; 11266/84; 11386/85 (ECtHR 29 November 1988), para 67.

<sup>975</sup>*Ciulla v Italy* App no 11152/84 (ECtHR 22 February 1989), para 44; *Sakik and Others v Turkey* App no 87/1996/706/898-903 (ECtHR 26 November 1997), para 60.

<sup>976</sup>*Dubovik v Ukraine*, 33210/07 and 41866/08 (ECtHR 15 October 2009), para 74.

<sup>977</sup>*Chitayev and Chitayev v Russia* App no 59334/00 (ECtHR 18 January 2007), para 195.

formalism.<sup>978</sup> The right to compensation relates primarily to financial compensation. It does not confer a right to secure the detained person's release, which is covered by Article 5(4) of the ECHR.<sup>979</sup> In the case of *Abdi Mahamud v Malta*, the ECtHR established that action in tort cannot be considered as an effective remedy for the purpose of a complaint about conditions of detention under Article 3 of the ECHR. In that case the ECtHR established that it has not been satisfactory established that action in tort may give rise to compensation for any non-pecuniary damage and that it was not a preventive remedy as it cannot impede the continuation of the violation alleged or provide the applicant with an improvement in the detention conditions.<sup>980</sup> Article 5(5) of the ECHR does not prohibit the Contracting States from making the award of compensation dependent upon the ability of the person concerned to show damage resulting from the breach. In cases where no pecuniary or non-pecuniary damage occurs, no question of "compensation" may arise.<sup>981</sup> At the same time, excessive formalism in requiring proof of non-pecuniary damage resulting from unlawful detention is not compliant with the right to compensation.<sup>982</sup>

Article 5(5) of the ECHR does not entitle the applicant to a particular amount of compensation.<sup>983</sup> However, compensation which is negligible or disproportionate to the seriousness of the violation would not comply with the requirements of Article 5 (5) of the ECHR as this would render the right guaranteed under that provision theoretical and illusory.<sup>984</sup> An award cannot be considerably lower than that granted by the ECtHR in similar cases.<sup>985</sup> For the general principles and standards as regards the state's liability where an individual suffered loss or damage as a result of a breach of EU law by a Member State, see section 3.3 of this Statement.

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<sup>978</sup>*Shulgin v Ukraine* App no 29912/05 (ECtHR 8 December 2011), para 65; *Houtman and Meeus v Belgium*, App no 22945/07 (ECtHR 17 March 2009), para 46.

<sup>979</sup> *Bozano v France* App no 9990/82 (ECtHR 18 December 1986).

<sup>980</sup> *Abdi Mahamud v Malta* App no 56796/13 (ECtHR 3 May 2016), para 50.

<sup>981</sup> *Wassink v the Netherlands* App no 12535/86 (ECtHR 27 September 1990), para 38.

<sup>982</sup> *Danev v Bulgaria* App no 9411/05 (ECtHR 2 September 2010), para 34-35.

<sup>983</sup> *Damian-Burueana and Damian v Romania* App no 6773/02 (ECtHR 26 May 2009), para 89; *Şahin Çağdaş v Turkey* App no 28137/02 (ECtHR 11 April 2006), para 34.

<sup>984</sup> *Cumber v United Kingdom*, Commission decision App no 28779/95 (ECtHR 27 November 1996), *Attard v Malta* (decision) App no 46750/99 (ECtHR 28 September 2000).

<sup>985</sup> *Ganea v Moldova* App no 2474/06 (ECtHR 17 May 2011), para 30; *Cristina Boicenco v Moldova* App no 25688/09 (ECtHR 27 September 2011), para 43.

### **Standard 36. Right to reasoned judicial decisions and their enforcement (execution)**

The fundamental right to a fair legal process enshrined in Article 47 of the Charter entails an obligation *“to provide a relevant and adequate statement of reasons”*.<sup>986</sup> With regard to disputes on the detention of irregular migrants, secondary EU law explicitly requires that decisions on detention, which must be ordered in writing by judicial or administrative authorities, contain *“reasons /.../ in fact and in law.”*<sup>987</sup> In the case of *Mahdi* the CJEU developed an interpretation that *“all decisions concerning extension of detention must also be given in writing.”*<sup>988</sup> However, authorities carrying out the review of detention at regular intervals pursuant to the first sentence of Article 15(3) are not obliged, at the time of each review, to adopt an express measure in writing that states the factual and legal reasons for that measure.<sup>989</sup> Only when the authority reviewing the lawfulness of detention at the end of initial six-month period takes also a decision on the further course of detention it is under the obligation to adopt a written reasoned decision.<sup>990</sup>

Since Article 47 of the Charter is not limited to civil rights (and obligations and criminal charges) as is the case with Article 6 of the ECHR,<sup>991</sup> more detailed standards in regards to the obligation to provide reasons in fact and in law in judgments may be gleaned from the guarantees enshrined in Article 6(1) of the ECHR. Under the case law of the ECtHR, this standard includes the obligation for courts to give *“sufficient”* reasons for their decisions.<sup>992</sup> A reasoned decision demonstrates to the parties that their case has truly been heard. Although a domestic court has a certain margin of appreciation when choosing arguments and admitting evidence, it is obliged to justify its activities by giving reasons for its decisions.<sup>993</sup> Article 6(1) of the ECHR obliges courts to give reasons for their decisions, but should not be interpreted as requiring a detailed answer to every argument.<sup>994</sup> The extent to

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<sup>986</sup>C-439/11 P, *Ziegler* EU:C:2013:513, para 104.

<sup>987</sup>The second sub-paragraphs of Article 15(2) of the Return Directive.

<sup>988</sup>C-146/14 PPU *Mahdi* EU:C:2014:1320 [2014] paras 43, 54.

<sup>989</sup>*Ibid.* para 47.

<sup>990</sup>*Ibid.* para 48.

<sup>991</sup>See: *Maaouia v France* App no 39652/98 (ECtHR 5 October 2000), paras 33-41.

<sup>992</sup>*H v Belgium* App no 8950/80 (ECtHR 30.November 1987), para 53.

<sup>993</sup>*Suominen v Finland* App no 37801/97 (ECtHR 1 July 2003), para 36.

<sup>994</sup>*Van de Hurk v the Netherlands* App no 16034/90 (ECtHR 19 April 1994), para 61; *Garcia Ruiz v Spain* (Grand Chamber) App no 30544/96 (ECtHR 21 January 1999), para 26 ; *Jahnke and Lenoble v France* (decision) App

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which this duty to give reasons applies may vary depending on the nature of the decision,<sup>995</sup> and may only be determined in the light of the circumstances of the case. It is necessary to take into account, *inter alia*, the diversity of the submissions that a litigant may bring before the courts and the differences existing in the Contracting States with regard to statutory provisions, customary rules, legal opinion, and the presentation and drafting of judgments.<sup>996</sup> However, where a party's submission is decisive for the outcome of the proceedings, a specific and express response is needed.<sup>997</sup> The courts are, therefore, required to examine with particular rigor and care: both the litigants' main arguments,<sup>998</sup> and pleas concerning the rights and freedoms guaranteed by the ECHR and its Protocols.<sup>999</sup>

In regards to the enforcement (execution) of judgments, the right to the enforcement (execution) of judicial decisions, given by any court, is an integral part of the right to court.<sup>1000</sup> The effective protection of the litigant and the restoration of legality, therefore, presuppose an obligation on the administrative authorities to comply with the judgment.<sup>1001</sup> Thus, while some delay in the enforcement (execution) of a judgment may be justified in particular circumstances, a delay may not be such as to impair the litigant's right to enforcement of the judgment.<sup>1002</sup> Enforcement (execution) must be full and exhaustive and not just partial,<sup>1003</sup> and may not be prevented, invalidated or unduly delayed.<sup>1004</sup>

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no 40490/98 (ECtHR 29 August 2000); *Perez v France* (Grand Chamber) App no 47287/99 (ECtHR 12 February 2004), para 81; see *mutatis mutandis*: C-439/11 P, *Ziegler* EU:C:2013:513 para 82.

<sup>995</sup>*Ruiz Torija v Spain* App no 18390/91 (ECtHR 9 December 1994), para 29; *Hiro Balani v Spain* App no 18064/91 (ECtHR 9 December 1994), para 27.

<sup>996</sup>*Ibid.*

<sup>997</sup>*Ruiz Torija v Spain* App no 30544/96 (ECtHR 21 January 1999,) para 28.

<sup>998</sup>*Buzescu v Romania* App no 61302/00 (ECtHR 24 May 2005), para 67; *Donadze v Georgia* App no 74644/01 (ECtHR 7 March 2006), para 35.

<sup>999</sup>*Wagner and J.M.W.L. v Luxembourg* App no 76240/01 (ECtHR 28 July 2007), para 96; European Court of Human Rights, *Guide on Article 6, Right to a fair trial (civil limb)*, (Council of Europe/European Court of Human Rights, May 2013).

<sup>1000</sup>*Hornsby v Greece* App no 18357/91 (ECtHR 19 March 1997), para 40; *Scordino v Italy (no1)* (Grand Chamber) App no 36813/97 (ECtHR 29 March 2006), para 196.

<sup>1001</sup>*Hornsby v Greece* App no 18357/91 (ECtHR 19 March 1997), para 41; *Kyrtatos v Greece* App no 41666/98, (ECtHR 22 May 2003), paras 31-32.

<sup>1002</sup>*Burdov v Russia* App no 33509/04 (ECtHR 15 January 2009), paras 35-37.

<sup>1003</sup>*Matheus v France* App no 62740/00 (ECtHR 31 March 2005), para 58; *Sabin Popescu v Romania* App no 48102/99 (ECtHR 2 March 2004), paras 68-76.

<sup>1004</sup>*Immobiliare Saffi v Italy* (Grand Chamber) App no 22774/93 (ECtHR 28 July 1999), para 74. See also standard no 32 of this check-list on the right to be immediately released in cases of unlawful detention.

### **Standard 37. Conditions of detention**

This standard consists of 9 elements described below under points 37.1. - 37.9.<sup>1005</sup>

#### **Standard 37.1. General conditions of detention: respect of human dignity, prohibition of inhuman/degrading treatment, and the protection of family life**

*“Third-country nationals in detention should be treated in a humane and dignified manner with respect for their fundamental rights and in compliance with international and national law. Without prejudice to the initial apprehension by law-enforcement authorities, regulated by national legislation, detention should, as a rule, take place in specialised detention facilities.”*<sup>1006</sup> If this is not possible, third-country nationals in detention shall be separated from ordinary prisoners.<sup>1007</sup> This exception (derogation) must be interpreted strictly.<sup>1008</sup> The separation of third-country nationals and ordinary prisoners is an unconditional obligation,<sup>1009</sup> and it applies even if a person concerned wishes to be detained together with ordinary prisoners.<sup>1010</sup> In the case of *Pham*<sup>1011</sup>, the CJEU reiterates its position set out in the cases of *El Dridi* (para. 31) and *Arslan* (para. 42), namely that the Return Directive *“pursues the establishment of an effective removal and repatriation policy, based on common standards, for persons to be returned in a humane manner and with full respect for their fundamental rights and their dignity.”*<sup>1012</sup> However, exceptionally, when a large number of third-country nationals to be returned places an unforeseen heavy burden on the capacity of the detention facilities, a Member State may, as long as the exceptional situation persists, decide to derogate from conditions set out in Article 16(1) of the Return Directive.<sup>1013</sup>

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<sup>1005</sup>For further details on this issue, see also standards of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment ‘CPT Factsheet on immigration detention’ (CPT/Inf(2017)3, Council of Europe 2017).

<sup>1006</sup>Recital 17 of the Return Directive.

<sup>1007</sup>Article 16(1) of the Return Directive; C-61/11 PPU, *El Dridi* EU:C:2011:268 para 40. See also standards on separation of facilities for detainees who are irregular migrants from ordinary prisoners in cases: C-473/13 and C-514/13 Joined Cases *Bero v Regierungspräsident Kassel* and *Bouzalmate v Kreisverwaltung Kleve* EU:C:2014:2095; C-474/13 *Pham* EU:C:2014:2096.

<sup>1008</sup>*Bero v Regierungspräsident Kassel and Bouzalmate v Kreisverwaltung Kleve* EU:C:2014:2095 para 25.

<sup>1009</sup>C-474/13, *Pham* EU:C:2014:2096 para 17.

<sup>1010</sup>*Ibid.* para 23.

<sup>1011</sup>*Ibid.*

<sup>1012</sup>*Ibid.* para 20. See also: the first sentence of the Recital 17 of the Return Directive.

<sup>1013</sup>Article 18(1) of the Return Directive.

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However, no derogation is lawful from the minimum standards for the protection of human dignity in the sense of Article 1 of the Charter or Article 3 of the ECHR. The CJEU in the case of *Cimade*, which relates to asylum seekers, states that “*further to the general scheme and purpose of the Reception Directive 2003/9 and the observance of fundamental rights, in particular the requirements of Article 1 of the Charter, under which human dignity must be respected and protected, the asylum seeker may not /.../ be deprived - even for a temporary period of time after the making of the application for asylum and before being actually transferred to the responsible Member State - of the protection of the minimum standards laid down by that directive;*”<sup>1014</sup> and the Reception Directive 2003/9 aims, similarly as the Recast Reception Directive 2013/33, to ensure “*full respect for human dignity and to promote the application of article 1 of the Charter*”<sup>1015</sup>.

Article 3 of the ECHR enshrines one of the most fundamental values of democratic societies and prohibits in absolute terms torture and inhuman or degrading treatment or punishment, irrespective of the circumstances and of the victim’s conduct. In view of the absolute nature of Article 3 of the ECHR, the “margin of appreciation” does not apply where there is an alleged breach of the substantive Article. In order to fall within the scope of Article 3, ill-treatment must attain a minimum level of severity. The assessment of this minimum is relative; it depends on all the circumstances of the case, such as the duration of the treatment and its physical or mental effects and, in some instances, the sex, age and state of health of the victim.<sup>1016</sup> Article 3 of the ECHR obliges a State to ensure that detention conditions comply with respect for human dignity, that the manner and method of the execution of the measure do not subject the detainees to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention and that, given the practical demands of imprisonment, their health and well-being are adequately secured.<sup>1017</sup>

From the standpoint of protection under Article 3 of the ECHR, the ECtHR “*attaches*

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<sup>1014</sup>C-179/11, *Cimade* EU:C:2012:594 para 56.

<sup>1015</sup>Recital 18 of the Recast Reception Directive 2013/33.

<sup>1016</sup>*M.S.S. v Belgium and Greece* (Grand Chamber) App no 30696/09 (ECtHR 21 January 2011), para 219; *Kudła v Poland* (Grand Chamber) App no 30210/96 para 91; *Khlaifia and others v Italy* (Grand Chamber), 16483/12, (ECtHR 15 December 2016), paras 158-159.

<sup>1017</sup>*M.S.S. v Belgium and Greece* (Grand Chamber) App no 30696/09 (ECtHR 21 January 2011) para 221.

*considerable importance to the applicant's status as an asylum seeker and, as such, a member of a particularly underprivileged and vulnerable population group in need of special protection".*<sup>1018</sup>

In order to determine whether the threshold of severity has been reached, the ECtHR also takes other factors into consideration, in particular: the purpose for which the ill-treatment was inflicted (although the absence of an intention to humiliate or debase the victim cannot conclusively rule out its characterisation as degrading); the context in which the ill-treatment was inflicted, such as an atmosphere of heightened tension and emotions; and whether the victim is in a vulnerable situation, which is normally the case for persons deprived of their liberty, but there is an inevitable element of suffering and humiliation involved in custodial measures and this, in itself, will not entail a violation of Article 3 of the ECHR.<sup>1019</sup> When assessing conditions of detention, account has to be taken of the cumulative effects, as well as of specific allegations made by the applicant. In particular, the major factors will be the length of the period during which the applicant was detained in the impugned conditions and where overcrowding reaches a certain level, the lack of space in an institution may also constitute a key factor to be taken into account.<sup>1020</sup>

As regards the detention of families pending removal, *in line with the ECHR the "respect for family life should be a primary consideration of Member States when implementing the Return Directive."*<sup>1021</sup> *"Families with minors shall only be detained as a measure of last resort and for the shortest appropriate period of time."*<sup>1022</sup> Detained families shall be provided with *"separate accommodation guaranteeing adequate privacy;"*<sup>1023</sup> the only exception is an emergency situation regulated in Article 18(1) of the Return Directive.

In cases of children detained separately from their parents, or children detained together with their parents, the jurisprudence of the ECtHR shows that Article 3 of the ECHR is not

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<sup>1018</sup>*Ibid.* para 251.

<sup>1019</sup>*Khlaifia and Others v Italy* (Grand Chamber) App no 16483/12 (ECtHR 15 December 2016), para 160.

<sup>1020</sup>*Ibid.* paras 163-164. See more on this under standard no 37.3 of this Check-list.

<sup>1021</sup>Second sentence of Recital 22 of the Return Directive.

<sup>1022</sup>Article 17(1) of the Return Directive.

<sup>1023</sup>Article 17(2) of the Return Directive.

the only right applicable and/or violated. In case *Mubilanzila Mayeka and Kaniki Mitunga v Belgium*<sup>1024</sup>, apart from Article 3, in relation to mother and her daughter, the ECtHR also found violation of Article 8 in relation to both applicants.<sup>1025</sup> In the case *A.B et autres c. France*, apart from violation of Article 3 in relation to children, the ECtHR has found also violation of the right to family life from Article 8 of the ECHR in relation to children and their parents who were detained together.<sup>1026</sup> When Article 8 of the ECHR is at stake, however, the principle of proportionality is applicable. For example, the ECtHR has adjudicated that the sole fact that family unit is maintained does not necessarily guarantee respect for the right to a family life, particularly where the family is detained.<sup>1027</sup> The fact of confining the applicants to a detention centre, for fifteen days, thereby subjecting them to custodial living conditions typical of that kind of institution, may be regarded as an interference with the effective exercise of their family life.<sup>1028</sup> Such interference must be in accordance with law and necessary in a democratic society.<sup>1029</sup> Authorities have a duty to strike a fair balance between the competing interests of the individual and society as a whole in assessing proportionality. They must take into account the child's best interest as a paramount value. The protection of the child's best interests involves both keeping the family together as far as possible, and considering alternatives so that the detention of minors is only a measure of last resort.<sup>1030</sup>

Regarding the conditions of detention, there is a general principle under EU secondary law that “particular attention shall be paid to the situation of vulnerable persons.”<sup>1031</sup>

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<sup>1024</sup>*Mubilanzila Mayeka and Kaniki Mitunga v Belgium* App no 13178/03 (ECtHR 12 October 2006).

<sup>1025</sup>*Ibid.* paras 72-85.

<sup>1026</sup>*A. B. et autres c. France* App no 11593/12 (ECtHR 12 July 2016) paras 139-156. For more on this, see the Explanatory notes on (un)accompanied minors.

<sup>1027</sup>*Popov v France*, 39472/07 and 39474/07 (ECtHR 19 January 2012), para 134.

<sup>1028</sup>*Ibid.* para 134.

<sup>1029</sup>*Ibid.* para 135.

<sup>1030</sup>*Ibid.* 139-141. See also standards no 37.5 and 37.6 of this Check-list on minors of this check-list. For particular circumstances of this case which have lead the ECtHR to found a violation of the right to family life of the applicants, see the Explanatory note to this Check-list.

<sup>1031</sup>Article 16(3) of the Return Directive.



**Standard 37.2. Inhuman/degrading treatment in detention: threshold and onus**

The ECtHR considers treatment to be “inhuman” when it was “*premeditated, applied for hours at a stretch and caused either actual bodily injury or intense physical or mental suffering*”.<sup>1032</sup> The treatment is considered to be “degrading” when it humiliates or debases an individual, showing a lack of respect for, or diminishing, his or her human dignity, or arousing feelings of fear, anguish or inferiority capable of breaking an individual’s moral and physical resistance.<sup>1033</sup> It may suffice that the victim is humiliated in his or her own eyes, even if not in the eyes of others. Although the question whether the purpose of the treatment was to humiliate or debase the victim is a factor to be taken into account, the absence of any such purpose cannot conclusively rule out a finding of a violation of Article 3 of the ECHR.<sup>1034</sup> In practice, the ECtHR will not always distinguish between inhuman treatment and degrading treatment, sometimes preferring instead to simply find that there has been a breach of Article 3. In other cases it might make a specific finding that the treatment in question is either inhuman or degrading. With regard to the burden of proof, the ECtHR generally relies on the rule that allegations of ill-treatment must be supported by appropriate evidence. In other words, the applicant bears the responsibility of providing evidence of treatment contrary to Article 3. The ECtHR has, however, noted that cases concerning allegations of inadequate conditions of detention do not lend themselves to a rigorous application of the principle *affirmanti incumbit probatio* (Lat.: “he who alleges something must prove that allegation”) because in such instances the respondent Government alone has access to information capable of corroborating or refuting these allegations. Accordingly, applicants might experience certain difficulties in procuring evidence to substantiate a complaint in that connection. Nevertheless, in such cases applicants may well be expected to submit at least a detailed account of the facts complained of and provide – to the greatest extent possible – some evidence in support of their complaints.<sup>1035</sup> Once the ECtHR has given notice of the applicant’s complaint to the Government, the burden is on the latter to collect and produce relevant documents. A

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<sup>1032</sup>*M.S.S. v Belgium and Greece* (Grand Chamber) App no 30696/09 (ECtHR 21 January 2011) para 220.

<sup>1033</sup>*Ibid.* para 220; *Kudła v Poland* App no 30210/96 (ECtHR 26 October 2000) para 92; *Pretty v United Kingdom* App no 2346/02 (ECtHR 29 April 2002) para 52.

<sup>1034</sup>*M.S.S. v Belgium and Greece* (Grand Chamber) App no 30696/09 (ECtHR 21 January 2011) para 169.

<sup>1035</sup>See *Visloguzov v Ukraine* App no 32362/02 (ECtHR 20 May 2010), para 45.

failure on the part of the Government to submit convincing evidence on material conditions of detention may give rise to the drawing of inferences as to the well-foundedness of the applicant's allegations.<sup>1036</sup> *"In assessing evidence the ECtHR has generally applied the standard of proof beyond reasonable doubt. However, such proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of facts."*<sup>1037</sup>

### **Standard 37.3. Conditions of detention: overcrowding, ventilation, access to light and natural air, quality of heating, health requirements, basic sanitary and hygiene requirements**

The ECtHR has found overcrowding by itself a sufficient factor to find a breach of Article 3. When the personal space granted to the applicant was less than 3 m<sup>2</sup> of floor surface per detainee (including space occupied by furniture but not counting the in-cell sanitary facility) in multi-occupancy accommodation. This should be maintained as the relevant minimum standard for its assessment under Article 3 of the ECHR.<sup>1038</sup> A weighty but not irrebutable presumption of a violation of Article 3 will arise when the personal space available to a detainee falls below 3 m<sup>2</sup> in multi-occupancy accommodation. The presumption could be rebutted in particular by demonstrating that the cumulative effects of other aspects of the conditions of detention compensated for the scarce allocation of personal space. In that connection, the ECtHR takes into account such factors as the length and extent of the restriction, the degree of freedom of movement and the adequacy of out-of-cell activities, as well as whether or not the conditions of detention in a particular facility are generally decent."<sup>1039</sup>

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<sup>1036</sup>See *Gubin v Russia* App no 8217/04 (ECtHR 17 June 2010), para 56 and *Khudoyorov v Russia* App no 6847/02 (ECtHR 8 November 2005) para 113; *Alimov v Turkey* App no 1434/13 (ECtHR 6 September 2016), para 75.

<sup>1037</sup>*Koktysh v Ukraine* App no 43707/07 (ECtHR 10 December 2009), para 90; *Salman v Turkey* (Grand Chamber) App no 21986/93 (ECtHR 27 June 2000), para 100; *Khlaifia and Others v Italy* App no 16483/12 (ECtHR 15 December 2016), paras 127, 168.

<sup>1038</sup>*Ibid.* para 166; see also: *Kadikis v Latvia* App no 62393/00 (ECtHR 4 May 2006), para 55; *Andrei Frolov v Russia* App no 205/02 (ECtHR 29 March 2007), paras 47-49; *Kantjyrev v Russia* App no 37213/02 (ECtHR 21 June 2007), paras 50-51; *Sulejmanovic v Italy* App no 22635/03 (ECtHR 16/07/2009), para 43; *Torreggiani and Others v Italy* App no 43517/09, 46882/09, 55400/09 et al. (ECtHR 8 January 2013), para 68.

<sup>1039</sup>*Khlaifia and Others v Italy* (Grand Chamber) App no 16483/12 (ECtHR 15 December 2016), para 166. For example, the ECtHR notes that scarce space in relative terms may in some circumstances be compensated for by the possibility to move about freely within the confines of a detention facility and by unobstructed access to natural light and air: *Alimov v Turkey* App no 14344/13 (ECtHR 6 September 2016), para 78 or by

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In *Aden Ahmed v Malta* (para. 87) the ECtHR had regard not just to the floor space afforded to each detainee, but also to whether each detainee had an individual sleeping place in the cell, and whether the overall surface area of the cell was such as to allow detainees to move freely between the furniture items. Based on standards from *Aden Ahmed v Malta*, in deciding whether or not there has been a violation of Article 3 on account of the lack of personal space, the ECtHR has to have regard to the following three elements: “each detainee must have an individual sleeping place in a cell; each detainee must dispose of at least three square meters of floor space; and the overall surface area of the cell must be such as to allow the detainees to move freely between the furniture items. The absence of any above elements creates in itself a strong presumption that the conditions of detention amounted to degrading treatment and were in breach of Article 3.”<sup>1040</sup> As the fourth element the ECtHR refers to “other aspects.” Where overcrowding was not significant enough to raise itself an issue under Article 3, the ECtHR has taken into account “other aspects” of detention conditions, including the ability to use the toilets privately,<sup>1041</sup> available ventilation, access to light and natural air, the quality of heating and and balanced meals<sup>1042</sup> and respect for basic health requirements. Therefore, in cases where each detainee had 3 to 4 m<sup>2</sup>, the ECtHR found a violation of Article 3 where the lack of space was accompanied by a lack of ventilation and light,<sup>1043</sup> limited access to outdoor exercise,<sup>1044</sup> or a total lack of privacy in

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the freedom to spend time away from the dormitory rooms: *Mahamed Jama v Malta* App no 10290/13 (ECtHR 26 November 2016), para 92. See also: *Abdi Mahamud v Malta*, 56796/13, 3 May 2016 (paras 81-83).

<sup>1040</sup>*Aden Ahmed v Malta* App no 55352/12 (ECtHR 9 December 2013), para 87.

<sup>1041</sup>For the compliance with basic sanitary and hygienic requirements, see, for example: *Anayev and Others v Russia* App nos 42525/07 and 60800/08 (ECtHR 10 January 2012), paras 156-159, *Aden Ahmed v Malta* App no 55352/12 (ECtHR 9 December 2013), para 88; *Moiseyev v Russia* App no 62936/00 (ECtHR 9 October 2008) para 124.

<sup>1042</sup>See, for example, *Mahamed Jama v Malta* App no 10290/13 (ECtHR 26 November 2015), paras 96, 98; *Abdi Mahamud v Malta* App no 56796/13 (ECtHR 3 May 2016), paras 84, 85, 89.

<sup>1043</sup>*Torreggiani and Others v Italy* App nos 43517/09, 46882/09, 55400/09 et al. (ECtHR 08 January 2013) para 69; see also *Babushkin v Russia* App no 5993/08 (ECtHR 16 October 2014) para 44; *Vlasov v Russia* App no 78146/01 (ECtHR 12 June 2008) para 84; *Moisseiev v Russia* App no 62936/00 (ECtHR 9 October 2008), paras 124-127.

<sup>1044</sup>*István Kovács Gábor v Hungary* App no 15707/10 (ECtHR 17 January 2012), para 26; see also: *Mandič and Jovič v Slovenia* App nos 5774/10 and 5985/10 (ECtHR 20 October 2011), para 78; *Babar Ahmad and Others v United Kingdom* App nos 24027/07, 11949/08, 36742/08, 66911/09 and 67354/09 (ECtHR 10 April 2012), paras 213-214.

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cells.<sup>1045</sup> The ECtHR mentions the Prisons Standards developed by the Committee for the Prevention of Torture<sup>1046</sup>, which specifically deal with outdoor exercise and consider it a basic safeguard of prisoners' well-being, and that all of them, without exception, should be allowed at least one hour of exercise in the open air every day, preferably as part of a broader programme of out-of-cell activities.<sup>1047</sup> Under the standards of the ECHR "access to outdoor exercise is a fundamental component of the protection afforded to persons deprived of their liberty under Article 3 and as such it cannot be left to the discretion of the authorities."<sup>1048</sup> For that reason, physical characteristics of outdoor exercise facilities are also relevant.<sup>1049</sup> In addition, the time during which an individual was detained in the contested conditions is an important factor to consider.<sup>1050</sup> As regards the notion of the so called "continuous detention", the ECtHR stated that when complaints in relation to conditions of detention do not simply relate to a specific event, but which concern a whole range of problems regarding sanitary conditions, the temperature in cells, overcrowding, lack of adequate medical treatment, which have affected an inmate throughout his or her incarceration, the ECtHR regards this as a "continuing situation", even if the person concerned has been transferred between various detention facilities in the relevant period.<sup>1051</sup>

For concrete examples of circumstances where the ECtHR did (not) find a violation of Article 3 of the ECHR, see summaries of cases in the judgment of the *Khlaifia and others v Italy* (paras. 171-177) and the Explanatory Note.

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<sup>1045</sup>*Novoselov v Russia* App no 66460/01 (ECtHR 2 June 2005), paras 32 and 40-43; *Khoudoyorov v Russia*, paras 106-107; *Belevitski v Russia* App no 72967/01 (ECtHR 1 March 2007), paras 73-79.

<sup>1046</sup>European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment 'CPT Factsheet on immigration detention' (CPT/Inf(2017)3, Council of Europe 2017).

<sup>1047</sup>*Abdullahi Elmi and Aweys Abubakar v Malta* App nos 25794/13 and 28151/13 (ECtHR 22 November 2016) para 102.

<sup>1048</sup>This is so regardless of how good the material conditions might be in the cells: *Alimov v Turkey* App no 14344/13 (ECtHR 6 September 2016), para 83. See also: *Mahamed Jama v Malta* App no 10290/13 (ECtHR 25 November 2015), para 93.

<sup>1049</sup>For instance, an exercise yard that is just two square metres larger than the cell, is surrounded by three-metre-high walls, and has an opening to the sky covered with metal bars and a thick net does not offer inmates proper opportunities for recreation and recuperation: *Mahamed Jama v Malta* App no 10290/13 (ECtHR 25 November 2015) para 93; see also paras 94-95.

<sup>1050</sup>*Kalashnikov v Russia* App no 47095/99 (ECtHR 15 July 2002), para 102; *Kehayov v Bulgaria* App no 41035/98 (ECtHR 18 January 2005), para 64; *Alver v Estonia* App no 64812/01 (ECtHR 8 November 2005), para 50.

<sup>1051</sup>*Alimov v Turkey* App no 14344/13 (ECtHR 6 September 2016), para 59.

#### **Standard 37.4. Right to communication and information in detention**

Third-country nationals in detention shall be allowed, upon request, to establish in due time, contact with legal representatives, family members and competent consular authorities.<sup>1052</sup>

Relevant and competent national, international and non-governmental organisations and bodies shall have a possibility to visit detention facilities to the extent that they are being used for detaining third-country nationals in accordance with Chapter IV of the Return Directive.<sup>1053</sup> Third-country nationals kept in detention shall be systematically provided with information, which explains the rules applied in the facility and sets out their rights and obligations. Such information shall include information on their entitlement under national law to contact the organisations and bodies referred to in Article 16(4) of the Return Directive.<sup>1054</sup>

#### **37.5. Minors**

*“The best interest of a child shall be a primary consideration in the context of the detention of minors pending removal.”*<sup>1055</sup> Minors in detention shall have a possibility to engage in leisure activities, including play and recreational activities appropriate to their age, and shall have, depending on the length of their stay, access to education.<sup>1056</sup> Apart from general conditions and procedural requirements that are described in other standards of this check-list, Article 37 of the UN Convention on the Rights of the Child<sup>1057</sup> among other things provides that deprivation of liberty of a child *“shall be used only as a measure of last resort and for the shortest appropriate period of time”* /.../ and *“in a manner which takes into account the needs of persons of his or her age”* /.../.<sup>1058</sup> Every child deprived of liberty *“shall be separated from adults unless it is considered in the child's best interest not to do so and*

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<sup>1052</sup>Article 16(2) of the Return Directive.

<sup>1053</sup>Article 16(4) of the Return Directive.

<sup>1054</sup>Article 16(5) of the Return Directive.

<sup>1055</sup>Article 17(5) of the Return Directive. See also recital 22 of the Return Directive.

<sup>1056</sup>Article 17(3) of the Return Directive.

<sup>1057</sup>Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3.

<sup>1058</sup>Those needs have to be considered also in the light of the right to primary education under Article 28 of the UN Convention on the Rights of the Child.

*shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances /.../ and shall have the right to prompt access to legal and other appropriate assistance.”<sup>1059</sup> When minors are detained, they shall have the possibility to engage in leisure activities, including play and recreational activities appropriate to their age.”<sup>1060</sup>*

### **37.6. Unaccompanied minors**

*“Unaccompanied minors shall only be detained as a measure of last resort and for the shortest appropriate period of time.”<sup>1061</sup> Unaccompanied minors shall as far as possible be provided with accommodation in institutions provided with personnel and facilities which take into account the needs of persons of their age.”<sup>1062</sup>*

### **37.7. Ill-health and special medical conditions**

In detention, emergency health care and essential treatment of illness shall be provided.<sup>1063</sup> As regards the detention of persons with special medical needs, the case-law of the ECtHR has mostly considered the situation of detainees with mental illness, suicidal tendencies, detainees who are HIV-positive, paraplegics, persons who are confined to a wheelchair, and pregnant women. See the Explanatory Note on ill-health (special medical conditions) and Standard 37.8 on the detention of the elderly.

### **37.8. Elderly**

The ECtHR has not expressly considered the detention of elderly persons in the expulsion context. The ECtHR, however, has routinely stated that age and state of health will be relevant to the

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<sup>1059</sup>Article 37(c) and(d) of the UN Convention on the Right of the Child.

<sup>1060</sup>For concrete examples in the case law of the ECtHR, see the Explanatory note to this Check-list.

<sup>1061</sup>Article 17(1) of the Return Directive.

<sup>1062</sup>Article 17(3) of the Return Directive. see also standard no 37.5 of this Check-list on minors and the Explanatory note to this Check-list on examples of detention of unaccompanied minors in the case-law of the ECtHR.

<sup>1063</sup>Second sentence of Article 16(3) of the Return Directive.

assessment of the level of severity of ill treatment, and there are a number of cases in which the ECtHR has addressed the vulnerability of this group within the domestic prison regime.<sup>1064</sup>

### **37.9. Other vulnerable persons (female applicants, mothers, LGBT etc.)**

In case of female detainees, a lack of female staff in the centre may be relevant, too.<sup>1065</sup> In the case of *Mahamad Jama v Malta*, irrespective of health concerns or age factor the ECtHR considered the female applicant more vulnerable than any other adult asylum seeker detained at the time.<sup>1066</sup>

In the case of *O.M. v Hungary*<sup>1067</sup> the ECtHR held that the authorities had failed to exercise particular care in order to avoid situations which may reproduce the conditions that forced that person to flee in the first place. The authorities ordered the applicant's detention without considering the extent to which vulnerable individuals, for instance, LGBT persons were safe or unsafe in custody among other detained persons, many of whom had come from countries with widespread cultural or religious prejudice against such persons.<sup>1068</sup> For further concrete examples in case law of the ECtHR on the detention of vulnerable persons, see the Explanatory note.

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<sup>1064</sup>See, for example: *Sawoniuk v United Kingdom* App no 63716/00 (ECtHR 29 May 2001); *Papon v France* App no 54210/00 (ECtHR 25 July 2002); *Farbtuhs v Latvia* App no 4672/02 (ECtHR 2 December 2004) and *Enea v Italy* App no 74912/01 (ECtHR 17 September 2009), *Haidn v Germany* App no 6587/04 (ECtHR 13 January 2011) *Contrada (no2) v Italy* App no 7509/08 (ECtHR 11 February 2014); see also the Explanatory note to this Check-list.

<sup>1065</sup>See, for example: *Mahamed Jama v Malta* App no 10290/13 (ECtHR 26 November 2015), para 97; *Abdi Mahamud v Malta* App no 56796/13 (ECtHR 3 May 2016), paras 84, 86, 89.

<sup>1066</sup>*Ibid.* para 100.

<sup>1067</sup>*O.M. v Hungary* App no 9912/15 (ECtHR 5 July 2016).

<sup>1068</sup>*Ibid.* para 53.

## Explanatory Note to the Basic Judicial Check-List 2

### Standard 2. Definition of detention

The right to freedom of movement under Article 45 (2) of the Charter of Fundamental Rights of the EU (hereinafter: the Charter) or under Article 2(1) of Protocol No. 4 to the ECHR<sup>1069</sup> cannot be applicable to irregular migrants in detention cases, because these categories of third country nationals do not have the status of “legal residents” or they are not “lawfully staying” on the territory of the Member States.<sup>1070</sup>

In its case law (until 2016), the CJEU mostly uses the term “*detention*” without developing a distinction between deprivation of freedom of movement and deprivation of liberty. In addition to the case of *Kadzoev*, in the judgment in the case of *Mahdi*, which also refers to detention under the Return Directive, the CJEU briefly refers to Article 6 of the Charter.<sup>1071</sup> In the case of *Alo and Osso*, the resident permits were issued to the applicants with subsidiary protection with a condition requiring them to take up residence, in Mr. Alo's case, in the town of Ahlen (Germany), and in Ms. Osso's case, in the Hannover region (Germany), with the exception of the capital of the Land of Lower Saxony. The CJEU delivered a preliminary ruling based on the provision on freedom of movement,<sup>1072</sup> providing that the fact that Article 33 of Directive 2011/95 is entitled “*Freedom of Movement*” is not sufficient to dispel the ambiguities in its wording.<sup>1073</sup> Similarly, the ECtHR states that “*it is often necessary to look beyond the appearances and the language used and concentrate on the realities of the situation.*”<sup>1074</sup>

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<sup>1069</sup>Article 45(2) of the Charter states that freedom of movement and residence may be granted, in accordance with the treaties, to nationals of third countries legally resident in the territory of a Member State. Article 2(1) of the Protocol No 4 to the ECHR states that: “*everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.*”

<sup>1070</sup>Recital 9 of the Return Directive; C-357/09 PPU *Kadzoev* (Grand Chamber) EU:C:2009:741 para 41; C-534/11, *Arslan* EU:C:2013:343 para 48.

<sup>1071</sup>C-146/14 PPU *Mahdi* EU:C:2014:1320 [2014] para 52 and point 1 of the operative part of the judgment.

<sup>1072</sup>C-443/14 and C-444/14 Joined Cases *Alo and Osso*, EU:C:2016:127 paras 15-16 and 22-24.

<sup>1073</sup>*Ibid.* para 25. For distinctions between the notions of restriction of person's liberty of movement, restriction of liberty and deprivation of liberty in the context of detention under the European arrest warrant, see judgment of the CJEU in the case C-294/16 PPU *JZ* EU:C:2016:610.

<sup>1074</sup>*Kasparov v Russia*, App no 53659/07 (ECtHR 11 October 2016) para 36; see also: *Ilias and Ahmed v Hungary* App no 47287/15 (ECtHR 14 March 2017) para 66.



In the case *Nada v Switzerland*, the ECtHR states in general terms that “*the requirement to take account of the type and manner of implementation of the measure in question /.../ enables it to have regard to the specific context and circumstances surrounding types of restriction other than the paradigm of confinement in a cell /.../. Indeed, the context in which the measure is taken is an important factor, since situations commonly occur in modern society where the public may be called on to endure restrictions on freedom of movement or liberty in the interest of the common good*” /.../.<sup>1075</sup> In this case, the ECtHR observed that the area in which the applicant was not allowed to travel was the territory of a third country, Switzerland. The restrictions in question did not prevent the applicant from living and moving freely within the territory of his permanent residence, which he had chosen of his own free will, to live and to carry on his activities. These circumstances differ radically from the factual situation in *Guzzardi*.<sup>1076</sup>

In the case *Guzzardi v Italy*, the applicant was suspected of belonging to a “*band of mafiosi*” and he had been forced to live on an island within an (unfenced) area of 2.5 km<sup>2</sup>, together with other residents in a similar situation and supervisory staff. The ECtHR found that the applicant had been deprived of his liberty within the meaning of Article 5 of the ECHR.

In the case of *Raimondo v Italy*, the applicant was suspected of involvement with mafia and he had been confined to his home in the evenings. He had an obligation to inform the police when he planned to leave his home, though he did not require permission from the police to leave his home. The ECtHR concluded that this amounted to a restriction of freedom of movement and not to deprivation of liberty. When a border official stops a passenger during border control in an airport in order to clarify his/her situation and where a detention has not exceeded the time strictly necessary to comply with relevant formalities, no issue arises under Article 5 of the ECHR.<sup>1077</sup>

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<sup>1075</sup>*Nada v Switzerland* (Grand Chamber) App no 10593/08 (ECtHR 12 September 2012), para 226.

<sup>1076</sup>*Ibid.* para 229.

<sup>1077</sup>*Gahramanov v Azerbaijan* (decision) App no 26291/06 (ECtHR 15 October 2013) para 41. For further examples, see also: *Cyprus v Turkey* App no 25781/94 (ECtHR 10 May 2001); *Djavit An v Turkey* App no 20652/92 (ECtHR 20 February 2003), *Hajibeyli v Azerbaijan* App no 16528/05 (ECtHR 10 July 2008); *Streletz*,

In the case *Khlaifia and others v Italy* the Italian authorities had kept the *Centro di Soccorso e Prima Accoglienza* (CSPA) on the island of Lampedusa, where after giving migrants first aid, the authorities proceeded with their identification “under surveillance” and the applicants were “prohibited from leaving the centre and the ships *Vincent* and *Audace*”. Despite the fact that detainees were not in cells, the conditions to which they were subjected were similar to detention and deprivation of freedom. They were subject to prolonged confinement, unable to communicate with the outside world and there was a lack of freedom of movement for the migrants placed in the Lampedusa reception centres. They were not free to leave the CSPA. “*When they have managed to evade the police surveillance and reach the village of Lampedusa, they were stopped by the police and taken back to the reception centre. This suggests that the applicants were being held at the CSPA involuntarily. The duration of the applicant’s confinement in the CSPA and on the ships, lasting for about twelve days in the case of the first applicant and about nine days in that of the second and the third applicants, was not insignificant. Classification of the applicants’ confinement in domestic law cannot alter the nature of the constraining measures imposed on them. Moreover, the applicability of Article 5 of the ECHR cannot be excluded by the fact, relied on by the Government that the authorities’ aim had been to assist the applicants and ensure their safety. Even measures intended for protection or taken in the interest of the person concerned may be regarded as a deprivation of liberty.*”<sup>1078</sup>

Depending on the factual circumstances, under the case-law of the ECtHR, detention during the period of 9 hours,<sup>1079</sup> 12 hours,<sup>1080</sup> or even only 2<sup>1081</sup> or 3 hours<sup>1082</sup> may mean a deprivation of liberty.

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*Kessler and Krenz v Germany* App no 34044/96, 35532/97, 44801/98 (ECtHR 22 March 2001), *Ashingdane v United Kingdom* (ECtHR 28 May 1985).

<sup>1078</sup>*Khlaifia and others v Italy*, (Grand Chamber) App no 16483/12 (ECtHR 15 December 2016), paras 65-71.

<sup>1079</sup>*Tiba v Romania* App no 36188/09 (ECtHR 13 December 2016), para 45.

<sup>1080</sup>*Justin Robertino Micu v Romania* App no 41040/11 (ECtHR 13 January 2015), para 109.

<sup>1081</sup>*Tomaszewscy v Poland* App no 8933/05 (ECtHR 15 March 2014), para 129.

<sup>1082</sup>*Baisuev and Anzorov v Georgia* App no 39804/04 (ECtHR 18 December 2012), para 53.

### Standard 3. Persons who can be subject to detention

According to the so called “Return Handbook”<sup>1083</sup> persons “apprehended or intercepted” by the competent authorities in “direct” connection with the irregular crossing of external borders are persons arriving irregularly by boat, apprehended upon or shortly after their arrival; persons arrested by the police after having climbed a border fence; and irregular entrants, who are leaving the train/bus which brought them directly into the territory of a Member State without previous stopover on the Member State’s territory. The *Return Handbook* also defines situations where there is no more direct connection to the act of irregular border crossing.<sup>1084</sup>

However, under the case-law of the ECtHR, in exceptional circumstances, when a State, through its agents operating outside its territory, exercises control and authority over an individual, and thus jurisdiction, the State is under an obligation under Article 1 to secure to that individual the rights and freedoms that are relevant to the situation of that individual under Section I of the ECHR. In each case, the question of the existence of exceptional circumstances, requiring and justifying a finding by the ECtHR that the State was exercising jurisdiction extraterritorially, must be determined with reference to the particular facts, for example, full and exclusive control over a prison or a ship.<sup>1085</sup>

In its case law, the CJEU also dealt with a situation in which a third country national was detained on the basis of the Return Directive, on the ground that there was a risk of absconding, after which he also applied for asylum. In such a case if “it seems” that an asylum application has been made with the sole intention of delaying or even jeopardising enforcement of the return decision, which must be assessed on a case-by-case basis of all relevant circumstances, such circumstances can justify the detention of such a national even

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<sup>1083</sup>The Return Handbook does not create any legally binding obligations upon Member States. It bases itself, to a large extent, on the work conducted by Member States and the Commission within the European Commission Directive Contact Committee Return Directive (2008/115/EC) in the years 2009-2014 and regroups in a systematic and summarised form the discussions that have taken place within that forum, which do not necessarily reflect a consensus among Member States on the interpretation of legal act.

<sup>1084</sup>*Ibid.* p15.

<sup>1085</sup>*Hirsi Jamaa and Others v Italy* (Grand Chamber) App no 27765/09 (ECtHR 23 February 2012), para 73; *Al-Skeini and Others v United Kingdom* (Grand Chamber) App no 55721/07 (ECtHR 7 July 2011), paras 132, 136; *Medvedjev and Others v Russia* App no 34184/03 (ECtHR 24 April 2012), para 67.

after an application for asylum has been made.<sup>1086</sup>

### **Standard 8. Objective criteria for assessing the risk of absconding**

*The Return Handbook* (draft) on page 11 (point 1.6.) provides that frequently used criteria for risk of absconding based on the Return Directive, that are defined in national law, are for instance: lack of documentation; absence of cooperation to determine identity; use of false documentation or destroying existing documents; failing repeatedly to report to relevant authorities; explicit expression of intent of non-compliance; existence of conviction for criminal offence; violation of a return decision; non-compliance with an existing entry ban; prior conduct (i.e. escaping); and being the subject of a return decision made in another Member State. However, it needs to be pointed out that based on the judgment in the case of *Mahdi*, the State may consider, for example, a lack of identity documents as an objective criterion for the risk of absconding. However, the mere fact that the person concerned has no identity documents cannot, on its own, be a ground for detention or extending detention, since any assessment relating to the risk of the person concerned must be based on an individual examination of that person's case.<sup>1087</sup>

Where national legislation had not introduced objective criteria for assessing the risk of absconding, the German Federal High Court<sup>1088</sup> and the Austrian High Administrative Court<sup>1089</sup> ruled that the detention of the applicants lacked sufficient legal basis and could not be applied.

### **Standard 12. Control of the quality of law on detention**

In the cases of *Abdolkhani and Karimnia* and *Keshmiri v Turkey* (no.2), the Government sought to rely on certain legal provisions to justify the applicants' detention, but the ECtHR held that these provisions were not concerned with a deprivation of liberty in the context of

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<sup>1086</sup>C-534/11, *Arslan* EU:C:2013:343 paras 57-62; see also: C-601/15 *PPU J.N.* (Grand Chamber) EU:C:2016:84, paras 75, 79-80; *Nabil and Others v Hungary* App no 62116/12 (ECtHR 22 September 2015), para 38.

<sup>1087</sup>C-146/14 *PPU Mahdi* EU:C:2014:1320 [2014] 70-74.

<sup>1088</sup>Bundesgerichtshof Beschluss v. 26. 6. 2014, AZ.: ZB 31/14.

<sup>1089</sup>Verwaltungsgerichtshof (VwGH), 19. 2. 2015, ZI. Ro 2014/21/0075-5.

deportation proceedings, but rather with the regulation of the residence of certain groups of foreigners in Turkey. Consequently, it found that the applicants' detention had no legal basis.<sup>1090</sup> Likewise, in the case of *Khlaifia v Italy*, the ECtHR held that there had been no legal basis for the applicants' detention in a reception centre in Lampedusa, as domestic law only permitted foreigners to be detained if they needed special assistance or where additional identity checks or documentation were required. Furthermore, even if these criteria were met, they should have been detained in a different centre pursuant to an administrative decision. The ECtHR also considered whether power to detain existed under a bilateral agreement between Italy and Tunisia. However, it noted that even if such a power had existed, the contents of this agreement were not public. It was, therefore, not accessible to the interested parties and they could not have foreseen the consequences of its application.<sup>1091</sup>

In the case of *Ilias and Ahmed v Hungary* detention in a transit zone was based on "elastically interpreted general provision of the law. Thus, according to Article 71/A(1) and (2) of the Asylum Act asylum seekers who were subjected to the border procedure were not entitled to stay in the territory of Hungary or to seek accommodation at a designated facility and the ECtHR was not persuaded that these rules circumscribe with sufficient precision and foreseeability. Furthermore, no special grounds for detention in the transit zone were provided for in Article 71/A of the Asylum Act. These were important elements in argumentation that detention was not lawful for the purposes of Article 5(1) of the ECHR.<sup>1092</sup>

### **Standard 15. Best interests of a child**

In the case of *MA, BT, DA*, the CJEU refers to the best interests of a child as a fundamental right and not as a general principle of law. The CJEU provides that /.../ "*those fundamental*

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<sup>1090</sup>*Abdolkhani and Karimnia v Turkey* App no 30471/08 (ECtHR 22 September 2009) paras 125-135; *Keshmiri v Turkey (No2)* App no 22426/10 (ECtHR 17 January 2012) para 33.

<sup>1091</sup>*Khlaifia v Italy* App no 16483/12 (ECtHR 1 September 2015), paras 69, 71. The Grand Chamber had confirmed that decision of the ECtHR from September 2015 (*Khlaifia and Others v Italy* (Grand Chamber), App no 16483/12 (15 December 2016), paras 102-108).

<sup>1092</sup>*Ilias and Ahmed v Hungary* App no 47287/15 (ECtHR 14 March 2017) paras 65-69.

*rights include, in particular, that set out in Article 24(2) of the Charter /.../ Thus, the second paragraph of Article 6 of the Dublin III Regulation cannot be interpreted in such a way that it disregards that fundamental right”.*<sup>1093</sup> The difference between the right and the general principle of law in the light of the Charter is significant, because “*principles*” may be implemented by legislative and executive acts taken by institutions of the Union, and by acts of Member States when they are implementing Union law, in the exercise of their respective powers and “*they shall be judicially cognisable only in the interpretation of such acts in the ruling on their legality.*”<sup>1094</sup> Such limitation, therefore, does not exist in case of judicial interpretation of “*rights.*”

The general position of the ECtHR regarding the best interests of a child is 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.*”<sup>1095</sup> The following examples demonstrate how this principle can affect the outcomes of the court proceedings: *Rahimi v Greece, Popov v France,*<sup>1096</sup> *Tarakhel v Switzerland.*<sup>1097</sup>

## **Standard 16. Consideration of the effectiveness and less coercive alternative measures to detention**

The EU Fundamental Rights Agency (hereinafter: FRA) proposes the following alternatives to

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<sup>1093</sup>C-648/11 *MA, BT and DA v Secretary of State of the Home Department* EU:C:2013:367 paras 57-58. In the earlier case C-427/12 *Commission v Parliament* EU:C:2014:170, where the judgment was delivered before the Charter came into force, the Grand Chamber of the CJEU stated that the right to respect for private or family life from Article 7 of the Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification [2003] OJ L251/12 must be read in conjunction with the obligation to have regard to the child's best interests which is recognised in Article 24(2) of the Charter. The CJEU adds that various instruments that stress the importance to a child of family life recommend that the State has regard to the child's interests, but “*they do not create for the members of a family an individual right*” to be allowed to enter the territory of a State and cannot be interpreted as denying States a certain margin of appreciation when they examine applications for family reunification (C-540/03 *Parliament v Council* (Grand Chamber) EU:C:2006:429 paras 58-59). Member States must have due regard to the best interests of minor children when weighing those interest (*Ibid.* paras 63, 73).

<sup>1094</sup>Article 52(5) of the Charter.

<sup>1095</sup> *Neulinger and Shuruk v Switzerland* (Grand Chamber) App no 41615/07 (ECtHR 6 July 2010) para 135.

<sup>1096</sup>See the Explanatory note concerning standards nos. 37.5. and 37.6 of this Check-list.

<sup>1097</sup>*Tarakhel v Switzerland* (Grand Chamber) App no 29217/12 (ECtHR 4 November 2014) paras 116-122. See also the Explanatory note to this Check-list on standard no 17 on principle of proportionality and the necessity test.

detention: the obligation to surrender passports or travel documents; residence restrictions combined with regular reporting requirements in designated places; open or semi-open facilities run by the government or NGOs, as well as hotels, hostels or private addresses; release on bail and provision of sureties by third parties; regular reporting to the authorities; placement in open facilities with caseworker support; and electronic monitoring.<sup>1098</sup> The UNHCR in its publication entitled “*Alternatives to Detention*”<sup>1099</sup> lists very similar, less coercive alternative measures to detention: deposit or surrender of travel or identity documentation; reporting at periodic intervals by using new technologies; use of a designated or directed residence; bail or bond systems – a financial deposit that may be forfeited in the event of the individual absconding; community supervision and case management; child and family appropriate alternatives to detention (foster care, supervised independent living, group care, collective residential (institutional) care; youth villages etc.).<sup>1100</sup> The UNHCR lists five elements that have been widely found to contribute to the success of alternatives to detention, and the research of the Odysseus network in Europe confirmed that alternatives were less successful when they did not incorporate one or more of those five elements.<sup>1101</sup> These are: 1) treating asylum-seekers (and migrants) with dignity, humanity and respect throughout the relevant asylum or migration procedure; 2) providing clear and concise information about rights and duties under the alternative to detention and the consequences of non-compliance; 3) providing asylum-seekers with legal advice, including on their asylum applications and options available to them should their asylum claim be rejected. Such advice is most effective when made available at the outset of and continuing throughout relevant procedures; 4) providing access to adequate material support, accommodation and other reception conditions; and 5) offering individualized “coaching” or case management services.<sup>1102</sup> The UNHCR stresses the importance of the context-specific development and implementation of the alternatives to detention. Despite the fact that no single alternative to detention will be fully replicable in every context, there

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<sup>1098</sup>European Union Agency for Fundamental Rights (FRA) *Alternatives to detention for asylum seekers and people in return procedures* (FRA 2015).

<sup>1099</sup>UNHCR Executive Committee of the High Commissioner's Programme, ‘Alternatives to Detention’ (2015) UN Doc EC/66/SC/CRP.

<sup>1100</sup>*ibid.* points 8-19.

<sup>1101</sup>*ibid.* point 20.

<sup>1102</sup>*ibid.* point 20.

are elements that remain constant through the many existing examples.<sup>1103</sup>

In regards to the availability of effective less coercive measures to detention, it is relevant to note that Regulation (EU) No 516/2014 establishing the Asylum, Migration and Integration Fund<sup>1104</sup> provides, in the second sub-paragraph of Article 5(1)(g) and in the second sub-paragraph of Article 11(a), that this fund shall support actions focusing on the establishment, development and improvement of alternatives to detention in relation to the categories of persons mentioned in the first sub-paragraph of the aforementioned provisions. Report of the UNHR Special Rapporteur on the human rights of migrants (Francois Crèpeau, 2 April 2012, A/HRC/20/24) pointed to research which found that over 90% compliance or cooperation rates can be achieved when persons are released to proper supervision and assistance. The alternatives have also proved to be considerably less expensive than detention, not only in direct costs but also when it comes to longer-term costs associated with detention, such as the impact on health services, integration problems and other social challenges.<sup>1105</sup>

As regards empirical research, the UNHCR has found, too (in 2014), that asylum seekers are inclined to comply with immigration procedures; and that the perception of fairness in the asylum procedure was far more important for ensuring compliance than the use of detention.<sup>1106</sup> Empirical findings of the International Detention Coalition reveal that a community-based alternatives to detention programme had demonstrated a cost saving of USD \$49 in the USA, AUD \$86 in Australia and CAD \$167 in Canada per person/per day.<sup>1107</sup>

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<sup>1103</sup>*ibid.* point 21.

<sup>1104</sup>Regulation (EU) No 516/2014 of the European Parliament and of the Council of 16 April 2014 establishing the Asylum, Migration and Integration Fund, amending Council Decision 2008/381/EC and repealing Decisions No 573/2007/EC and No 575/2007/EC of the European Parliament and of the Council and Council Decision 2007/435/EC [2014] OJ L 150/168.

<sup>1105</sup>Cited in: European Union Agency for Fundamental Rights (FRA) Alternatives to detention for asylum seekers and people in return procedures (FRA 2015).

<sup>1106</sup>UNHCR Legal and Protection Policy Research Series, Costello, Cathryn & Kaytaz, Ezra 'Building empirical research into alternatives to detention: perceptions of asylum seekers and refugees in Toronto and Geneva' (2013) UN Doc PPLA/2013/02.

<sup>1107</sup>International Detention Coalition, There are alternatives: a handbook for preventing unnecessary immigration detention, 13 May 2011 (cited in: UNHCR Executive Committee of the High Commissioner's Programme, 'Alternatives to Detention' (2015) UN Doc EC/66/SC/CRP point 6).



### **Standards 17. Principle of proportionality and the necessity test**

In the cases of *Chahal* and *Saadi*, the ECtHR examined whether the person has been detained under Article 5(1)(f) of the ECHR with a view to deportation. *It held that “Article 5(1)(f) does not demand that the detention of a person against whom action is being taken with a view to deportation be reasonably considered necessary, for example to prevent his committing an offence or fleeing; in this respect Article 5(1)(f) provides a different level of protection from Article 5(1)(c) of the ECHR”.*<sup>1108</sup> *“Any deprivation of liberty under Article 5(1)(f) will be justified only for as long as deportation proceedings are in progress. If such proceedings are not prosecuted with due diligence, the detention will cease to be permissible.”*<sup>1109</sup> However, in some recent cases the ECtHR has also introduced the necessity test, the purpose of which is to check that deprivation of liberty is not only in line with national law, but also necessary in the circumstances of the case, so that less coercive measures to attain legitimate aims are taken into consideration, too.<sup>1110</sup> This is so particularly in cases of the detention of minors.<sup>1111</sup>

In any event, it is a requirement of Article 5(1) of the ECHR that detention be *“in accordance with a procedure prescribed by domestic law”*;<sup>1112</sup> therefore, in considering the question of *“lawfulness”*, the ECtHR may also have regard to the *“necessity”* of the measure where *“necessity”* is a requirement of domestic law based on EU secondary law and the case-law of the CJEU or national constitutional law. For example, in *Rusu v Austria* (para. 58), while the ECtHR reiterated that *“necessity”* did not form part of the test under Article 5(1)(f), it noted that in Austria it was part of the domestic law test. In that case, having regard to all the circumstances, the ECtHR found that the applicant’s detention was such a serious measure that – in a context in which the necessity of the detention to achieve the stated aim was required by domestic law – it would be arbitrary unless it was justified as a last resort where

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<sup>1108</sup>*Chahal v United Kingdom* App no 22414/93 (ECtHR 15 November 1996), para 112.

<sup>1109</sup>*Ibid.* para 113. See also: *Saadi v United Kingdom* (Grand Chamber) App no 13229/03 (ECtHR 29 Jan 2008) para 72; *A and Others v United Kingdom* (Grand Chamber) App no 3455/05 (ECtHR 19 February 2009) para 164; *Khlaifia and others v Italy* (Grand Chamber) App no 16483/12 (15 December 2016), para 90.

<sup>1110</sup>For example: *Richmond Yaw and Others v Italy* App nos. 3342/11, 3391/11, 3408/11 and 3447/11 (ECtHR 6 October 2016), para 71.

<sup>1111</sup>See: *Abdullahi Elmi and Aweys Abubakar v Malta* App no 25794/13 and 28151/13 (ECtHR 22 November 2016), paras 111, 144, 146.

<sup>1112</sup>This includes international law: *Medvedyev and Others v France* (Grand Chamber) App no 3394/03 (ECtHR 29 March 2010) para 79; *Toniolo v San Marino and Italy* App no 44853/10 (ECtHR 26 June 2012), para 46.

other less severe measures had been considered and found to be insufficient to safeguard the individual or public interest which might require that the person concerned be detained. The ECtHR, therefore, found a violation of Article 5(1)(f) of the ECHR in that case. *Mutatis mutandis* this is relevant for detention under the Return Directive, since EU secondary law requires the necessity test.

In regards to alternatives to detention, in a number of cases the ECtHR has considered relevant the fact that alternatives to detention were available to the authorities,<sup>1113</sup> especially if this is a requirement of domestic law.<sup>1114</sup> This is especially (but not exclusively) the case when the detainee is exceptionally vulnerable, for example, on account of his or her youth or ill health or sexual orientation.<sup>1115</sup> In *Rahimi v Greece* the ECtHR observed that the authorities had not examined whether it had been necessary, as a measure of last resort, to place the applicant – an unaccompanied fifteen year old – in a detention centre, or whether less drastic action might not have sufficed to secure his deportation. These factors gave the ECtHR cause to question the authorities’ good faith in executing the detention measure. A similar approach was adopted in respect of an HIV-positive applicant in *Yoh-Ekale Mwanje v Belgium*. The ECtHR in the case of *Popov v France* (para. 119) stated that with respect to minors, even if accompanied by their parents, and even though the detention centre had a special wing for the accommodation of families, the authorities “*did not verify that the placement in administrative detention was a measure of last resort for which no alternative was available.*”<sup>1116</sup>

### **Standard 18. Length of detention and conditions for extension of detention, including due diligence requirement**

The general standard regarding the length of detention, based on the case law of the ECtHR and on Article 5(1)(f) of the ECHR, provides that it should not continue for an unreasonable length of time. Deprivation of liberty will be justified only for as long as the relevant

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<sup>1113</sup>See *Raza v Bulgaria* App no 31465/08 (ECtHR 11 February 2010), para 74; *Louled Massoud v Malta* App no 24340/08 (ECtHR 27 July 2010) para 68.

<sup>1114</sup>See, for example: *Nabil and Others v Hungary* App no 62116/12 (ECtHR 22 September 2015) para 40.

<sup>1115</sup>See: *O.M. v Hungary* App no 9912/15 (ECtHR 5 July 2016) para 52.

<sup>1116</sup>For more on this, see concurring opinion of Judge Pinto de Albuquerque in the case of *Abdullahi Elmi and Aweys Abubakar v Malta* App nos 25794/13 and 28151/13 (ECtHR 22 November 2016) paras 27-28.

proceedings are in progress. If such proceedings are not prosecuted with due diligence, the detention will cease to be permissible.<sup>1117</sup> This means that the ECtHR will probably examine the activity or inactivity of the authorities during the period of an applicant's detention in order to determine whether or not they acted with adequate diligence. The refusal of an applicant to cooperate may be relevant for the assessment of the reasonableness of the length of detention.<sup>1118</sup> The reasoning in the case of *Abdi v the United Kingdom* provides that not all refusals to transfer voluntarily will be treated equally. A conclusion that the refusal to return voluntarily is relevant to the assessment of the reasonableness of the length of detention cannot be drawn in every case. It is necessary to distinguish between cases in which the return to the country of origin was possible, and cases where it was not. Where the return was not possible for reasons extraneous to the person detained, the fact that this person was not willing to return voluntarily could not be held against this individual since his/her refusal had no causal effect. If return was possible, but the detained person was not willing to go, it would be necessary to consider whether or not this individual had issued proceedings challenging the deportation. If this person had done so, it would be entirely reasonable that he/she should remain in the [State] (...) pending the determination of those proceedings, unless they were an abuse of process, and his/her refusal to return voluntarily could not be seen as a trump card which enabled the Secretary of State to continue to detain until deportation could be effected, otherwise the refusal would justify as reasonable any period of detention, however, long."<sup>1119</sup> Although in some cases the ECtHR seemed to suggest that fixed domestic time-limits for detention were necessary to comply with the "quality of law" – the requirement under Article 5(1) of the ECHR<sup>1120</sup> – in the recent case *J.N. v the United Kingdom* the Court expressly rejected the applicant's assertion that Article 5(1) requires contracting States to establish a maximum period of immigration

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<sup>1117</sup>*Saadi v United Kingdom* (Grand Chamber) App no 13229/03 (ECtHR 29 Jan 2008), para 72; 33; *A and Others v United Kingdom* (Grand Chamber) App no 3455/05 (ECtHR 19 February 2009), para 164.

<sup>1118</sup>See, for example, the opinion of the ECtHR in the case of *Abdi v United Kingdom* App no 27770/08 (ECtHR 9 April 2013).

<sup>1119</sup>*Ibid.* para 73.

<sup>1120</sup>*Azimov v Russia*, App no 67474/11 (ECtHR 18 March 2013), para 171; *Ismoilov and others v Russia* App no 2947/06 (ECtHR 24 April 2008), paras 139-140; *Ryabikin v Russia* App no 8320/04 (ECtHR 19 June 2008), para 129; *Muminov v Russia* App no 42502/06 (ECtHR 11 December 2008), para 121; *Nasrulloev v Russia* App no 656/06 (ECtHR 11 October 2007), paras 73-74; *Abdolkhani And Karimnia v Turkey* App no 30471/08 (ECtHR 22 June 2009), para 135; *Garayev v Azerbaijan* App no 53688/08 (ECtHR 10 June 2010), para 99; *Mathloom v Greece* App no 48883/07 (ECtHR 24 March 2012), para 71.

detention. Rather it stated that it would examine the system of immigration detention in the respondent State as a whole, having regard to the particular facts of each individual case. In that case, it concluded that the system of the United Kingdom, according to which detainees could challenge their ongoing detention by way of judicial review, having regard to domestic law principles closely reflecting the requirements of Article 5(1)(f) of the ECHR, in principle complied with the requirements of that Article. Consequently, the absence of domestic time-limits will not, by itself, constitute a breach of Article 5(1) of the ECHR. However, the ECtHR has in some cases suggested that such time-limits might constitute an important procedural safeguard,<sup>1121</sup> in which the ECtHR noted that in the absence of time limits, the applicant was subject to an undetermined period of detention, and, consequently, the existence of other procedural safeguards (such as an effective remedy by which to contest the lawfulness and length of detention) would become decisive. It is also important to note that, where fixed time-limits exist under domestic law, compliance with those time limits cannot automatically be regarded as bringing the applicant's detention in line with Article 5(1)(f) of the ECHR if the expulsion proceedings were not otherwise prosecuted with due diligence. However, a failure to comply with them may be relevant to the question of "lawfulness", as detention exceeding the period permitted by domestic law is unlikely to be considered "in accordance with the law".<sup>1122</sup> It would, therefore, appear that while time-limits are one of a number of possible safeguards against arbitrariness, alone they are neither necessary nor sufficient to ensure compliance with Article 5 (1)(f) of the ECHR.

In the case of *Djalti v Bulgaria*,<sup>1123</sup> an Algerian citizen did not have a travel document necessary for his expulsion. He had been detained for a period lasting longer than 1 year and 3 months. The ECtHR found that despite the fact that the detainee was not inclined to cooperate, had refused to take a passport picture and did not want to meet with the representatives of the Algerian embassy, the mere fact of writing to the Algerian consulate requesting the issuance of the travel document was not sufficient to demonstrate that the authorities had acted with due diligence.<sup>1124</sup> The ECtHR indicated that by failing to provide

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<sup>1121</sup>See, for example, *Louled Massoud v Malta* App no 24340/08 (ECtHR 27 October 2010), para 71.

<sup>1122</sup>*Shamsa v Poland* App no 45355/99 (ECtHR 27 November 2003), paras 57-60.

<sup>1123</sup>*Djalti v Bulgaria* App no 31206/05 (ECtHR 12 March 2013).

<sup>1124</sup>*Ibid.* para 53.

the Algerian consulate with the additional information it had requested, and by not undertaking other necessary actions to set aside the obstacles to successful removal, the Bulgarian authorities did not show sufficient diligence required by Article 5(1)(f) ECHR.<sup>1125</sup> In the case of *Amie and Others v Bulgaria*, the ECtHR held that 4 written requests for a travel document made to the Lebanese Embassy in Sofia during a period of 1 year and 8 months did not satisfy the requirement of due diligence, even if the Bulgarian authorities could not have compelled the issuing of such a document. Accordingly, the ECtHR found that by failing to pursue the matter vigorously and by not endeavouring to enter into negotiations with the Lebanese authorities with a view to expediting the delivery of the travel document, the Bulgarian authorities had violated Article 5(1)(f) ECHR.<sup>1126</sup> Similarly, in the case of *Singh v the Czech Republic*, a 5- to 7-month inactivity on the part of the returning country's competent authorities was found by the ECtHR to have breached the due diligence obligation under Article 5(1)(f) ECHR, despite the lack of cooperation of the embassy of the country of possible destination.<sup>1127</sup>

**Standard 21. Right to be informed “adequately” about the reasons for detention and about procedures laid down in national law for challenging the detention order**

In the case *Rusu v Austria*, the information given to the applicant on the day of her arrest was inaccurate as to the facts and incorrect as to the legal basis of her arrest and detention, and the ECtHR found a violation of Article 5(2) of the ECHR<sup>1128</sup>. In the case of *T and A v Turkey* (para. 66), the applicant was told she was held on suspicion of having committed a criminal act, rather than for the purposes of immigration control. The ECtHR thus found that the reasons for the applicant's detention were never communicated to her and decided there had been a violation of Article 5(2) of the ECHR.

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<sup>1125</sup>*Ibid.* para 54.

<sup>1126</sup>*Amie and Others v Bulgaria* App no 58149/08 (ECtHR 12 February 2013) para 77; see also: *M. and Others v Bulgaria* App no 41416/08 (ECtHR 26 July 2011), para 71.

<sup>1127</sup>*Singh v République Tchèque* App no 60538/00 (ECtHR 25 January 2005), para 62. See more examples of application of due diligence requirements in cases: *Abdi Mahamud v Malta*, App no 56796/13 (ECtHR 3 May 2016), para 138; *H.A. v Greece* App no 58424/11 (ECtHR 21 January 2016), paras 52-53.

<sup>1128</sup>*Rusu v Austria* App no 34082/02 (ECtHR 2 October 2008), para 42.

## **Standard 24. Right to (free) legal assistance and/or representation**

In the case of DEB, which does not relate to detention, the CJEU decided that in the context of principle of proportionality and the right to free legal aid the following elements need to be taken into consideration: the subject-matter of litigation; whether the applicant has a reasonable prospect of success; the importance of what is at stake for the applicant in the proceedings; the complexity of the applicable law; the applicant's capacity to represent himself effectively; the amount of the costs of the proceedings and whether those costs might represent an insurmountable obstacle to access to the courts.<sup>1129</sup> Whilst Article 6 of the ECHR is not directly applicable in detention cases under the Return Directive, the following standards related to civil disputes may additionally serve as guidance for considering effective access to judicial review in detention cases. The question whether a particular case implies a requirement to provide legal aid depends, among other factors, on the following: the importance of what is at stake for the applicant;<sup>1130</sup> the complexity of the relevant law or procedure;<sup>1131</sup> the applicant's capacity to represent him or herself effectively;<sup>1132</sup> and the existence of a statutory requirement to have legal representation.<sup>1133</sup> However, the right in question is not absolute, and it may, therefore, be permissible to impose conditions on granting legal aid based, in particular, on considerations such as the financial situation of the litigant<sup>1134</sup> and his or her prospects of success in the proceedings.<sup>1135</sup> It is essential for the court to give reasons for the refusal to grant legal aid and to handle requests for legal aid with diligence.<sup>1136</sup>

However, assigning a lawyer to represent a party does not in itself guarantee effective

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<sup>1129</sup>C-279/09, *DEB v Federal Republic of Germany* EU:C:2010:489 para 61.

<sup>1130</sup>*Steel and Morris v United Kingdom* App no 68416/01 (ECtHR 15 February 2005), para 61.

<sup>1131</sup>*Airey v Ireland* App no 6289/73 (9 October 1979), para 24.

<sup>1132</sup>*McVicar v United Kingdom* App no 46311/99 (ECtHR 7 May 2002), paras 48-62; *Steel & Morris v United Kingdom* App no 68416/01 (ECtHR 15 February 2005), para 61; *P., C. and S. v United Kingdom*, App no 56547/00 (ECtHR 16 July 2002), para 100.

<sup>1133</sup>*Airey v Ireland* App no 6289/73 (9 October 1979); *Gnahoré v France* App no 40031/98 (ECtHR 19 September 2000), para 41.

<sup>1134</sup>*Steel and Morris v United Kingdom* App no 68416/01 (ECtHR 15 February 2005), para 62.

<sup>1135</sup>*Ibid.* para 62.

<sup>1136</sup>*Tabor v Poland* App no 12825/02 (ECtHR 27 June 2006) paras 45-46; *Saoud v France* App no 9375/02 (ECtHR 9 October 2007) paras 133-136.

assistance.<sup>1137</sup> The lawyer appointed for legal aid purposes may be prevented, for a protracted period, from acting or may be asked to shirk his/her duties. If notified of the situation, the competent national authorities must replace the lawyer. Should they fail to do so, the litigant would be deprived of effective assistance in practice despite the provision of free legal aid.<sup>1138</sup> It is above all the responsibility of the State to ensure the requisite balance between the effective enjoyment of access to justice on the one hand, and the independence of the legal profession on the other. The ECtHR has stressed that any refusal by a legal aid lawyer to act must meet certain quality requirements. Those requirements will not be met where the shortcomings in the legal aid system deprive individuals of the “*practical and effective*” access to court to which they are entitled.<sup>1139</sup>

### **Standard 25. Other aspects of the practical and effective right to judicial review**

In the case *L.M. And Others v Russia*, an asylum seeker was detained for the period of the proceedings before the ECtHR. In this case, the ECtHR reiterated that it is of the utmost importance for the effective operation of the system of individual petition instituted by Article 34 of the ECHR that applicants or potential applicants should be able to communicate freely with the ECtHR, without being subjected to any form of pressure from the authorities to withdraw or modify their complaints. *“In this context, pressure includes not only direct coercion and flagrant acts of intimidation but also other improper indirect acts or instances of contact designed to dissuade or discourage applicants from pursuing a Convention remedy. The fact that an individual has actually managed to pursue his application does not prevent an issue arising under Article 34. The intentions or reasons underlying the acts or omissions in question are of little relevance when assessing whether Article 34 of the ECHR has been complied with; what matters is whether the situation created as a result of the authorities' act or omission conforms to Article 34. The ECtHR has already found in a number of cases that measures limiting an applicant's contact with his representative may constitute*

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<sup>1137</sup>*Siałkowska v Poland* App no 8932/05 (ECtHR 22 March 2007), paras 110, 116.

<sup>1138</sup>*Bertuzzi v France* App no 36378/97 (ECtHR 13 February 2003), para 30.

<sup>1139</sup>*Staroszczyk v Poland* App no 59519/00 (ECtHR 22 March 2007) para 135; *Siałkowska v Poland* App no 8932/05 (ECtHR 22 March 2007), para 114. See also: European Court of Human Rights Guide on Article 6, Right to fair trial (civil limb) (Council of Europe/European Court of Human Rights, 2013), 17-18.

*interference with the exercise of his right of individual petition (see, for example, Shtukaturov v Russia*<sup>1140</sup>, *where a ban on lawyer's visits, coupled with a ban on telephone calls and correspondence, was held to be incompatible with the respondent State's obligations under Article 34 of the Convention).*" It might be necessary that a representative complies with certain formal requirements before obtaining access to a detainee, for instance, for security reasons, or in order to prevent collusion, or the obstruction either of the course of the investigation or justice. Excessive formalities in such matters, such as those that could *de facto* prevent a prospective applicant from effectively enjoying his right of individual petition, have been found unacceptable.<sup>1141</sup>

### **Standard 26. Automatic judicial review or detainee's right to initiate judicial review of the lawfulness of detention (including conditions of detention)**

In *J.N. v the United Kingdom*, the ECtHR held that no requirement of "automatic judicial review" could be read into Articles 5(1)(f) or Article 5(4) of the ECHR.<sup>1142</sup> However, in the context of Article 5(1)(f) of the ECHR, the ECtHR found that subjecting an applicant's detention to automatic periodic judicial review provided an important safeguard against arbitrariness, but could not be regarded as decisive. The systems examined in *Auad* and of *Dolinskiy* were of automatic *periodic* review; in order to comply with the ECHR, it is likely that a system of automatic review would have to either be implemented at frequent intervals, or permit the detainee to also institute proceedings. Otherwise there would be a risk that detention could become unlawful without the detainee having any means by which to challenge it.<sup>1143</sup> For example, in the context of Article 5(1)(e) the ECtHR held that a person of unsound mind, who is compulsorily confined in a psychiatric institution for a lengthy period of time, is entitled to take proceedings "at reasonable intervals" in order to put the lawfulness of his/her detention in issue.<sup>1144</sup> A system of periodic review, in which the

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<sup>1140</sup>*Shtukaturov v Russia*, App no 44009/05 (ECtHR 27 March 2008), para 140.

<sup>1141</sup>See more on this: *L.M. And Others v Russia* App nos 40081/14, 40088/14 and 40127/14 (ECtHR 10 October 2015), paras 156-157.

<sup>1142</sup>*J.N. v United Kingdom* App no 37289/12 (ECtHR 19 May 2016), paras 87-88.

<sup>1143</sup>*Auad v Bulgaria* App no 46390/10 (ECtHR 11 October 2011), para 132; *Dolinskiy v Estonia* App no 14160/08, (ECtHR 2 February 2010).

<sup>1144</sup>*M.H. v United Kingdom* App no 11577/06 (ECtHR 22 October 2013), para 77.



initiative lies solely with the authorities, is not sufficient on its own.<sup>1145</sup> The criteria for “lawful detention” under Article 5(1)(e) of the ECHR entail that the review of lawfulness guaranteed by Article 5(4) in relation to the continuing detention of a mental health patient should be made by reference to the patient’s contemporaneous state of health, including his or her dangerousness, as evidenced by up-to-date medical assessments.<sup>1146</sup>

### **Standard 27. Right to judicial review before an “independent and impartial tribunal/court established by law”**

In the case of *H.I.D.*, the CJEU stated that “according to the settled case-law of the CJEU, in order to determine whether a body making a reference is a court or tribunal for the purposes of Article 267 TFEU, which is a question governed by EU law alone, the CJEU takes account of a number of factors, such as whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is *inter partes*, whether it applies rules of law and whether it is independent”.<sup>1147</sup> In this particular case, the CJEU established that the Irish Refugee Appeals Tribunal met the criteria of establishment by law, permanence, application of rules of law; that positive decisions of the Refugee Appeals Tribunal had binding force;<sup>1148</sup> that the requirement for the procedure to be *inter partes* was not an absolute criterion; and that each party had the opportunity to make the Refugee Appeals Tribunal aware of any information necessary to the success of the application for asylum or to the defence.<sup>1149</sup> The CJEU established that the Refugee Appeals Tribunal had a broad discretion, since it was cognisant of both questions of fact and questions of law and ruled on the evidence submitted to it, in relation to which it enjoyed discretion.<sup>1150</sup> Regarding, the contested issue of the independence of the Refugee Appeal Tribunal, the CJEU reiterated that independence has its external and internal aspect. The external aspect

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<sup>1145</sup>*X. v Finland* App no 34806/04 (ECtHR 3 July 2012), para 170; *Raudevs v Latvia* App no 24086/03 (ECtHR 17 December 2013), para 82.

<sup>1146</sup>*Juncal v United Kingdom* (decision) App no 32357/09 (ECtHR 17 September 2013), para 30; *Ruiz Rivera v Switzerland* App no 8300/06 (ECtHR 18 February 2014) para 60; *H.W. v Germany* App no 17167/11 (ECtHR 19 September 2013), para 107.

<sup>1147</sup>*C-175/11, H.I.D., B.A. v Refugee Applications Commissioner, Refugee Appeals Tribunal, Minister for Justice, Equality and Law Reform, Ireland, Attorney General* (ECtHR 31 January 2013), para 83.

<sup>1148</sup>For example, the CJEU notes that where the Refugee Appeal Tribunal finds in favour of the applicant for asylum, the Minister is bound by the decision of that tribunal and is therefore not empowered to review it (*ibid.* para 98).

<sup>1149</sup>*Ibid.* paras 84, 85, 87, 88, 91.

<sup>1150</sup>*Ibid.* para 93.

*“entails that the body is protected against external intervention or pressure liable to jeopardise the independent judgment.”* The internal aspect *“is linked to impartiality and seeks to ensure a level playing field for the parties to the proceedings and their respective interests in relation to the subject-matter of those proceedings”*.<sup>1151</sup> As for the rules governing the appointment of members of the Refugee Appeals Tribunal, in the opinion of the CJEU, these were not capable of calling into question the independence of that tribunal. The members were appointed for a specific term from among persons with at least five years of experience as a practising barrister or a practising solicitor, and the circumstances of their appointment by the Minister did not differ substantially from the practice in many other Member States.<sup>1152</sup> With regard to the issue of the removal of members of the Refugee Appeals Tribunal, it followed from paragraph 7 of the second schedule to the Refugee Act that the Minister could remove the ordinary members of that Tribunal from office. The Minister’s decision had to state the reasons for such removal.<sup>1153</sup> The CJEU then noted that cases in which the members *“may be removed from office are not defined precisely by the Refugee Act. Nor does the Refugee Act specify whether the decision to remove a member of the Refugee Appeals Tribunal is amenable to judicial review.”*<sup>1154</sup> This was clearly a problematic aspect for the CJEU, because in the next paragraph the CJEU refers to the second sentence of recital 27 of the Directive 2005/85, which defines that the *“effectiveness of the remedy, also with regard to the examination of the relevant facts, depends on the administrative and judicial system of each Member State seen as a whole.”* Based on this recital of the secondary EU law, the CJEU then decided that since an applicant in the Irish system could also question the validity of the recommendations of the Refugee Applications Commissioner and the decisions of the Refugee Appeals Tribunal before the High Court, the judgments of which could be the subject of an appeal to the Supreme Court, the Irish system *“as a whole”* respected the right to an effective remedy.<sup>1155</sup>

However, in the context of the right to speedy judicial review of detention under the third and fourth sub-paragraphs of Article 15(2) of the Return Directive, or under Article 5(4) of

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<sup>1151</sup>*Ibid.* para 97.

<sup>1152</sup>*Ibid.* para 99.

<sup>1153</sup>*Ibid.* para 100.

<sup>1154</sup>*Ibid.* para 101.

<sup>1155</sup>*Ibid.* para 102-105.

the ECHR, where in case of unlawful detention an applicant must be released immediately, it is not possible to consider the requirements of independence and impartiality of courts or tribunals as a whole.<sup>1156</sup> Already at the first instance of judicial procedure, the court or tribunal which provides speedy judicial review must meet the requirements of independence and impartiality and must be established by law. Thus, in relation to Article 5(4) of the ECHR, the ECtHR states that the court which reviews the lawfulness of detention must be independent both from the executive and from the parties to the case.<sup>1157</sup> Basic standards regarding these requirements deriving from the case law of the ECtHR are as follows:

The concept of tribunal/court:

*A court or tribunal is characterised in the substantive sense of the term by its judicial function, that is to say, determining matters within its competence on the basis of rules of law and after proceedings conducted in a prescribed manner.*<sup>1158</sup> The proceedings must provide the “*determination by a tribunal of the matters in dispute*” which is required by Article 6 (1) of the ECHR.<sup>1159</sup> For the purposes of Article 6(1) of the ECHR, a “*tribunal*” need not be a court of law integrated within the standard judicial machinery of the country concerned. It may be set up to deal with a specific subject matter, which can be appropriately administered outside the ordinary court system. To ensure compliance with Article 6 § 1, it is important to put in place both substantive and procedural guarantees.<sup>1160</sup> The fact that it performs many functions (administrative, regulatory, adjudicative, advisory and disciplinary) cannot in itself preclude an institution from being a “*tribunal*”.<sup>1161</sup> The power to give a binding decision, which may not be altered by a non-judicial authority to the detriment of an individual party, is inherent in the very notion of a “*tribunal*”.<sup>1162</sup>

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<sup>1156</sup>See standard no 28 on the right to speedy judicial review of the lawfulness of detention.

<sup>1157</sup>*Stephens v Malta, (no 1)* App no 11956/07 (ECtHR 21 March 2009), para 95.

<sup>1158</sup>*Sramek v Austria* App no 8790/79 (ECtHR 22 October 1984) para 36; *Cyprus v Turkey* App no 25781/94 (ECtHR 12 May 2014), para 233.

<sup>1159</sup>*Bentham v the Netherlands* App no 8848/80 (ECtHR 23 October 1985) para 40.

<sup>1160</sup>*Rolf Gustafson v Sweden* App no 23196/94 (ECtHR 1 July 1997) para 45.

<sup>1161</sup>*H. v Belgium* Application no 8950/80 (ECtHR 30 November 1987) para 50.

<sup>1162</sup>*Van de Hurk v the Netherlands* App no 16034/90 (ECtHR 19 April 1994), para 45; *Brumarescu v Romania* App no 28342/95 (ECtHR 23 January 2001) para 61; European Court of Human Rights Guide on Article 6, *Right to a fair trial (civil limb)*, (Council of Europe/European Court of Human Rights, May 2013).

The tribunal/court established by law:

A “*tribunal*” must always be “*established by law*”, as it would otherwise lack the legitimacy required in a democratic society to hear individual cases.<sup>1163</sup> The phrase “*established by law*” covers not only the legal basis for the very existence of a “*tribunal*”, but also compliance by the tribunal with particular rules governing it.<sup>1164</sup> The lawfulness of a court or tribunal must by definition also encompass its composition.<sup>1165</sup> The practice of tacitly renewing terms of office of judges for an indefinite period after their statutory term of office had expired, and pending their reappointment, was held to be contrary to the requirement of having a “*tribunal established by law*”.<sup>1166</sup> The procedures governing the appointment of judges could not be relegated to the status of internal practice.<sup>1167</sup> The term “*law*”, within the meaning of Article 6(1) of the ECHR, thus comprises not only legislation providing for the establishment and competence of judicial organs, but also any other provision of domestic law which, if breached, would render irregular the participation of one or more judges in the examination of a case.<sup>1168</sup> This includes, in particular, provisions concerning the independence of the members of a “*tribunal*”, the length of their term of office, impartiality, and the existence of procedural safeguards.<sup>1169</sup> The object of the term “*established by law*” in Article 6(1) of the ECHR is to ensure that the organisation of the judicial system does not depend on the discretion of the executive, but is regulated by law emanating from the Parliament.<sup>1170</sup>

An independent tribunal/court:

The term “*independent*” refers to independence *vis-à-vis* other branches of power (the executive and the legislative),<sup>1171</sup> and also *vis-à-vis* the parties.<sup>1172</sup> The independence of judges will be undermined where the executive intervenes in a case pending before the

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<sup>1163</sup>*Lavents v Latvia* App no 58442/00 (ECtHR 28 November 2002), para 81.

<sup>1164</sup>*Sokurenko and Strygun v Ukraine* App nos 29458/04; 29465/04 (ECtHR 20 July 2006) para 24.

<sup>1165</sup>*Buscarini v San Marino* App no 24645/94 (ECtHR 18 February 1999).

<sup>1166</sup>*Oleksandr Volkov v Ukraine* App no 21722/11 (ECtHR 9 January 2013) para 151.

<sup>1167</sup>*Ibid.* paras 154-156.

<sup>1168</sup>*DMD Group, A.S. v Slovakia* App no 19334/03 (ECtHR 5 October 2010) para 59.

<sup>1169</sup>*Gurov v Moldova* App no 36455/02 (ECtHR 11 July 2006), para 36.

<sup>1170</sup>*Savino and Others v Italy* App nos 17214/05; 42113/04; 20329/05 (ECtHR 28 April 2009), para 94; European Court of Human Rights Guide on Article 6, Right to a fair trial (civil limb), (Council of Europe/European Court of Human Rights, May 2013) 25-26.

<sup>1171</sup>*Beaumont v France* App no 15287/89 (ECtHR 25 October 1994), para 38.

<sup>1172</sup>*Sramek v Austria* App no 8790/79 (ECtHR 22 October 1984), para 42.

## Explanatory Note to the Basic Judicial Check-List 2

courts with a view to influencing the outcome.<sup>1173</sup> The fact that judges are appointed by the executive and are removable does not *per se* amount to a violation of Article 6(1) of the ECHR.<sup>1174</sup> The appointment of judges by the executive is permissible provided that the appointees are free from influence or pressure, and that they do not receive any instructions when carrying out their adjudicatory role.<sup>1175</sup> In determining whether a body can be considered to be independent, the ECtHR has had regard, *inter alia*, to the following criteria: the manner of appointment of its members;<sup>1176</sup> the duration of their term of office;<sup>1177</sup> guarantees against outside pressure,<sup>1178</sup> including safeguards against arbitrary exercise of court president's duty to (re)assign cases to judges;<sup>1179</sup> and the appearance of independence.<sup>1180</sup>

An impartial tribunal/court:

The term "impartiality" normally denotes the absence of prejudice or bias, and its existence may be tested in various ways.<sup>1181</sup> The existence of impartiality shall be determined by conducting the following tests:<sup>1182</sup>

- a subjective test, where regard must be had to the personal conviction and behaviour of a particular judge, specifically whether the judge held any personal prejudice or bias in a given case. The personal impartiality of a judge must be presumed unless there is proof to the

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<sup>1173</sup>*Sovtransavto Holding v Ukraine* App no 48553/99 (ECtHR 25 July 2002), para 80; *Mosteanu and Others v Romania* App no 33176/96 (ECtHR 26 November 2002), para 42.

<sup>1174</sup>*Clarke v United Kingdom* (decision) App no 15767/89 (ECtHR 14 October 1991).

<sup>1175</sup>*Flux v Moldova (no 2)* App no 31001/03 (ECtHR 3 July 2007), para 27; *Zolotas v Greece* App no 66610/09 (ECtHR 29 January 2013), para 24; *Majorana v Italy*, (dec.); *Sacilor-Lormines v France* App no 65411/01 (ECtHR 9 November 2006), para 67.

<sup>1176</sup>*Sramek v Austria* App no 8790/79 (ECtHR 22 October 1984) para 38; *Brudnicka and Others v Poland* App no 54723/00 (ECtHR 3 March 2005), para 41; *Clarke v United Kingdom* (decision) App no 15767/89 (ECtHR 14 October 1991).

<sup>1177</sup>*Sacilor-Lormines v France* App no 65411/01 (ECtHR 9 November 2006), para 67, *Luka v Romania* App no 34197/02 (ECtHR 13 May 2014), para 44.

<sup>1178</sup>*Parlov-Tkalčić v Croatia* App no 24810/06 (ECtHR 22 December 2009), para 86, *Agrokompleks v Ukraine* App no 23465/03 (ECtHR 25 July 2013), para 137.

<sup>1179</sup>*Parlov-Tkalčić v Croatia* App no 24810/06 (ECtHR 22 December 2009), paras 88-95.

<sup>1180</sup>*Sramek v Austria* App no 8790/79 (ECtHR 22 October 1984) para 42; *Sacilor-Lormines v France* App no 65411/01 (ECtHR 9 November 2006), para 63; European Court of Human Rights Guide on Article 6, Right to a fair trial (civil limb), (Council of Europe/European Court of Human Rights, May 2013) 27-28.

<sup>1181</sup>*Wettstein v Switzerland* App no 33958/96 (ECtHR 21 December 2000), para 43; *Micallef v Malta* App no 17056/06 (ECtHR 15 October 2009), para 93.

<sup>1182</sup>*Micallef v Malta* App no 17056/06 (ECtHR 15 October 2009), para 93.

contrary;<sup>1183</sup>

- an objective test, that is to say, by ascertaining whether the tribunal itself and, among other aspects, its composition, offered sufficient guarantees to exclude any legitimate doubt in respect of its impartiality.

According to the objective approach, apart from the judge's conduct, an assessment of the existence of the ascertainable facts, which may raise doubts as to judge's impartiality, should be carried out. When a body sitting as a bench is being assessed, it is important to determine whether, apart from the personal conduct of any of the members of that body, there are ascertainable facts which may raise doubts as to the impartiality of the body itself. This implies that, in considering the impartiality of a particular judge<sup>1184</sup> or a body sitting as a bench<sup>1185</sup> in a given case, the standpoint of the person concerned is considered as an important factor, but not a decisive one. What is decisive is whether this fear may be held to be objectively justified.<sup>1186</sup> The objective test mostly concerns hierarchical or other links between the judge and other actors in the proceedings.<sup>1187</sup> Therefore, it must be decided in each individual case whether the relationship in question is of such a nature and degree as to indicate a lack of impartiality on the part of the tribunal.<sup>1188</sup> For the courts to inspire confidence in the public, which is indispensable, account must also be taken of questions of internal organisation. The existence of national procedures for ensuring impartiality, namely rules regulating the withdrawal of judges, is a relevant factor.<sup>1189</sup> Such rules manifest the national legislature's concern to remove all reasonable doubts as to the impartiality of a judge or court concerned and constitute an attempt to ensure impartiality by eliminating the

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<sup>1183</sup>*Le Compte Van Leuven and De Meyere v Belgium* App nos 6878/75; 7238/75 (ECtHR 18 October 1982), para 58.

<sup>1184</sup>*Morel v France* App no 34130/96 (ECtHR 6 June 2000), paras 45-50; *Pescador Valero v Spain* App no 62435/00 (ECtHR 17 June 2003), para 23.

<sup>1185</sup>*Luka v Romania* App no 34197/02 (ECtHR 21 July 2007), para 40.

<sup>1186</sup>*Wettstein v Switzerland* App no 33958/96 (ECtHR 21 December 2000), para 44; *Pabla Ky v Finland* App no 47221/99 (ECtHR 22 June 2004), para 30; *Micallef v Malta* App no 17056/06 (ECtHR 15 October 2009), para 96.

<sup>1187</sup>*Mežnarić v Croatia* App no 71615/01 (ECtHR 15 July 2005), para 36; *Wettstein v Switzerland* App no 33958/96 (ECtHR 21 December 2000), para 47.

<sup>1188</sup>*Micallef v Malta* App no 17056/06 (ECtHR 15 October 2009), paras 97, 102.

<sup>1189</sup>See the specific provisions regarding the challenging of judges in *Ibid.* para 99-100.

causes of such concerns.<sup>1190</sup>

### **Standard 28. Right to “speedy” judicial review of the lawfulness of detention**

In the case *Khudyakova v Russia* (para. 99), fifty-four (54) days had elapsed between the date of the submission of the application and the final decision of the appeal court. The Government did not plead that complex issues had been involved in the determination of the lawfulness of the applicant’s detention, nor sought to justify the delay, other than to state that the review of the applicant’s detention could not have affected her situation as the detention had been authorised by the court and should thus be considered lawful. In the case *M.D. c. Belgique*, an applicant was detained under the Dublin Regulation. On 2 July 2010, the applicant’s detention was extended, and on 12 July 2010, he filed an appeal to the first-instance tribunal. On the 15 July 2010, the first-instance tribunal decided not to grant the applicant’s lawsuit. In the next stage of the procedure, on 28 July 2010, the Court of Appeal decided to order the immediate release of the applicant. The Government appealed against that judgment to the *Cour de cassation*. The ECtHR found a violation of Article 5(4) of the ECHR, because the applicant was not released based on the judgment of the Appeal Court, while the *Cour de cassation*, which abrogated the judgment of the Court of Appeal, did not examine the substantial issues of the case, but only the procedural issues.<sup>1191</sup>

The ECtHR also stated in the case of *Shcherbina v Russia* that where a decision to detain a person has been taken by a non-judicial authority, the standard of “speediness” of judicial review under Article 5(4) of the ECHR comes closer to the standard of “promptness” under Article 5(3) of the ECHR<sup>1192</sup> where a delay of sixteen (16) days in the judicial review of the applicant’s detention order issued by the prosecutor was found to be excessive. The standard of “speediness” of the proceedings before a court of appeal is less stringent.<sup>1193</sup> Where a court, in a procedure offering appropriate guarantees of due process, imposed the

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<sup>1190</sup>For further standards regarding the exercise of both advisory and judicial functions in the same case, the exercise of both judicial and extra-judicial functions in the same case and exercise of different judicial functions, see: European Court of Human Rights Guide on Article 6, Right to a fair trial (civil limb), (Council of Europe/European Court of Human Rights, May 2013).

<sup>1191</sup>*M.D. v Belgium* App no 58689/12 (ECtHR 19 January 2016), paras 39-47.

<sup>1192</sup>*Shcherbina v Russia* App no 41970/11 (ECtHR 26 June 2014), paras 65-70.

<sup>1193</sup>*Abdulkhanov v Russia* App no 22782/06 (ECtHR 3 October 2013), para 198.

original detention order, the ECtHR may tolerate longer periods of review in the proceedings before the second instance court.<sup>1194</sup>

### **Standard 30. The “scope and intensity” of judicial review including procedural guarantees**

From the standpoint of EU law, the basic principle provides that “*Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law,*”<sup>1195</sup> but the characteristics of such a remedy “*must be determined in a manner that is consistent with Article 47 of the Charter, which constitutes a reaffirmation of the principle of effective judicial protection.*”<sup>1196</sup> The principle of effective judicial protection (along with the principle of equivalence) is a general principle of European law stemming from the constitutional traditions common to the Member States, enshrined in Articles 6 and 13 of the ECHR.<sup>1197</sup> The principle of equivalence provides that the rules applicable in an EU law dispute shall not be less favourable than those governing similar domestic actions. It requires that the national rule in question is applied without distinction, whether the alleged infringement is of EU or national law, and where the purpose and cause of action are similar.<sup>1198</sup> In regards to the application of the principle of effectiveness, the CJEU held that when a question arises as to whether a national procedural provision makes the application of EU law (practically) impossible or excessively difficult, the cases must be analysed with reference to the role of that provision in the procedure, its conduct and its special features, viewed as a whole, before the various national bodies. For those purposes, where appropriate, account must be taken of the basic principles of the domestic judicial system, such as protection of the rights of the defence, the principle of legal certainty and the proper conduct of procedure.<sup>1199</sup> “*In the absence of EU rules concerning the procedural requirements relating to a detention-review measure, the Member States remain competent, in accordance with the principle of procedural autonomy, to determine those requirements,*

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<sup>1194</sup>*Shcherbina v Russia* App no 41970/11 (ECtHR 26 June 2014) para 65.

<sup>1195</sup>Treaty on European Union (Maastricht Treaty) art 19(1).

<sup>1196</sup>C-562/13, *Abdida* EU:C:2014:2453 , para 45.

<sup>1197</sup>C-93/12 *Agrokonsulting* EU:C:2013:432 para 59; C-432/05 *Unibet v Justitiekanslern* EU:C:2007:163, para 37.

<sup>1198</sup>Joined Cases C-46/93 and C-48/03, *Brasserie du Pêcheur* [1996] ECR I-1029, para 83; C-246/09 *Bulicke* EU:C:2010:418 para 25-26.

<sup>1199</sup>*Ibid.* para 35.



*whilst at the same time ensuring that the fundamental rights are observed and that the provisions of EU law relating to that measure are fully effective.”<sup>1200</sup>*

The above-cited argumentation was a (general) starting point of the interpretation adopted by the CJEU in the case of *Mahdi*, which deals with judicial review of the extension of detention under the Return Directive. Nevertheless, in the same case, the CJEU in its reasoning under cited paragraphs 62-64, expanded upon this general principle of effectiveness and explained in more detail the meaning of the term “*fully effective*”.

### **Standard 31. Restrictions on the right to a defence and/or equality of arms based on national (public) security, public policy or public order**

The right to access a court file (“equality of arms”/“right to defence”), as being part of the right under Article 4(5) of the ECHR or Article 47(1) and (2) of the Charter in conjunction with the right to judicial review under Article 15(2) of the Return Directive, may be restricted on grounds of national (public) security, public policy, or public order, in accordance with the principle of proportionality under Article 52(1) of the Charter.<sup>1201</sup> In the case of *Kadi*, the Grand Chamber of the CJEU stated: “*according to settled case-law, fundamental rights form an integral part of the general principles of law whose observance the CJEU ensures. For that purpose, the CJEU draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international instruments for the protection of human rights on which the Member States have collaborated or to which they are signatories. In that regard, the ECHR has a special significance /.../ Measures incompatible with respect for human rights are not acceptable in the Community.*”<sup>1202</sup> In the case of *Kadi*, in the context of measures against terrorism, the right to a defence, the right to be heard and the right to effective judicial review were at stake. The CJEU decided “*in such a case, it is none the less the task of the Community judicature to apply, in the course of the judicial review it carries out, techniques which accommodate, on the one hand, legitimate*

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<sup>1200</sup>*Ibid.* para 50.

<sup>1201</sup>See *mutatis mutandis*: C-601/15(PPU) *J.N. v Staatsecretariat van Veiligheid en Justitie* [2016] EU:C:2016:84; Joined Cases C-402/05 P and C-415/05 P *Kadi* (Grand Chamber) EU:C:2008:461. For comparison, see the approach of the CJEU in the case of risk of “public policy” C-554/13, *Z. Zh. and O* EU:C:2015:377, paras 48, 50, 56, 60, 65.

<sup>1202</sup>*Ibid.* paras 283-284.

*security concerns about the nature and sources of information taken into account in the adoption of the act concerned and, on the other, the need to accord the individual a sufficient measure of procedural justice.*<sup>1203</sup> In the case *A. and others v the United Kingdom* (para. 218), the Grand Chamber of the ECtHR formulated the following basic principle: “*It was essential that as much information about the allegations and evidence against each applicant was disclosed as was possible without compromising national security or the safety of others. Where full disclosure was not possible, Article 5(4) of the ECHR required that the difficulties this caused were counterbalanced in such a way that each applicant still had the possibility effectively to challenge the allegations against him.*” This must be decided on a case-by-case basis. Where the evidence was to a large extent disclosed, and the open material played a predominant role in the determination, the applicant cannot be said to have been denied an opportunity to challenge effectively the reasonableness of the belief and suspicion of the Secretary of State. In other cases, even where all or most of the underlying evidence remained undisclosed, if the allegations contained in the open material were sufficiently specific, it should be made possible for the applicant to provide his/her representatives and the special advocate with information to refute them, if such information existed, without him/her having to know the details or sources of evidence, which formed the basis of the allegations.<sup>1204</sup>

In the case of *A and Others v the United Kingdom*, the ECtHR stated that even in proceedings under Article 6 of the ECtHR, concerning the determination of guilt on criminal charges, there may be restrictions on the right to a fully adversarial procedure where it is strictly necessary in the light of a strong countervailing public interest, such as national security, the need to keep secret police methods of investigation or the protection of the fundamental rights of another person. The conditions for a fair trial will not be fulfilled, unless any difficulties caused to the defendant by a limitation on his/her rights are sufficiently counterbalanced by the procedures followed by the judicial authorities.<sup>1205</sup> Thus, while the right to a fair criminal trial under Article 6 includes the right to disclosure of all material evidence possessed by the prosecution (both for and against the accused), the ECtHR has

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<sup>1203</sup>*Ibid.* para 344.

<sup>1204</sup>*Ibid.* para 220. For further explanation of these limitations and definition of national security and public order, see the Explanatory note to this Check-list.

<sup>1205</sup>*A and Others v United Kingdom* (Grand Chamber) App no 3455/05 (ECtHR 19 February 2009), para 205.

held that it might sometimes be necessary to withhold certain evidence from the defence on “public-interest” grounds.<sup>1206</sup>

In cases of the lack of a definition of a particular term in EU law, when the decisions are made under the Return Directive in the context of the concept of the “risk of public policy”, the definition of this term must be determined by considering that term in its usual meaning in everyday language. Also the context in which that term occurs and the purposes of the rules, which it forms part of must be taken into account. When such a term appears in a provision, which constitutes derogation from a principle, the term must be read to allow a strict interpretation of the provision,<sup>1207</sup> while a Member State should be able to prove that the person concerned “in fact constitutes such a risk.”<sup>1208</sup> *“While Member States essentially retain the freedom to determine the requirements of public policy in accordance with their national needs, which can vary from one Member State to another and from one era to another, the fact still remains that, in the EU context and particularly when relied upon as a justification for derogating from an obligation designed to ensure that the fundamental rights of third-country nationals are respected when they are removed from the EU, those requirements must be interpreted strictly, so that their scope cannot be determined unilaterally by each Member state without any control by the institutions of the EU”.*<sup>1209</sup> According to the general principles of EU law, decisions should be adopted on a case-by-case basis, and be based on objective criteria in order to ascertain whether the personal conduct of the third-country nationals concerned “poses a genuine and present risk to public policy”. The principle of proportionality must be observed throughout all the stages of the return procedure.<sup>1210</sup> When a State relies on the general practice or on any other assumption in order to determine such a risk, without properly taking into account the individual’s personal conduct, and the risk which this conduct poses to public policy, a Member State fails to have regard to the requirements relating to an individual examination of the case concerned, and to the principle of proportionality. It follows that the fact that a third-country national is suspected, or has been criminally convicted, of an act punishable as a criminal offence under

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<sup>1206</sup>*Ibid.* para 206.

<sup>1207</sup>C-554/13, *Z. Zh. and O* EU:C:2015:377, para 42.

<sup>1208</sup>*Ibid.* para 46.

<sup>1209</sup>*Ibid.* para 48.

<sup>1210</sup>*Ibid.* paras 49, 50.

national law, cannot in itself justify a finding that this individual poses a risk to public policy. In the event of a criminal conviction, however, a Member State may find that there is a risk to public policy even where that conviction has not become final and absolute, if that conviction taken together with other circumstances relating to the situation of the person concerned justifies such a finding. Moreover, a mere suspicion that a third-country national has committed an act punishable as a criminal offence under national law may, together with other factors relating to the case in question (including the nature and seriousness of that act, and the time which has elapsed since it was committed), may be used as a basis for a finding that he poses a risk to public policy.<sup>1211</sup>

In the context of a decision refusing an EU citizen admission to a Member State, the CJEU stated that provisions of the Directive 2004/38 oblige Member States to lay down in domestic law the measures necessary to enable Union citizens and members of their families to have access to judicial, and where appropriate, administrative redress procedures to appeal against or seek review of any decision restricting their rights to move and reside freely in the Member States on the grounds of public policy, public security or public health. In order to enable a person concerned to make effective use of the redress procedures, a competent authority is required, as the principle under Article 30(2) of Directive 2004/38 provides, to inform the person precisely about the facts and circumstances on which the proposed measure is based in the administrative procedure, and in full of the public policy, public security or public health grounds on which the decision in question is based.<sup>1212</sup> It is only by way of derogation that Article 30(2) of Directive 2004/83 permits the Member States to limit the information shared with the person concerned in the interests of State security. This provision must be interpreted strictly, but without depriving it of its effectiveness (Article 47 of the Charter). In this context, a question arises of whether and to what extent Article 30(2) and 31 of the Directive 2004/38 permit the grounds of a decision taken under Article 27 of the directive “*not to be disclosed precisely and in full /.../. It should be taken into account that, whilst Article 52(1) of the Charter admittedly allows limitations on the exercise of the rights enshrined by the Charter, it nevertheless lays down that any limitations must in particular respect the essence of the fundamental right in question and requires, in addition,*

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<sup>1211</sup>*Ibid.* paras 50-51, 55.

<sup>1212</sup>C-300/11, *ZZ v Secretary of State for the Home Department* EU:C:2013:363 paras 47-48.

*that subject to the principle of proportionality, the limitation must be necessary and genuinely meet objectives of general interest recognised by the EU.*<sup>1213</sup> According to the settled case law of the CJEU, *“if the judicial review guaranteed by Article 47 of the Charter is to be effective, the person concerned must be able to ascertain the reasons upon which the decision taken in relation to him is based, either by reading the decision itself or by requesting and obtaining notification of those reasons, without prejudice to the power of the court with jurisdiction to require the authority concerned to provide that information /.../ so as to make it possible for him to defend his rights in the best possible conditions and to decide, with full knowledge of the relevant facts, whether there is any point in his applying to the court with jurisdiction, and in order to put the latter fully in a position in which it may carry out the review of the lawfulness of the national decision in question. Admittedly, it may prove necessary, both in administrative proceedings and in judicial proceedings, not to disclose certain information to the person concerned, in particular in the light of overriding consideration connected with State security.”*<sup>1214</sup> In certain cases, disclosure of that evidence is liable to compromise State security in a direct and specific manner, in that it may, in particular, endanger the life, health or freedom of persons or reveal the methods of investigation specifically used by the national security authorities, and thus seriously impede, or even prevent, future performance of the task of those authorities.<sup>1215</sup> By invoking reasons of State security, the court of a Member State must have at its disposal, and apply, techniques and rules of procedural law which accommodate, on the one hand, legitimate State security considerations regarding the nature and sources of the information taken into account in the adoption of such a decision, and, on the other hand, the need to ensure sufficient compliance with the person’s procedural rights, such as the right to be heard and the adversarial principle.<sup>1216</sup> In the context of that judicial review, it is required that the Member States lay down rules enabling a court entrusted with the review of the decision’s legality to examine both the grounds and the related evidence on the basis of which the decision was taken. It is necessary for a court to be entrusted with verifying whether those reasons are precise and full disclosure of the grounds, on which the decision

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<sup>1213</sup>*Ibid.* paras 49-51.

<sup>1214</sup>*Ibid.* paras 53-54.

<sup>1215</sup>*Ibid.* para 66.

<sup>1216</sup>*Ibid.* para 57.

in question is based and of the related evidence.<sup>1217</sup> Thus, the competent national authority has the task of proving, in accordance with the national procedural rules that state security would, in fact, be compromised by precise and full disclosure to the person concerned of the grounds which constitute the basis of a decision taken under Article 27 of Directive 2004/38, and of the related evidence. It follows that there is no presumption that the reason invoked by a national authority exists and is valid.<sup>1218</sup> If the court concludes that state security does not stand in the way of precise and full disclosure to the person concerned, it gives the competent national authority the opportunity to disclose the missing grounds and evidence to the person concerned. If that authority does not authorise their disclosure, the court proceeds to examine the legality of such a decision solely on the basis of the grounds and evidence which have been disclosed.<sup>1219</sup> Any limitation of the right to effective judicial protection must be strictly necessary.<sup>1220</sup> In particular, a person concerned must be informed, in any event, of the essence of the grounds on which a decision refusing entry, taken under Article 27 of Directive 2004/38, is based, as the necessary protection of State security may not have the effect of denying the person concerned his/her right to be heard and, therefore, of rendering his/her right of redress ineffective, as provided in Article 31 of that Directive.<sup>1221</sup>

### **Standard 34. Derogation from obligations under Article 5(1) of the ECHR<sup>1222</sup>**

The concept of a “*public emergency threatening the life of the nation*” has a natural and customary meaning. Those words are sufficiently clear and they refer to an exceptional situation of crisis or emergency, which affects the whole population and constitutes a threat

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<sup>1217</sup>*Ibid.* para 59.

<sup>1218</sup>*Ibid.* para 61.

<sup>1219</sup>*Ibid.* para 63.

<sup>1220</sup>*Ibid.* para 64.

<sup>1221</sup>*Ibid.* para 65.

<sup>1222</sup>Article 15 of the ECHR states that “*in time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.*” Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) art 15.

to the organised life of the community, of which the state is composed. In the *Greek case*<sup>1223</sup>, the Commission held that, in order to justify a derogation, the emergency should be actual and imminent; that is should affect the whole nation to the extent that the continuance of the organised life of the community was threatened; and that the crisis or danger should be exceptional, in that the normal measures or restrictions permitted by the ECHR for the maintenance of public safety, health and order, were plainly inadequate. In the case *Ireland v the United Kingdom*, the ECtHR agreed that the Article 15 test was satisfied, since terrorism in Northern Ireland had for a number of years presented a particularly far-reaching and acute danger for the territorial integrity of the United Kingdom, the institutions of the six counties of Northern Ireland and the lives of the inhabitants of that province. In the case of *Aksoy*, it was accepted that the Kurdish separatist violence had given rise to public emergency in Turkey.<sup>1224</sup> The requirement of imminence should not be interpreted so narrowly as to require a State to wait for a disaster to strike before taking measures to deal with it.<sup>1225</sup> Since the purpose of Article 15 is to permit States to take derogating measures to protect their populations from future risks, the existence of a threat to the life of the nation must be assessed primarily with reference to those facts which were known at the time of the derogation.<sup>1226</sup> The ECtHR's case law has never explicitly incorporated a requirement of the temporary emergency, although the question of the proportionality of the response may be linked to the duration of the emergency.<sup>1227</sup> In the past, the ECtHR has concluded that emergency situations have existed even though the institutions of a State did not appear to be imperilled, so that the existence of the institutions of the government or existence of civil society would be threatened.<sup>1228</sup>

As regards the question of whether "the measures were strictly required by the exigencies of the situation", Article 15 of the ECHR allows the national authorities a wide margin of appreciation. However, in particular, where a derogating measure encroaches upon a

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<sup>1223</sup>*Denmark, Norway, Sweden and the Netherlands v Greece* App nos 3321/67, 3322/67, 3323/67, 3344/67 (ECtHR 24 January 1968).

<sup>1224</sup>*A and Others v United Kingdom* (Grand Chamber) App no 3455/05 (ECtHR 19 February 2009), para 176.

<sup>1225</sup>*Aksoy v Turkey* App no 21987/93 (ECtHR 18 December 1996).

<sup>1226</sup>*Ibid.* para 177.

<sup>1227</sup>*Ibid.* para 178.

<sup>1228</sup>*Ibid.* para 179.

fundamental right under the ECHR, such as the right to liberty, the ECtHR should ascertain whether it was a genuine response to the emergency situation, fully justified by the special circumstances of the emergency, and that adequate safeguards were provided against abuse.<sup>1229</sup> If the measures are found to be disproportionate to that threat and to be discriminatory in their effect, there is no need to go further and examine their application in the concrete case of each applicant.<sup>1230</sup>

### **37.1. General conditions of detention in respect of EU law and protection against inhuman/degrading treatment and the protection of family life**

In the case *Popov v France*, the ECtHR has found a violation of the right to family life of applicants from Kazakhstan (parents and two children born in 2004 and 2007), because the applicants “*did not present any risk of absconding that required their detention. Their confinement in a secure centre did not therefore appear justified by a pressing social need, especially as their compulsory residence in a hotel during the first phase of their administrative detention does not seem to have caused any problems. The ECtHR finds that there is no indication in the material transmitted by the Government that any alternative to detention was envisaged, whether a compulsory residence measure or, as decided by the Maine-et Loire prefecture, confinement in hotel accommodation. Neither does it appear that the authorities ever re-examined the possibility of confinement outside a detention centre during the period in question. Lastly, it does not appear from the facts of the case that the authorities took all the necessary steps to enforce the removal measure as quickly as possible and thus limit the time spent in detention. The applicants were held for fifteen days without any flight being arranged for them.*”<sup>1231</sup>

The ECtHR also found an interference with the right to respect for family life to be disproportionate: where parents and their four-year old child were detained together for 18 days ( *A.B. and Others v France*).<sup>1232</sup> where a mother and her two-year old child were

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<sup>1229</sup>*Ibid.* para 184.

<sup>1230</sup>*Ibid.* para 185.

<sup>1231</sup>*Popov v France* App nos 39472/07 and 39474/07 (ECtHR 19 January 2012), paras 145-146.

<sup>1232</sup>*A.B. and Others v France* App no 11593/12 (ECtHR 12 July 2016), paras 144-156.



detained together for ten days (*R.C. et V C. c. France*);<sup>1233</sup> and where parents and their fifteen-month old child were detained together for 4 or 9 days (*R.K. and Others v France*).<sup>1234</sup> For a case in which the detention of family members did not give rise to a violation of the right to respect for family life, see *A. M. and Others v France*.<sup>1235</sup>

### **Standard 37.3. Conditions of detention: overcrowding, ventilation, access to light and natural air, quality of heating, health requirements, basic sanitary and hygiene requirements**

In *S.D. v Greece*, an asylum-seeker was confined to a prefabricated cabin for two months without being allowed to go outdoors, or to make a telephone call, and with no clean sheets and insufficient hygiene products. He was also detained for six days, in a confined space, with no possibility of taking a walk, no leisure area, sleeping on dirty mattresses, and with no free access to the toilet. The ECtHR found both periods of detention to be in breach of Article 3 of the ECHR.<sup>1236</sup> In *Tabesh v Greece*, an asylum-seeker was detained for three months on police premises pending the application of an administrative measure, with no access to any recreational activities, and without access to proper meals.<sup>1237</sup> In *A.A. v Greece*, an asylum-seeker was detained for three months in an overcrowded place in appalling conditions of hygiene and cleanliness, with no leisure or catering facilities, where a dilapidated state of repair of the sanitary facilities rendered them virtually unusable and where the detainees slept in extremely filthy and crowded conditions.<sup>1238</sup> In the case *MSS. v Belgium and Greece*, the Grand Chamber reviewed immigration detention conditions in Greece, and found a violation of Article 3 of the ECHR, as the applicant had been detained in a building next to the airport, where the sector for asylum-seekers was rarely unlocked. As a result, the detainees had no access to the water fountain outside, and were obliged to drink water from the toilets. There were 145 detainees in the 110 m<sup>2</sup> space in the sector for arrested persons. There was only 1 bed for 14 to 17 people in a number of cells with not enough mattresses, and a number of detainees were sleeping on the bare floor. There was

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<sup>1233</sup>*R.C. and V C. v France* App no 76491/14 (ECtHR 12 July 2016), paras 71-83.

<sup>1234</sup>*R.K. and Others v France*, App no 68264/14 (ECtHR 12 July 2016), paras 105-117.

<sup>1235</sup>*A. M. and Others v France* App no 24587/12 (ECtHR 12 July 2016), paras 85-97.

<sup>1236</sup>*S.D v Greece* App no 53541/07 (ECtHR 11 September 2009), paras 49-54.

<sup>1237</sup>*Tabesh v Greece* App no 8256/07 (ECtHR 26 November 2009), paras 38-44.

<sup>1238</sup>*A.A. v Greece* App no 12186/08 (ECtHR 22 October 2010), paras 57-65.

insufficient room for all the detainees to lie down and sleep at the same time; and because of the overcrowding, there was a lack of sufficient ventilation and the cells were unbearably hot. Detainees' access to the toilets was severely restricted and they complained that the police would not let them out into the corridors. The police admitted that the detainees had to urinate in plastic bottles which they emptied when they were allowed to use the toilets. It was observed that in all sectors there was no soap or toilet paper, that sanitary and other facilities were dirty, with no doors, and no access to outdoor exercise. Against this background, the ECtHR found the relatively short periods of detention to be insignificant (4 days and 1 week), especially when the particularly vulnerable position of the applicant (asylum-seeker) was taken into consideration. The applicant in *MSS* had been detained in Greece in 2009<sup>1239</sup>. At that time, the poor detention conditions had been a persistent, long-standing and well-documented problem (the Grand Chamber cited reports criticising detention conditions in Greece dating back as far as 2005). The Grand Chamber considered the issue of sudden arrival of a large group of migrants in the case *Khalifia v Italy*. The applicants in that case had fled from Tunisia during the "Arab Spring" in 2011. They complained both of their detention in a reception centre on the island of Lampedusa, and on board ships moored in Palermo harbour. In considering their detention conditions, the Court expressly accepted that during the relevant time, there existed a state of emergency in Lampedusa due to a wave of over 50,000 arrivals after the uprisings in Tunisia and Libya, which placed many obligations on the Italian authorities with regard to rescue, medical care, reception and maintenance of public order.

The Grand Chamber took into consideration the fact that Italy had declared a state of humanitarian emergency on the island of Lampedusa and appealed for solidarity of EU Member States. The arrival *en masse* of North African migrants undoubtedly created organisational, logistical and structural difficulties for the Italian authorities in view of the combination of requirements to be met, as they had to rescue certain vessels at sea, to receive and accommodate individuals arriving on Italian soil, and to take care of those in particularly vulnerable situations. In this connection, the ECtHR observed that, according to the data supplied by the Government, some 3000 women and 3000 children arrived during

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<sup>1239</sup>*M.S.S. v Belgium and Greece* App no 30696/09 (ECtHR 21 January 2011).

the period in question. The ECtHR could not criticise, in itself, the decision to concentrate the initial reception of the migrants on Lampedusa. As a result of its geographical position, where most rudimentary vessels would arrive, it was often necessary to carry out rescues at sea around the island in order to protect the life and health of the migrants. It was therefore not unreasonable, at the initial stage, to transfer the survivors from the Mediterranean to the closest reception facility. In addition to that general situation, there were some specific problems, like a revolt among the migrants, protest marches through the island's streets, clashes between the local community and a group of aliens threatening to explode gas canisters, self-harm and vandalism. While constraints inherent in such crises cannot, in themselves, be used to justify a breach of Article 3, the ECtHR was of the view that it would certainly be artificial to examine the facts of the case without considering the general context in which those facts arose.<sup>1240</sup> In regard to detention in the Contrada Imbriacola CSPA, the ECtHR took into account several factors, and, among them, the fact that migrants could move around freely within the confines of the facility, communicate by telephone with the outside world, make purchases and contact representatives of humanitarian organisations and lawyers. Even though the number of square metres per person in the centre's rooms was not established, the ECtHR found that the freedom of movement enjoyed by the applicants in the CSPA must have alleviated in part, or even to a significant extent, the constraints caused by the fact that the centre's maximum capacity was exceeded. The applicants were not asylum-seekers and therefore were not inherently vulnerable, and did not claim to have endured traumatic experiences in their country of origin. They belonged neither to the category of elderly persons, nor that of minors. At the time of the events they were aged between 23 and 28 and did not claim to be suffering from any particular medical condition, nor did they complain of any lack of medical care in the centre. The applicants did not claim that they had been deliberately ill-treated by the authorities in the centre, that the food or water had been insufficient or that the climate at the time had affected them negatively when they had to sleep outside.<sup>1241</sup> In regards to the conditions on the ships Vincent and Audace, the ECtHR also found no violation of Article 3 of the ECHR.<sup>1242</sup>

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<sup>1240</sup>*Khlaifia and Others v Italy* (Grand Chamber) App No 16483/12 (ECtHR 15 December 2016), paras 178-186.

<sup>1241</sup>*Ibid.* paras 187-198.

<sup>1242</sup>*Ibid.* paras 202-211.

### **Standard 37.5. Minors**

In *Muskhadzhiyeva and Others v Belgium* the ECtHR considered the detention of a mother and four children (asylum-seekers) in the same detention centre as the unaccompanied five-year old applicant in *Mubilanzila Mayeka and Kaniki Mitunga*. In *Muskhadzhiyeva and Others* the ECtHR took into account the children's ages (they were 7 months, 3 and a half, 5 and 7 years old at the relevant time), the fact that they were found to be suffering from psychological problems and the fact that they were detained for more than 1 month with their mother in a centre which was not adjusted to reception of children. The court therefore accepted that detention conditions had violated the children's rights under Article 3 of the ECHR. . In the case of *Kanagaratnam and Others v Belgium*, the children were also detained with their mother. They did not have specific health concerns and they were older than the children in *Muskhadzhiyeva and Others*. Nevertheless, the ECtHR took into account a traumatic situation they had experienced in the past and the fact that they were detained for a longer period (4 months). The ECtHR found a violation of the children's rights under Article 3 of the ECHR.<sup>1243</sup>

In *Popov v France*, the ECtHR reviewed a 15-day detention of two infants (3-year, and five-month old asylum-seekers). During this period, they were detained with their parents at a centre authorised to receive families. In finding a violation of Article 3, the ECtHR noted that although the authorities had been careful to separate families from other detainees, the facilities available in the "families" area of the centre were nevertheless ill-adapted to the presence of children; there were no beds adapted for children, and adult beds had pointed metal corners; there were no activities for children; there was a very basic play area on a small piece of carpet; a concreted courtyard of 20 m<sup>2</sup> with a view of the sky through a wire netting; there was a tight grill over the bedroom windows obscuring the view outside; and there were automatically closing bedroom doors with consequent danger for children.<sup>1244</sup> The ECtHR had regard to the International Convention on the Rights of the Child, which provided in Article 37 that "[e]very child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into

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<sup>1243</sup>*Muskhadzhiyeva and Others v Belgium* App no 41442/07 (ECtHR 19 January 2010), paras 55-63.

<sup>1244</sup>*Popov v France* App nos 39472/07 and 39474/07 (ECtHR 19 January 2012), para 95.

*account the needs of persons of his or her age*".<sup>1245</sup> It accepted that confinement in conditions such as explained in detail in that judgment caused great emotional and mental suffering to minors, and that the abnormal living conditions imposed on very small children exceeded the threshold of seriousness for the purposes of Article 3 of the ECHR.<sup>1246</sup> However, as in the cases *Muskhadzhiyeva and others v Belgium*,<sup>1247</sup> *A.M. et autres c. France*,<sup>1248</sup> *R.K. et autres c. France*,<sup>1249</sup> *R.M. et autres c. France*, in the case of *Popov v France*,<sup>1250</sup> <sup>1251</sup>the ECtHR refused to find additional violation of Article 3 in respect of the parents.

In the case of *A. B. et autres v France*, the ECtHR found a violation of Article 3 of the ECHR in respect of a four-year old child detained together with his parents for 18 days in the centre Toulouse-Cornebarrieu, where he was exposed to extreme and constant noise from the nearby airport. In the case of *A. M. et autres c. France*, the ECtHR found a violation of Article 3 of the ECHR in respect of two children aged 2 and a half and 4 months who were detained together with their mother for 8 hours in the centre Metz-Queuleu, where conditions were not suitable for young children.<sup>1252</sup>

### **Standard 37.6. Unaccompanied minors**

In *Rahimi v Greece*, an applicant was a fifteen-year old unaccompanied minor (asylum seeker) from Afghanistan, who was placed in a detention centre for a couple of days before being housed in a hostel. Although the ECtHR could not state with certainty whether he was placed in a detention centre with adults, it found that the conditions in the centre were in general so bad as to undermine the very meaning of human dignity. As the applicant was both an unaccompanied minor and an illegal alien, he had been extremely vulnerable and it had therefore been dependent on the contracting State to protect and care for him by taking

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<sup>1245</sup>*Ibid.* para 90.

<sup>1246</sup>*Ibid.* paras 101-103.

<sup>1247</sup>*Muskhadzhiyeva and Others v Belgium* App no 41442/07 (ECtHR 19 January 2010) paras 64-66.

<sup>1248</sup>*A.M. and Others v France* App no 24587/12 (ECtHR 12 July 2016), paras 79-97.

<sup>1249</sup>*R.K. and Others v France*, App no 68264/14 (ECtHR 12 July 2016).

<sup>1250</sup>*Popov v France* App nos 39472/07 and 39474/07 (ECtHR 19 January 2012) paras 104-105.

<sup>1251</sup>*R.M. and Others v France* App no 33201/11 (ECtHR 12 July 2016) paras 71-76.

<sup>1252</sup>*A.M. and Others v France* App no 24587/12 (ECtHR 12 July 2016), paras 44-53.

appropriate measures in the light of its positive obligations under Article 3 of the ECHR.<sup>1253</sup>

In *Mubilanzila Mayeka and Kaniki Mitunga v Belgium* a five-year old child (asylum seeker) from DRC had been detained alone for nearly two months in a transit centre for adults. In finding a violation of Article 3 of the ECHR, the ECtHR had regard to the child's extreme vulnerability on account of her age and the fact that she was alone in a foreign country. In finding a violation of her rights under Article 3, the ECtHR had regard to the fact that no one had been assigned to look after her; no measures were taken to ensure that she received proper counselling and educational assistance from qualified personnel; the place of detention was not adapted to her needs; and there was a legal void in respect of unaccompanied foreign minors. In respect of the last point, the ECtHR noted that there was virtually no possibility of accommodating a child such as the applicant in more suitable conditions (existing detention centres were not adapted to afford adequate protection to minors), and the domestic courts could only consider the lawfulness of her detention and not its appropriateness. The child had received legal assistance, had daily telephone contact with her mother or uncle, and staff and residents at the centre did their best for her. However, the ECtHR found that this "uncoordinated attention" could not be regarded as sufficient to meet all the needs of a five-year-old child.<sup>1254</sup>

### **Standard 37.7. Ill-health and special medical conditions**

In the case *Z v A Government Department and the Board of management of a community school*, the CJEU stated that following the ratification of the UN Convention on the Rights of Persons with Disabilities by the EU, the concept of "disability" within the meaning of the Framework Directive (2000/78)<sup>1255</sup> had to be understood as referring to a "*limitation which results in particular from long-term physical, mental or psychological impairments which in interaction with various barriers may hinder the full and effective participation of the person concerned in professional life on an equal basis with other workers.*" The provisions of that Convention, however, are not unconditional and sufficiently precise as regards their content;

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<sup>1253</sup>*Rahimi v Greece* App no 8687/08 (ECtHR 5 April 2011).

<sup>1254</sup>*Mubilanzila Mayeka and Kaniki Mitunga v Belgium* App no 13178/03 (ECtHR 12 October 2006).

<sup>1255</sup>Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [2000] OJ L303.

they are “*programmatically*” and therefore do not have direct effect. The validity of the directive cannot be assessed in the light of the UN Convention.<sup>1256</sup>

In the case *Mahmundi v Greece*, one of the applicants had been detained pending her deportation while she was heavily pregnant. The ECtHR was critical of the fact that, according to a report on detention conditions, several pregnant women, in the last month of pregnancy, had been held in inhumane conditions in overcrowded cells. The report noted that in addition to the suffering caused by the emotional and psychological impact of detention, these women were often not examined by a doctor. The fact of not knowing where they were going to give birth, and what would happen to them and their children, increased their anxiety. However, although the ECtHR found a violation of Article 3, it based its decision on a combination of factors, including poor detention conditions in general. Likewise, in *Aden Ahmed v Malta*, the ECtHR found violation of Article 3 in a case concerning the detention of a pregnant woman who miscarried in detention. In finding a violation, the ECtHR found “disconcerting” the lack of female staff in the centre. It confirmed that this must have caused a degree of discomfort to the female detainees, particularly the applicant, who suffered from specific medical conditions related to her miscarriage.

The applicant in *Asalya v Turkey* was paraplegic and confined to a wheelchair. He was detained (pending his deportation) for seven days in a regular detention facility, which was not adapted for wheelchair users. No special arrangements were made to alleviate the subsequent hardship. As a consequence, the applicant experienced serious difficulties in meeting his most basic needs, such as using the toilet. He was dependent entirely on the good will of the police officers to assist him. In finding violation of Article 3, the ECtHR reiterated that where authorities decide to place and keep a disabled person in detention, they should demonstrate special care in guaranteeing such conditions as correspond to the special needs resulting from his/her disability.<sup>1257</sup>

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<sup>1256</sup>C-363/12, *Z v A Government Department and the Board of management of a community school* (Grand Chamber) EU:C:2014:159 paras 88 and 90.

<sup>1257</sup>See: *Price v United Kingdom* App no 33394/96 (ECtHR 12 September 2000), para 30; *Farbtuhs v Latvia* App no 4672/02 (ECtHR 2 December 2004), para 56, *Jasinskis v Latvia* App no 45744/08 (21 December 2010), para 59, and *Z.H. v Hungary* App no 28973/11 (ECtHR 8 November 2012), para 29.

## Explanatory Note to the Basic Judicial Check-List 2

In *Yoh-Ekale Mwanje v Belgium*<sup>1258</sup>, the ECtHR found a violation of Article 3 where an HIV-positive woman was detained while being subject to the removal procedure. The authorities were aware of her condition and there was evidence that her state of health had deteriorated, and the infection had progressed while she was in detention. However, a number of weeks passed before she was examined by medical specialists, and after treatment was eventually prescribed it was not administered until one week later. Accordingly, the ECtHR found that in failing to take at an earlier stage all the measures that could reasonably have been expected of them to protect the applicant's health and prevent a worsening of her condition, the authorities had not acted with the requisite diligence. That situation had impaired the applicant's dignity, and, combined with the distress caused by the prospect of being deported, had subjected her to particularly acute hardship causing suffering beyond that inevitably associated with detention and with her condition. It had, therefore, amounted to inhuman and degrading treatment.

The ECtHR has consistently held that detained persons with mental health problems should be detained in places appropriate to their pathology, and be provided with the necessary treatment. For example, the ECtHR has found a violation of Article 3 where an applicant with a severe mental illness was placed in a normal prison and treated the same way as other inmates.<sup>1259</sup> It has also recognised that persons with mental health problems might be more vulnerable within the detention regime, and, therefore, the conditions of detention might be more likely to undermine the detainee's human dignity and arouse in him or her feelings of humiliation and debasement.<sup>1260</sup> However, in order to find a violation of Article 3 the Court will have to ascertain that the conditions of detention caused the deterioration in the applicant's mental health.<sup>1261</sup>

In cases where detained persons committed suicide, the ECtHR found a breach of the

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<sup>1258</sup>*Yoh-Ekale Mwanje v Belgium* App no10486/10 (ECtHR 20 December 2011).

<sup>1259</sup>*Dybeku v Albania* App no 41153/06 (ECtHR 18 December 2007); *Musial v Poland* App no 24557/94 (ECtHR 25 March 1999).

<sup>1260</sup>See: *Romanov v Russia* App no 41461/02 (ECtHR 24 July 2008) in respect of overcrowding; see also *Kucheruk v Ukraine* App no 2570/04 (ECtHR 6 September 2007) in respect of handcuffing and solitary confinement.

<sup>1261</sup>See: *Novak v Croatia* App no 8883/04 (ECtHR 14 June 2007).



positive obligation under Article 2 whenever the authorities were aware of their suicidal tendencies and failed to either provide adequate treatment or adequate monitoring/supervision.<sup>1262</sup>

In the case of *Keenan v the United Kingdom*, which does not refer to detention of asylum seekers or irregular migrants, the ECtHR stated that, in the case of mentally ill persons, the assessment of whether the treatment or punishment concerned is incompatible with the standards of Article 3 has to take into consideration their vulnerability and their inability (in some cases) to complain coherently or at all about how they are being affected by any particular treatment. Treatment of mentally-ill persons may be incompatible with the standards imposed by Article 3 on the protection of fundamental human dignity, even though a person may not be able or capable of pointing to any specific ill-effects. In this case, the ECtHR was struck by the lack of medical notes concerning the applicant, who was at an identifiable suicide risk, and was suffering from additional stresses, that could be expected from the segregation and, later, disciplinary punishment. The ECtHR ascertained an inadequate concern to maintain full and detailed records of his mental state and ineffectiveness of any monitoring or supervision process.<sup>1263</sup>

### **Standard 37.8. Elderly**

In *Contrada (No. 2) v Italy*<sup>1264</sup>, the ECtHR considered the detention of an 82-year old man, who suffered from a number of serious and complex medical disorders. As it found that his state of health was incompatible with the prison regime to which he was subjected, it accepted that his continued detention had been incompatible with the prohibition of inhuman or degrading treatment under Article 3 of the ECHR. It appears that in such cases the state of health of a detained person is a relevant factor. In *Haidn v Germany*<sup>1265</sup> (para.

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<sup>1262</sup>*Renolde v France* App no 5608/05 (ECtHR 16 October 2008); *Jasinska v Poland* App no 28326/05 (ECtHR 1 June 2010); *Ketreb v France* 38447/09 (ECtHR 19 July 2012).

<sup>1263</sup>*Keenan v United Kingdom* App no 27229/95 (ECtHR 3 April 2011), paras 111, 113, 114 and 116. As regards the monitoring requirements in case of drug addicted prisoner, see also: *McGlinchey and Others v United Kingdom* App no 50390/99 (ECtHR 29 July 2003), paras 57-58.

<sup>1264</sup>*Contrada (No 2) v Italy* App no 7509/08 (ECtHR 11 February 2014).

<sup>1265</sup>*Haidn v Germany* App no 6587/04 (ECtHR 13 January 2011).

108), the ECtHR found that the applicant's relatively advanced, but not particularly old age (70-years old), combined with his state of health, which cannot be considered as critical for detention purposes, did not as such attain a minimum level of severity so as to fall within the scope of Article 3 of the ECHR.

**Standard 37.9. Other vulnerable persons (female applicants, mothers, LGBT etc.)**

In *Mubilanzila Mayeka and Kaniki Mitunga v Belgium*, in addition to finding a violation of Article 3 in respect of the child, the ECtHR also found a violation of the Article 3 rights of the mother. In doing so, it noted that the only action the Belgian authorities took was to inform her that her daughter had been detained and to provide her with a telephone number, under which she could be reached. The ECtHR, therefore, recognised that, as a mother, she would have suffered deep distress and anxiety as a result of her daughter's detention, and this suffering reached the level of severity required for there to be a violation of Article 3 of the ECHR.<sup>1266</sup>

In *Muskhadziyeva and Others v Belgium*, in respect of the children's mother, the ECtHR found, that as she had not been separated from her children, and their constant presence would have somewhat appeased the distress and frustration she must have felt from her inability to protect them against the conditions of detention. Any suffering or distress she would have experienced did not reach the level of severity required to constitute inhuman treatment. Similarly, in *Popov v France* the ECtHR also did not find a violation of Article 3 of the ECHR in respect of the parents.<sup>1267</sup>

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<sup>1266</sup>*Mubilanzila Mayeka and Kaniki Mitunga v Belgium* App no 13178/03 (ECtHR 12 October 2006), paras 41-71.

<sup>1267</sup>The same type of judgment as regards the mother of detained children was handed down in the case of *Kanagaratnam and Others v Belgium* App no 15297/09 (ECtHR 13 December 2011), paras 70-72.

## Section 6. Detention under the Recast Reception Directive and the ECHR: Basic Judicial Check-list 3

### Standard 1. Article 8(1)(2) and (3) of the Recast Reception Directive<sup>1268</sup>

The Reception Directive is binding as to the result to be achieved, upon each Member State, but shall leave to the national authorities the choice of form and methods.<sup>1269</sup> However, the text of Article 8(1)(2) and (3) of the Reception Directive is very similar to Article 28 of the Dublin III regulation,<sup>1270</sup> which is directly applicable legal provision.<sup>1271</sup> Furthermore, Article 8(1)(2) and (3) is basically the same as Article 15 of the Return Directive in conjunction with Article 3(7) and 7(3) of the Return Directive, which according to the interpretation of the CJEU has a direct effect.<sup>1272</sup> However, grounds for detention are to be laid down in national law<sup>1273</sup> and rules on alternatives to detention should be regulated in national law, too.<sup>1274</sup> In that regard the CJEU recalls that, *“when a directive allows the Member States discretion to define transposition measures adapted to the various situations possible, they must, when implementing those measures, not only interpret their national law in a manner consistent with the directive in question, but also ensure that they do not rely on an interpretation of the directive that would be in conflict with the fundamental rights or with the other general principles of EU law.”*<sup>1275</sup>

In the judgment in the case of J.N., where the CJEU developed an interpretation of the relevant provisions on detention of asylum seeker under the Reception Directive, the CJEU

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<sup>1268</sup>Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast) (Official Journal of the EU, L 180, 29. 6. 2013; hereinafter: the Recast Reception Directive).

<sup>1269</sup>Article 288(3) of the TFEU, Article 31 of the Recast Reception Directive.

<sup>1270</sup>Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast), Official Journal of the EU, L 180, 29. 6. 2013; hereinafter the Dublin III Regulation.

<sup>1271</sup>See standard no 1 of the Check-list no 1 (section 4 of the Statement).

<sup>1272</sup>See the first paragraph of standard no 1 of the Check-list no 2 (section 5 of the Statement).

<sup>1273</sup>Second sub-paragraph of Article 8(3) of the Recast Reception Directive.

<sup>1274</sup>Article 8(4) of the Recast Reception Directive; C-601/15 PPU, *J.N.* (Grand Chamber), EU:C:2016:8415 February 2016, para 61.

<sup>1275</sup>*Ibid.* para 60.

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confirms that “Article 8(3) of Reception Directive must be undertaken solely in the light of the fundamental rights guaranteed by the Charter”<sup>1276</sup> and that “any EU measure must be interpreted, as far as possible, in such a way as not to affect its validity and in conformity with primary law as a whole and, in particular, with the provisions of the Charter.”<sup>1277</sup>

Recital 10 of the Reception Directive states that: “With respect to the treatment of persons falling within the scope of this Directive, Member States are bound by obligations under instruments of international law, which they are party.” Taking into account Article 78 of the TFEU and recitals 3 and 15 of the Recast Reception Directive the first relevant “instrument of international law” is the 1951 Convention relating to the Status of Refugees, which in Article 31(2) regulates restrictions in movements of refugees.<sup>1278</sup>

Recital 9 of the Recast Reception Directive states that “in applying this directive, Member States should seek to ensure full compliance with the principle of the best interests of the child and family unity, in accordance with the Charter of Fundamental Rights of the EU,<sup>1279</sup> the 1989 UN Convention on the Right of the Child and the ECHR respectively.” Article 6 of the Charter corresponds to Article 5 of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter the ECHR),<sup>1280</sup> while Article 45(2) of the Charter<sup>1281</sup> may be considered in the light of Article 2(1) of Protocol 4 to the ECHR.

### Standard 2. Definition of detention

Article 31(2) of the 1951 Convention relating to the Status of Refugees uses the expression

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<sup>1276</sup>*Ibid.* para 46.

<sup>1277</sup>*Ibid.* para 48.

<sup>1278</sup>Recital 3 of the Recast Reception Directive uses the term “full and inclusive” application of the Geneva Convention Relating to the Status of Refugees, while recital 15 explicitly states that detention should be applied in accordance with Article 31 of the Geneva Convention. See also paragraph 3 in the section 3 of this Statement.

<sup>1279</sup>Charter of Fundamental Rights of the European Union [2012] OJ C 326/ 02; hereinafter the Charter.

<sup>1280</sup>In the *J.N.* case, the CJEU established that rights laid down in Article 6 of the Charter correspond to those guaranteed by Article 5 of the ECHR (C-601/15 PPU, *J.N.* (Grand Chamber) EU:C:2016:84, para 47.

<sup>1281</sup>Article 45 of the Charter states that freedom of movement and residence may be granted, in accordance with the Treaties, to nationals of third countries legally resident in the territory of a Member State.

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*“restrictions on movements of refugees”*. Unlike Dublin III Regulation, the Recast Reception Directive uses the specific terminology of *“deprivation of freedom of movement”*.<sup>1282</sup> However, the CJEU in the case of *Al Chodor* states that Articles 2(n) and 28(2) of the Dublin III Regulation provide for limitation on the exercise of the *“fundamental right to liberty”* enshrined in Article 6 of the Charter and that for the purpose of interpreting Article 6 of the Charter account must be taken of Article 5 of the ECHR as the *“minimum threshold of protection.”*<sup>1283</sup> The CJEU further adds that detention of applicants constitutes a *“serious interference”* with applicant's right to liberty.<sup>1284</sup> In the case of *J.N.*, too, the CJEU examines a validity of detention under the Recast Reception Directive in the light of the provision on the right to liberty from Article 6 of the Charter and not in the light of the right to freedom of movement from Article 45(2) of the Charter.

Despite this general position of the CJEU and Article 2(h) of the Recast Reception Directive it is worth noting that under the ECHR, a distinction between the right to liberty of movement under Article 2(1) of Protocol 4 to the ECHR and the right to liberty and security of person under Article 5 of the ECHR, leading to application of different procedural safeguards under the ECHR, can be explained by the test established by the ECtHR, which says that *“to determine whether someone has been deprived of his liberty /.../ the starting-point must be his concrete situation, and account must be taken of a whole range of criteria such as the type, duration, effects and manner of implementation of the measure in question. The difference between deprivation of and restriction upon liberty is merely one of degree or intensity, and not one of nature or substance /.../. The mere fact that it is possible for asylum seekers to leave voluntarily the country where they wish to take refuge cannot exclude a restriction on liberty /.../.”*<sup>1285</sup>

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<sup>1282</sup>*“Detention means confinement of an applicant by a Member State within a particular place, where the applicant is deprived of his or her freedom of movement”* (Article 2(h) of the Recast Reception Directive).

<sup>1283</sup>C-528/15 *Al Chodor* EU:C:2017:213, paras 36-37.

<sup>1284</sup>*Ibid.* para 40.

<sup>1285</sup>*Amuur v France* (1996) App no 19776/92 (ECtHR 25 June 1996), paras 42 and 48; See also: *Rantsev v Cyprus and Russia* App no 25965/04 (ECtHR 7 January 2010), para 314; *Stanev v Bulgaria* (Grand Chamber) App no 367/60/06 (ECtHR, 17 January 2012), para 115; *Medvedyev and Others v France* (Grand Chamber) App no 3394/03 (ECtHR 29 March 2010), para 73; *Creangă v Romania (Grand Chamber) App no 29226/03 (ECtHR 23 Feb 2012)*, para 91; *Khlaifia and others v Italy* (Grand Chamber) App no 16483/12 (ECtHR 15 December 2016), para 64.

## Section 6. Detention under the Recast Reception Directive and the ECHR: Basic Judicial Check-list 3

The notion of deprivation of liberty within the meaning of Article 5(1) of the ECHR comprises not only the *objective element* of a person's confinement in a particular restricted space for a non-negligible length of time, but also, as an additional *subjective element*, the question of whether he has validly consented to the confinement in question.<sup>1286</sup> However, the ECtHR also decided that the right to liberty is too important in a democratic society for a person to lose the benefit of protection for the single reason that he/she may have given himself/herself up to be taken into detention, especially when that person is legally incapable of consenting to, or disagreeing with, the proposed action.<sup>1287</sup> Thus, “[d]etention may violate Article 5 of the ECHR even though the person concerned has agreed to it.”<sup>1288</sup> Where the facts indicate a deprivation of liberty within Article 5(1) of the ECHR, a relatively short duration of the detention does not affect this conclusion.<sup>1289</sup> For concrete examples of deprivation of liberty or restriction of freedom of movement in the case-law of the ECtHR and the CJEU, see standard no. 2. in the Explanatory Note to Check-list 1 of this Statement.

### Standard 3. Special reception needs of vulnerable persons

In order to effectively implement the “*general principle*” from Article 21 of the Recast Reception Directive on taking into account the special situation of vulnerable persons, Member States shall assess whether the applicant is someone with special reception needs.<sup>1290</sup> Under Article 2(k) of the Recast Reception Directive applicant with special reception needs means a vulnerable person, in accordance with Article 21, who is in need of

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<sup>1286</sup>*Storck v Germany* App no 61603/00 (ECtHR 16 June 2006), para 74; *Stanev v Bulgaria (Grand Chamber)* App no 36760/06 (ECtHR 17 January 2012), para 117.

<sup>1287</sup>*H.L. v United Kingdom*, App no 45508/99 (ECtHR 5 October 2004), para 90; *Stanev v Bulgaria (Grand Chamber)* App no 36760/06 (ECtHR 17 January 2012), para 119.

<sup>1288</sup>*Kasparov v Russia* App no 53659/07 (ECtHR 11 October 2016), para 36.

<sup>1289</sup>*Ranstev v Cyprus and Russia* App no 25965/04 European Court of Human Rights, *Guide on Article 5 – Right to Liberty and Security* (Council of Europe/European Court of Human Rights, 2014), pp. 5-6/points 7, 9, 12. Since measures of the Member States on detention under the Recast Reception Directive in most cases interfere with the right to personal liberty, this check-list further refers to standards and rules in relation to Article 5 of the ECHR and Article 6 of the Charter.

<sup>1290</sup>For more on this principle, see various standards under point 33 of this Check-list.

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special guarantees in order to benefit from the rights and comply with the obligations provided for in this Directive. That assessment shall be initiated “*within a reasonable period of time*” after an application for international protection is made and may be integrated into existing national procedures, but does not need to take the form of an administrative procedure.<sup>1291</sup> However, “*reasonable period of time*” could mean as soon as possible and without delay if age assessment is at stake and asylum seeker is detained.<sup>1292</sup> Member States shall provide for appropriate monitoring of the situation of persons with special needs throughout the duration of the asylum procedure.<sup>1293</sup> Member States shall ensure that those special reception needs are also addressed, if they become apparent at a later stage in the asylum procedure.<sup>1294</sup>

### **Standard 4. Persons who can be subject to detention under Recast Reception Directive**

The Recast Reception Directive shall apply to all third-country nationals and stateless persons who make an application for international protection on the territory, including at the border, in the territorial waters or in the transit zones of a Member State, as long as they are allowed to remain on the territory as applicants, as well as to family members, of they are covered by such application for international protection according to national law.<sup>1295</sup> An applicant who “*may be detained*” under Recast Reception Directive,<sup>1296</sup> means a third-country national or a stateless person who has made an application for international

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<sup>1291</sup>Article 22(1) and (2) of the Recast Reception Directive.

<sup>1292</sup>See, for example, *Mahamed Jama v Malta* App no 10290/13 (ECtHR 26 November 2015), paras 148-150; *Aarabi v Greece* App no 39766/09, (ECtHR 2 April 2015), para 43-45.

<sup>1293</sup>The third sub-paragraph of Article 22(1) of the Recast Reception Directive.

<sup>1294</sup>The second sub-paragraph of Article 22(1) of the Recast Reception Directive. As regards the importance of early and proper examination of whether a child is accompanied or unaccompanied, see *Rahimi v Greece* App no 8687/08 (ECtHR 5 July 2011), paras 63-73. As regards an appointment of child's representative, see also standard no 12 on best interests of a child. For the example of excessive delays in the procedure for vulnerability assessment, see: *Abdi Mahamud v Malta* App no 56796/13 (ECtHR 3 May 2016), paras 132-135.

<sup>1295</sup>Article 3 of the Recast Reception Directive. See also recital 8 of the Recast Reception Directive and definition of an applicant under the 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 (O J 180/60, 29. 6. 2013, hereinafter: the Recast Procedure Directive)

<sup>1296</sup>Article 8(3) of the Recast Reception Directive.

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protection in respect of which a final decision has not yet been taken.<sup>1297</sup>

### **Standard 5. Authorities who can order a detention**

Detention of applicants shall be ordered by judicial or administrative authorities.<sup>1298</sup>

### **Standard 6. Permissible grounds for detention**

While it is not allowed to hold a person in detention for the sole reason he or she is an applicant in accordance with the Recast Procedure Directive,<sup>1299</sup> the “*exhaustive*” list of possible grounds for detention of applicants, which are “*self-standing*”, need to be interpreted as “*exceptional circumstances*,”<sup>1300</sup> is as follows:

- in order to determine or verify his or her identity or nationality (Article 8(3)(a)),
- in order to determine those elements on which the application for international protection is based which could not be obtained in the absence of detention, in particular when there is a risk of absconding of the applicant (Article 8(3)(b)),<sup>1301</sup>
- in order to decide, in the context of a procedure, on the applicant's right to enter the territory (Article 8(3)(c)),
- when her she is detained subject to the Return Directive and the Member State concerned can substantiate on the basis of objective criteria, including that he or she already had an opportunity to access the asylum procedure, that there are reasonable grounds to believe that he or she is making the application for international protection merely in order to delay

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<sup>1297</sup>Article 2(b) of the Recast Reception Directive. See also mutatis mutandis the first paragraph of standard no 4 in the Explanatory Note to Check-list 1. As regards “applicants” who may be detained in accordance with Article 28 of the Dublin III Regulation (Article 8(3)(f)), see standard no 4 in Section 4 of the Statement (Check-list no 1).

<sup>1298</sup>Article 9(2) of the Recast Reception Directive.

<sup>1299</sup>Article 8(1) and recital 15 of the Recast Reception Directive and Article 26(1) of the Recast Procedure Directive. This rule also be considered as a reflection of the right to non-discrimination from Article 21 of the Charter which prohibits any discrimination based on any ground such as sex race, colour, ethnic or social origin, genetic features, language, religion or belief, birth, political or any other opinion, membership of national minority, property, birth, disability, age or sexual orientation; within the scope of application of the Treaties and without prejudice to any of their specific provisions, any discrimination on grounds of nationality shall be prohibited, too.

<sup>1300</sup>C-601/15 (PPU) *J.N.* EU:C:2016:84, paras 52 and 59 and Recital 15 of the Recast Reception Directive.

<sup>1301</sup>For more on risk of absconding under Article 8(3)(b) of the Recast Reception Directive, see standard no 7 of this Check-list.



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or frustrate the enforcement of the return decision (Article 8(3)(d));<sup>1302</sup>

- when protection of national security or public order “so requires” (Article 8(3)(e))<sup>1303</sup>; detention based on this provision “*is subject to compliance with a series of conditions whose aim is to create a strictly circumscribed framework in which such a measure may be used;*”<sup>1304</sup> it may be decided “*in view of the requirement of necessity, if the applicant’s individual conduct represents a genuine, present and sufficiently serious threat, affecting a fundamental interest of society or the internal or external security of the Member State concerned*”;<sup>1305</sup>

- in accordance with Article 28 of the Dublin III Regulation (Article 8(3)(f)).<sup>1306</sup>

Under recital 17 of the Recast Reception Directive, the grounds for detention set out in this directive are without prejudice to other grounds for detention including detention grounds within the framework of criminal proceedings, which are applicable under national law, unrelated to the third country national's or stateless person's application for international protection.

The second sub-paragraph of Article 8(3) of the Recast Reception Directive states that the grounds for detention shall be laid down in national law.<sup>1307</sup>

As regards permissible grounds for detention from the perspective of ECHR, Article 5(1) sub-paragraphs (a) to (f) of the ECHR, too, contain an exhaustive list of permissible grounds of deprivation of liberty. Thus, no deprivation of liberty is lawful unless it falls within one of

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<sup>1302</sup>For this kind of situations under case law of the CJEU and ECtHR, see the first paragraph of standard no 4 (persons who can be subject to detention) in the Explanatory Note to Check-list 1 of the Statement.

<sup>1303</sup>C-601/15 (PPU) *J.N.* EU:C:2016:84, para 58. As regards legal notions of “national security” and “public order”, see standard no 27 of this Check-list.

<sup>1304</sup>C-601/15 (PPU) *J.N.* EU:C:2016:84, para 57.

<sup>1305</sup>*Ibid.* para 67. A competent authority must previously determine on a case-by-case basis, whether the threat presented by the person concerned to national security or public order corresponds at least to the gravity of the interference with the liberty of those persons that such measures entail (*Ibid.* para 69).

<sup>1306</sup>See standard no 6 in Section 4 of the Statement (Check-list no 1).

<sup>1307</sup>As regards the requirement of the quality of national law, see standard no 9 of this Check-list.

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those grounds.<sup>1308</sup> Only a narrow interpretation of those exceptions is consistent with the aim of that provision which enshrines a fundamental human right, namely the protection of the individual against arbitrary interference by the state with his or her right to liberty.<sup>1309</sup> Grounds for detention in the context of the Reception Directive could be based on ECHR linked either to Article 5(1)(f)<sup>1310</sup> or to Article 5(1)(b)<sup>1311</sup> of the ECHR or in case of detention when protection of national security or public order so requires under Article 5(1)(c) of the ECHR.<sup>1312</sup> However, in the case of J.N. the CJEU decided that point (e) of the first subparagraph of Article 8(3) of the Recast Reception Directive does not disregard the level of protection afforded by the second limb of Article 5(1)(f) of the ECHR, because an eventual rejection of the asylum application may open the way to the enforcement of removal orders that have already been made and have been only interrupted because of the asylum procedure.<sup>1313</sup>

### **Standard 7. Objective criteria for assessing the risk of absconding**

Risk of absconding can be related to the grounds for detention not only under Article 8(3)(b), but also under Article 8(3)(d)(e) and(f) of the Recast Reception Directive. While Article 2(n) of the Dublin III Regulation and Article 3(7) of the Return Directive explicitly regulate an obligation of the Member States to define objective criteria for a risk of absconding in national law, in case of the Recast Reception Directive comparably the very same obligation can be grounded on the second sub-paragraph of Article 8(3), which states that “*the grounds*

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<sup>1308</sup>*Saadi v United Kingdom* (Grand Chamber) App no 13229/03 (ECtHR 29 January 2008), para 43; *A and Others v United Kingdom* (Grand Chamber) App no 3455/05 (ECtHR 19 February 2009), para 163. See also standard no 18 of this Check-list.

<sup>1309</sup>*Khlaifia and others v Italy* (Grand Chamber) App no 16483/12 (ECtHR 15 December 2016), para 88.

<sup>1310</sup>The lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

<sup>1311</sup>The lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law.

<sup>1312</sup>A person may be arrested and detained on reasonable suspicion of having committed an offence or to prevent committing an offence within the meaning of Article 5(1)(c) of the ECHR (*Kasparov v Russia* App no 53659/07 (ECtHR 11 October 2016), para 54).

<sup>1313</sup>C-601/15 (PPU) *J.N.* EU:C:2016:84, paras 77-80. For more on the questions as regards possible legal grounds for detention of asylum seekers from the perspective of Article 5(1)(f) and (b), see standard no 6 in the Explanatory Note to Check-list 1 of the Statement.

*for detention shall be laid down in national law.”*<sup>1314</sup> The difference between the risk of absconding under Dublin III Regulation and the risk of absconding under the Recast Reception Directive is that in case of detention under the Recast Reception Directive the risk of absconding need not to be a “significant”.

### **Standard 8. Proof and burden of proof concerning determination of a ground for detention**

The burden of proof for determination of a ground for detention, including an eventual risk of absconding, is on the State (Articles 8(2)(3) and 9(1)(2)). For example, before ordering detention based on Article 8(3)(e) of the Recast Reception Directive the competent authority must previously determine on a case-by-case basis whether the threat that the person concerned represent to national security or public order corresponds at least to the gravity of the interference with the liberty of those persons that such measure entail.<sup>1315</sup>

According to Article 2(n) of the Dublin III Regulation, risk of absconding means the existence of legitimate reasons to “believe” that a person “may” abscond. The nature of the assessment of the risk of absconding can be compared to the nature of the assessment of real risk that an asylum seeker would be tortured or ill-treated if returned or extradited to his/her country of origin. In both those cases, any such allegation always concerns an eventuality, “*something which may or may not occur in the future. Consequently, such allegations cannot be proven in the same way as past events.*”<sup>1316</sup>

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<sup>1314</sup>For more on this, see mutatis mutandis standard no 7 in the section 4 of the Statement (Check-list no 1) and standards nos 8 and 9 of this Check-list.

<sup>1315</sup>C-601/15 (PPU) *J.N.* EU:C:2016:84, para 69.

<sup>1316</sup>*Fozil Nazarov v Russia* App no 74759/13 (ECtHR 20 April 2015), para 38. In his concurring opinion in the case of *Saadi v Italy* App no 37201/06 (ECtHR 28 February 2008), Judge Zupančič opined that “*the cognitive approach to future events may be only a rational probabilistic assessment in the spectrum of experiment which moves from abstract probability to concrete probability. The correctness of that probabilistic assessment – one might use the word prognosis – critically depends on the nature of information (not evidence!) adduced in a particular situation.*”

### **Standard 9. Control of the quality of law on detention**

Article 5(1) of the ECHR requires that any deprivation of liberty must be “lawful”; it must conform to the substantive and procedural rules of national law.<sup>1317</sup> The law must satisfy the principle of legal certainty. It must be “sufficiently accessible and precise, in order to avoid all risk of arbitrariness”<sup>1318</sup> It must also be foreseeable.<sup>1319</sup> This was reiterated by the Grand Chamber in the case of *Khlaifia and others v Italy*, in which the ECtHR stated “where deprivation of liberty is concerned it is particularly important that the general principle of legal certainty be satisfied. It is therefore essential that the conditions for deprivation of liberty under domestic law be clearly defined and that the law itself be foreseeable in its application, so that it meets the standard of lawfulness set by the ECHR, a standard which requires that all law be sufficiently precise to allow the person – if need be, with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail”.<sup>1320</sup> The standards on the quality of law relate not only to clearly regulated grounds for detention, but also to time-limits for detention or for extending detention and for the existence of a legal remedy by which the lawfulness of detention may be challenged.<sup>1321</sup>

### **Standard 10. Right to information and a personal interview before detention order is issued**

The Recast Reception Directive does not regulate specifically that an applicant has a right to information and/or to a personal interview before detention order is issued. The last sentence of recital 15 merely states that where an applicant “is held in detention” he or she should have effective access to the necessary procedural guarantees, such as judicial remedy

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<sup>1317</sup>*Amuur v France* (1996) App no 19776/92 (ECtHR, 25 June 1996), para 50; *Abdolkhani and Karimnia v Turkey* App no 30471/08 (ECtHR 22 September 2009), para 130.

<sup>1318</sup>*Amuur v France* (1996) App no 19776/92 (ECtHR, 25 June 1996), para 50.

<sup>1319</sup>*Nasrulloev v Russia* App no 656/06 11 (ECtHR October 2007), para 71; C-528/15 *Al Chodor* EU:C:2017:213, paras 38-40.

<sup>1320</sup>*Khlaifia and others v Italy* (Grand Chamber) App no 16483/12 (ECtHR 15 December 2016), para 92.

<sup>1321</sup>For further details, see standard no 9 in the Explanatory Note to Check-list 1 of the Statement.

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before a national judicial authority.<sup>1322</sup> However, as it is stated under the corresponding standard no. 10 in the Check-lists no. 1 and under standard no. 13 in the Check-list no. 2, the right to information and to a personal interview is part of the general principle of EU law to be heard or to a defence. The right to a personal interview as a general principle of EU law needs to be secured before a detention order is issued if such an interview is indispensable for the effective fulfilment of other standards such as individual assessment, consideration of less coercive alternative measures to detention and the principle of proportionality.<sup>1323</sup>

### **Standard 11. Requirement of individual assessment**

Member States may detain an applicant on the basis of an “*individual assessment of each case*”, when it proves necessary, of other less coercive alternative measures cannot be effectively applied.<sup>1324</sup> In practice, the requirement of an individual assessment means that the mere fact that, for example, the person concerned has no identity documents, which may be regulated as an objective criterion for the risk of absconding, cannot, on its own, be a ground for detention or extending detention, since any assessment must be based on an individual examination of that person's case.<sup>1325</sup>

### **Standard 12. Best interests of a child**

*“The minor's best interests, as prescribed in Article 23(2) shall be a primary consideration for Member States.”*<sup>1326</sup> Minors shall be detained “*only as a measure of last resort and after it having been established that other less coercive alternative measures cannot be applied*”

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<sup>1322</sup>For further procedural guarantees of applicants who are already held in detention, see Article 10(5) of the Recast Reception Directive. The preliminary question in the case of *J.N.* (C-601/15 (PPU) *J.N.* EU:C:2016:84) did not refer to the issue of the right to defence or to be heard before a detention order is issued.

<sup>1323</sup>For further discussion on the right to be heard and to defence in relation to detention and for the consequences of the interference in this right, see *mutatis mutandis* standard no 10 in the Explanatory Note to Check-list 1 of the Statement.

<sup>1324</sup>Article 8(2) of the Recast Reception Directive; C-601/15 (PPU) *J.N.* EU:C:2016:84, paras 52, 61; see also *mutatis mutandis*: C-528/15 *Al Chodor* EU:C:2017:213, para 34; *O.M. v. Hungary* App no 9912/15 (ECtHR 5 July 2016), para 52.

<sup>1325</sup>See *mutatis mutandis*: C-146/14 PPU *Mahdi* EU:C:2014:1320, paras 70-74.

<sup>1326</sup>Second sub-paragraph of Article 11(2) of the Recast Reception Directive.

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*effectively. Unaccompanied minors shall be detained only in exceptional circumstances. Such detention shall be for the shortest period of time and all efforts shall be made to release the detained minors and place them in accommodation suitable for minors.*<sup>1327</sup> Unaccompanied minors shall be detained “*only in exceptional circumstances*” and all efforts shall be made to release the detained unaccompanied minor “*as soon as possible*”.<sup>1328</sup>

However, in the *MA, BT, DA* case, which relates to interpretation of the Dublin III Regulation, the CJEU states that “*although express mention of the best interests of the minor is made only in the first paragraph of Article 6 of the Dublin III Regulation, the effect of Article 24(2) of the Charter,<sup>1329</sup> in conjunction with Article 51(1) of the Charter thereof, is that the child's best interests must also be a primary consideration in all decisions adopted by the Member States on the basis of the second paragraph of Article 6 of the Dublin III Regulation*”.<sup>1330</sup> This means – taking into account also the fact that the CJEU refers to Article 24(2) of the Charter as being a right and not a principle<sup>1331</sup> – the principle of the best interests of a child extends beyond the requirements of the best interests of a child, which are expressly mentioned or regulated in the Recast Reception Directive (for example, in Article 23 of the Recast Reception Directive). The best interests of the child extend to all sorts of decisions taken during the procedures carried out under the Recast Reception Directive and this includes detention. As regards unaccompanied children, the child's representative must be appointed “*as soon as possible*” and before any administrative proceedings are undertaken.<sup>1332</sup> Under the case law of the ECtHR, where children are seeking asylum their extreme vulnerability is compounded. Such double vulnerability must take precedence over child's irregular status.<sup>1333</sup> It derives both from the case-law on the detention of children<sup>1334</sup> and from other

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<sup>1327</sup>Second sub-paragraph of Article 11(2) and 11(3) of the Recast Reception Directive.

<sup>1328</sup>Articles 11(3) of the Recast Reception Directive. As regards material conditions for detention of minors see standards nos. 33.5. and 33.6 of this Check-list.

<sup>1329</sup>Article 24(2) of the Charter states that “*in all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration*”.

<sup>1330</sup>C-648/11 *MA, BT, DA* EU:C:2013:367, para 59.

<sup>1331</sup>*Ibid.* paras 57-58.

<sup>1332</sup>Article 25(1)(a) of the Recast Procedures Directive.

<sup>1333</sup>*Mubilanzila, Mayeka and Kaniki Mitunga v Belgium* App no 13178/03 (ECtHR 12 October), para 55; *Popov v France* App nos 39472/07 and 39474/07 (ECtHR 19 January 2012), para 91; *Tarakhel v Switzerland* App no 29217/12 (ECtHR 4 November 2014), para 99; *A.B. and Others v France* App no 11593/12 (ECtHR 12 July 2016), para 110.

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cases concerning children,<sup>1335</sup> and requires that in all actions relating to children an in-depth examination of the child's best interests must be undertaken prior to a decision that will impact that child's life. This includes principle of proportionality and consideration of the effectiveness of less coercive and alternative measures to detention.<sup>1336</sup>

### **Standard 13. Consideration of the effectiveness of less coercive alternative measures to detention**

Article 8(4) of the Recast Reception Directive regulates that Member States shall ensure that the rules concerning alternatives to detention, such as regular reporting to the authorities, the deposit of a financial guarantee, or an obligation to stay at an assigned place, are laid down in national law. 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 Recast Reception 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*”.<sup>1337</sup> For further issues related to consideration of the effectiveness and less coercive alternative measures to detention, see standard no. 13 and the last paragraph of standard no. 14 (proportionality and the necessity test) in the Explanatory Note to Check-list 1 of the Statement.

### **Standard 14. Principle of proportionality and the necessity test**

The necessity test in cases of restrictions of “*movements*” of refugees is part of Article 31(2) of the 1951 Convention relating to the Status of Refugees. The first sentence of the recital 15

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<sup>1334</sup>*Rahimi v Greece App no 8687/08* (ECtHR 5 July 2011), paras 51-96; *Mubilanzila, Mayeka and Kaniki Mitunga v Belgium App no 13178/03* (ECtHR 12 October), para 53; *Muskhadzhiyeva and Others v Belgium App no 41442/07* (ECtHR 19 January 2010), paras 61-62; *Popov v France, 39472/07 and 39474/07*, paras 92-103.

<sup>1335</sup>*Neulinger and Shuruk v Switzerland App no 41616/07* (6 July 2010), para 139.

<sup>1336</sup>*Popov v France*, para 119; *A.B. and Others v France App no 11593/12* (ECtHR 12 July 2016), para 110. For further discussion on the best interest of a child, see standard no 12 in the Explanatory Note to Check-list 1 of the Statement and standards nos. 33.1, 33.5. and 33.6 of this Check-list.

<sup>1337</sup>See also: C-601/15 (PPU) *J.N.* EU:C:2016:84, para 61.

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of the Recast Reception Directive states that detention under this directive should be in accordance with Article 31 of the Geneva Convention. The second sentence of this recital states that applicants may be detained only under very clearly defined exceptional circumstances laid down in this directive and subject to the principle of necessity and proportionality with regard to both to the manner and the purpose of such detention. Recital 20 of the Recast Reception Directive states that detention should be a measure of last resort and may only be applied after all non-custodial alternative measure to detention have been duly examined.<sup>1338</sup> *"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 measures cannot be applied effectively".*<sup>1339</sup> The CJEU uses the term *"strictly necessary"*<sup>1340</sup> and mentions that recitals 15 and 20 and other paragraphs of Article 8 of the Recast Reception Directive place *"significant limitations on the Member States' power to detain a person"*.<sup>1341</sup>

Under EU law Article 8(2) of the Recast Reception Directive is also an expression of the principle of proportionality from Article 52(1) of the Charter and the necessity test forms a part of that principle of proportionality. Article 52(1) of the Charter states that *"any limitations on the exercise of the rights and freedoms recognized by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union on the need to protect the rights and freedoms of others."*<sup>1342</sup> Principle of proportionality requires, according to settled case-law of the CJEU, that measures adopted by the EU institutions do not exceed the limits of what is appropriate and necessary in order to attain the legitimate objectives pursued by the

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<sup>1338</sup>See also: C-601/15 (PPU) *J.N.* EU:C:2016:84, para 63 and standard no 13 (consideration of the effectiveness and less coercive measures to detention) in the Explanatory Note to Check-list 1 of the Statement. For the relevance of alternative measures for detention from the standpoint of case-law of the ECtHR, see the last paragraph of standard no 14 on proportionality and the necessity test in the Explanatory Note to Check-list 1 of the Statement.

<sup>1339</sup>Article 8(2) of the Recast Reception Directive; C-601/15 (PPU) *J.N.* EU:C:2016:84, para 61.

<sup>1340</sup>*Ibid.* para 56.

<sup>1341</sup>*Ibid.* para 61.

<sup>1342</sup>C-601/15 (PPU) *J.N.* EU:C:2016:84, para 50.



disproportionate to the aims pursued.<sup>1343</sup>

In a case of detention under the Recast Reception Directive, the objective of the general interest recognised by the EU is to conduct effectively the procedure for international protection under the Recast Procedures Directive (Article 8(3)(a) and (b)), to conduct effectively the procedures under the Return Directive (Article 8(3)(d)), to protect national security or public order (Article 8(3)(e)) or to “*secure transfer procedures in accordance*” with the Dublin III Regulation (Article 8(3)(f)). As regards the principle of proportionality and the necessity test, the standards under the case-law of the ECtHR – if taken in conjunction with applicable EU law – are not less stringent.<sup>1344</sup>

### **Standard 15. Length of detention and due diligence requirement**

An applicant shall be detained only for as short a period as possible and shall be kept in detention only for as long as the grounds set out in Article 8(3) are applicable. Administrative procedures relevant to the grounds for detention set out in Article 8(3) shall be executed with due diligence. Delays in administrative procedures that cannot be attributed to the applicant shall not justify a continuation of detention.<sup>1345</sup> The notion of “*due diligence at least requires that Member States 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. Detention shall not exceed the time reasonably needed to complete the relevant procedures.*”<sup>1346</sup>

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<sup>1343</sup>*Ibid.* para 54.

<sup>1344</sup>For more on this, see mutatis mutandis standard no 14 on proportionality and the necessity test in the Explanatory Note to Check-list 1 of the Statement.

<sup>1345</sup>Article 9(1) of the Recast Reception Directive.

<sup>1346</sup>Recital 16 of the Recast Reception Directive; see also; C-601/15 (PPU) *J.N.* EU:C:2016:84, para 78, where the CJEU cites the judgment of the ECtHR in the case of *Nabil and Others v Hungary* (para 29). Concerning the length of detention, see also standard no 25 on the right to judicial review of the continuing detention. In regards to the length of the detention from the standpoint of the case-law of the ECtHR, see standard no 15 (on length of detention and due diligence) in the Explanatory Note to Check-list 1 of the Statement.

**Standard 16. Right to be informed “promptly” about the reasons for detention after a detention order is issued**

According to Article 9(4) of the Recast Reception Directive detained applicants “*shall be immediately*” informed – among other things – of the reasons for detention. Article 5(2) of the ECHR states that “*everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest.*” The requirement of “*prompt information*” is to be given an autonomous meaning extending beyond the realm of criminal law measures.<sup>1347</sup> The standards of “*immediate*” information under EU law and of “*prompt*” information under the case-law of the ECHR could slightly differ, because of a different obligatory content and form of the information that needs to be given to the applicants.<sup>1348</sup> Under the case-law of the ECtHR the requirement of “*promptness*” means that the “*reasons*” for detention need to be given to the applicant within a few hours of arrest.<sup>1349</sup> Where reasons were provided after 76 hours of detention,<sup>1350</sup> after 4 days of detention<sup>1351</sup> or after 10 days of detention,<sup>1352</sup> the Court found that they were not given promptly. If the applicant is incapable of receiving the information, the relevant details must be given to those persons who represent his interests such as a lawyer or a guardian.<sup>1353</sup>

**Standard 17. Right to be informed “adequately” about the reasons for detention and about procedures laid down in national law for challenging the detention order**

Based on EU secondary law, detained applicants must be informed immediately “*in writing, in a language which they understand or are reasonably supposed to understand*” not just about the reasons for detention, but also about “*the procedures laid down in national law*

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<sup>1347</sup> *Khlaifia and Others v Italy* (Grand Chamber) App no 16483/12 (ECtHR 15 December 2016), para 81.

<sup>1348</sup> See standard no 17 of this Check-list.

<sup>1349</sup> *Fox, Campbell and Hartley v United Kingdom* App no 12244/86; 12245/86; 12383/86 (ECtHR 30 August 1990), paras 41-42; *M.A. v Cyprus* App no 41872/10 (ECtHR 23 July 2013), para 228; *Kerr v United Kingdom* App no 40451/98 (ECtHR 7 December 1999).

<sup>1350</sup> *Saadi v United Kingdom* (Grand Chamber) App no 13229/03 (ECtHR 29 January 2008), paras 81-85.

<sup>1351</sup> *Shamayev and Others v Georgia and Russia* App no 36378/02 (ECtHR 12 October 2005), para 416; *Khlaifia and others v Italy* (Grand Chamber) App no 16483/12 (ECtHR 15 December 2016), para 120.

<sup>1352</sup> *Rusu v Austria* App no 34082/02 (ECtHR 2 October 2008), para 43.

<sup>1353</sup> *X. v United Kingdom* App no 7215/75 (ECtHR 5 November 1981), paras 42-43; see: European Court of Human Rights, *Guide on Article 5 – Right to Liberty and Security* (Council of Europe/European Court of Human Rights, 2014), p. 22/point 116.

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*for challenging the detention order, as well as of the possibility to request free legal assistance and representation”.*<sup>1354</sup>

As regards the manner of communicating the reasons for arrest, the ECtHR states that “any person arrested must be told in simple, non-technical language that he can understand, the essential legal and factual grounds for his arrest, so as to be able, if he sees fit, to apply to a court to challenge its lawfulness in accordance with Article 5(4) of the ECHR /.../.” This information “need[s] not be related in its entirety by the arresting officer at the very moment of arrest. Whether the content and promptness of the information conveyed were sufficient is to be assessed in each case according to its special features,”<sup>1355</sup> but the information provided must be correct.<sup>1356</sup> Information about the legal status of a migrant or about the possible removal measures that could be implemented cannot satisfy the need for information as to the legal basis for the migrant’s deprivation of liberty.<sup>1357</sup> Moreover “a bare indication of the legal basis” for the arrest, taken on its own, is insufficient for the purposes of Article 5(2) of the ECHR.<sup>1358</sup> In *M.A. v Cyprus* (para. 229), the ECtHR has accepted that (correct) information does not necessarily have to be given in writing. “In cases where detainees had not been informed of the reasons for their deprivation of liberty, the ECtHR has found that their right to appeal against their detention was deprived of all effective substance”.<sup>1359</sup>

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<sup>1354</sup>Article 9(4) of the Recast Reception Directive.

<sup>1355</sup>*Shamayev and Others v Georgia and Russia* App no 36378/02 (ECtHR 12 October 2005), para 413; *Khlaifia and others v Italy* (Grand Chamber) App no 16483/12 (ECtHR 15 December 2016), para 115.

<sup>1356</sup>*Rusu v Austria*, 34082/02, 2. 10. 2008, para 42.

<sup>1357</sup>*Khlaifia and others v Italy* (Grand Chamber) App no 16483/12 (ECtHR 15 December 2016), para 118.

<sup>1358</sup>European Court of Human Rights, *Guide on Article 5 – Right to Liberty and Security* (Council of Europe/European Court of Human Rights, 2014), p. 22/point 122; *Fox, Campbell and Hartley v United Kingdom* App no 12244/86; 12245/86; 12383/86 (ECtHR 30 August 1990), para 41; *Murray v United Kingdom* (Grand Chamber) App no 14310/88 (ECtHR 28 October 1994), para 76, *Kortesis v Greece* App no 60593/10 (ECtHR 12 June 2012), paras 61-62.

<sup>1359</sup>*Khlaifia and others v Italy* (Grand Chamber) App no 16483/12 (ECtHR 15 December 2016), para 132. For some examples of incorrect information about the reasons for detention, see standard no 17 in the Explanatory Note to Check-list 1 of the Statement.

**Standard 18. Written decision on detention (or its extension)<sup>1360</sup> must be delivered to the applicant/legal representative and must contain reasons closely connected to the grounds of detention**

Detention of applicants shall be ordered in writing. The detention order shall state the reasons in fact and in law on which it is based.<sup>1361</sup> Similarly, under ECHR de facto detention must be “*incarnated by a formal decision of legal relevance, complete with reasoning.*”<sup>1362</sup> If the express – or even underlying – reason for detention is other than to prevent the detainee from effecting an unauthorised entry or to secure the fulfilment of any obligation prescribed by law, it cannot be justified under Article 5(1)(f)<sup>1363</sup> or Article 5(1)(b) of the ECHR. The detention will be arbitrary where there has been bad faith or deception.<sup>1364</sup>

**Standard 19. The obligation to keep records on detention cases**

A special requirement of Article 5(1) of the ECHR is the obligation to keep records of matters of detention. The ECtHR considers that the unacknowledged detention of an individual is a complete negation of the fundamentally important guarantees contained in Article 5 of the ECHR and discloses the gravest violation of that provision.<sup>1365</sup> The absence of a record of such information as the date, time and location of detention, the name of the detainee, the reasons for detention and the name of the person effecting it must be seen as incompatible, *inter alia*, with the very purpose of Article 5 of the ECHR.<sup>1366</sup>

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<sup>1360</sup>“Detention and extension of detention are similar in nature since both deprive the third-country national concerned of his liberty”/.../ (C-146/14 PPU *Mahdi* EU:C:2014:1320, para 44).

<sup>1361</sup>Article 9(2) of the Recast Reception Directive; C-601/15 (PPU) *J.N.* EU:C:2016:84, para 62. The obligation of the administration to give reasons for its decisions is a general principle of EU law (see: Article 41(2)(c) of the Charter); see also *mutatis mutandis* C-146/14 PPU *Mahdi* EU:C:2014:1320, paras 44, 52.

<sup>1362</sup>*Ilias and Ahmed v Hungary* App no 47287/15 (ECtHR 14 March 2017), para 67.

<sup>1363</sup>See *mutatis mutandis*: *Bozano v France* App no 9990/82 (ECtHR 18 December 1986), para 60, *Čonka v Belgium* App no 51564/99 (ECtHR 5 February 2002), para 42; *Khodorkovskiy v Russia* App no 5829/04 (ECtHR 31 May 2011), para 142, *Azimov v Russia* App no 67474/11 (ECtHR 18 April 2013), para 164.

<sup>1364</sup>*Bozano v France* App no 9990/82 (ECtHR 18 December 1986), para 55; *Čonka v Belgium* App no 51564/99 (ECtHR 5 February 2002), para 42.

<sup>1365</sup>*El-Masri v the Former Yugoslav Republic of Macedonia* (Grand Chamber) App no 39630/09 (ECtHR 13 December 2012), para 233; *Kurt v Turkey* App no 15/1997/799/1002 (ECtHR 25 May 1998), para 125.

<sup>1366</sup>*Kasparov v Russia* App no 53659/07 (ECtHR 11 October 2016), para 55.

### **Standard 20. Right to free legal assistance and representation**

*“In cases of a judicial review of the detention order provided for in paragraph 3, Member States shall ensure that applicants have access to free legal assistance and representation. This shall include, at least, the preparation of the required procedural documents and participation in the hearing before the judicial authorities on behalf of the applicant. Free legal assistance and representation shall be provided by suitably qualified persons as admitted or permitted under national law whose interests do not conflict or could not potentially conflict with those of the applicant.”*<sup>1367</sup> Procedures for access to legal assistance and representation shall be laid down in national law.<sup>1368</sup> These are mandatory provisions of EU law. The second sentence of Article 47(2) of the Charter states that *“everyone shall have the possibility of being advised, defended and represented.”* Article 47(3) of the Charter states that *“legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice”*. Article 9(7) of the Recast Reception Directive is a non-mandatory provision and sets possible conditions or modalities that Member States may regulate regarding the right to free legal assistance and representation.

From the standpoint of the case-law of the ECtHR, the ECHR *“is intended to guarantee rights that are not theoretical or illusory, but practical and effective.”*<sup>1369</sup> In the case of *Čonka*, the ECtHR held that the accessibility of a remedy implies, *inter alia*, that the circumstances voluntarily created by the authorities must be such as to afford applicants a realistic possibility of using the remedy.<sup>1370</sup> In the context of detention proceedings, the ECtHR has held that the authorities are not obliged to provide free legal aid.<sup>1371</sup> However, if the absence of legal aid raises concerns about the accessibility of a remedy, an issue may arise

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<sup>1367</sup>Article 9(6) of the Recast Reception Directive.

<sup>1368</sup>Article 9(10) of the Recast Reception Directive.

<sup>1369</sup>*Čonka v Belgium* App no 51564/99 (ECtHR 5 February 2002), para 46.

<sup>1370</sup>*Ibid.* para 46.

<sup>1371</sup>*Lebedev v Russia*, App no 4493/04 (ECtHR 25 October 2007), para 84; *Susa Musa v Malta* App 42337/12 (23 July 2013), para 61.

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under Article 5(4) of the ECHR<sup>1372</sup> (for example, when legal representation is required in the domestic context) or under Article 13 in conjunction with Article 3 of the ECHR.<sup>1373</sup>

### **Standard 21. Other aspects of the practical and effective right to judicial review**

Apart from the issues of free legal aid and representation,<sup>1374</sup> there may be certain other aspects of effective access to a court relevant in detention cases. The following guidance may be gleaned from the case-law of the ECtHR regarding general standards for practical and effective access to a court in civil disputes. The right of access to a court must be “*practical and effective*”.<sup>1375</sup> For the right of access to be effective, an individual must “*have a clear, practical opportunity to challenge an act that is an interference with his rights*”.<sup>1376</sup> The rules governing the formal steps to be taken and the time-limits to be complied with in lodging an appeal or an application for judicial review are aimed at ensuring a proper administration of justice and compliance, in particular, with the principle of legal certainty.<sup>1377</sup> The rules in question, or their application, should not prevent litigants from using an available remedy.<sup>1378</sup> The practical and effective nature of this right may be impaired by the prohibitive cost of the proceedings in view of the individual's financial capacity,<sup>1379</sup> by issues relating to time-limits,<sup>1380</sup> and by the existence of procedural bars

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<sup>1372</sup>*Ibid.* para 61; *Abdolkhani and Karimnia v Turkey* App no 30471/08 (ECtHR 22 September 2009), para 141.

For further standards as regards free legal aid under EU law and the ECHR, see *mutatis mutandis* standard no 20 in the Explanatory Note to Check-list 1 of the Statement.

<sup>1373</sup>See, for example: *Alimov v Turkey* App no 14344/13 (ECtHR 6 September 2016), paras 66-67.

<sup>1374</sup>For the examples of *L.M. And Others v Russia* App nos 40081/14, 40088/14 and 40127/14 (ECtHR 10 October 2015) and *I. M. v France* App no 9152/09 (ECtHR 2 May 2012), see standard no 21 in the Explanatory Note to Check-list 1 of the Statement.

<sup>1375</sup>*Bellet v France* App no 23805/94 (4 December 1995), para 38.

<sup>1376</sup>*Ibid.* para 36. See also: *Stoichkov v Bulgaria* App no 9808/02 (ECtHR 24 March 2005), para 66; *Vachev v Bulgaria* App no 42987/98 (ECtHR 8 July 2004), para 71; *Ismoilov and others v Russia*, App no 2947/06 (ECtHR 24 April 2008, para 145; *Nunes Dias v Portugal* App nos 69829/01; 2672/03 (ECtHR 10 March 2003).

<sup>1377</sup>*Cañete de Goñi v Spain* App no 55782/00 (ECtHR 15 October 2002), para 36.

<sup>1378</sup>*Miragall Escolano and Others v Spain* App nos. 38366/97, 38688/97, 40777/98, 40843/98, 41015/98, 41400/98, 41446/98, 41484/98, 41487/98 and 41509/98 (ECtHR 25 January 2000); *Zvolisky and Zvoliska v Czech Republic*, App no 46129/99 (ECtHR 12 November 2002), para 51.

<sup>1379</sup>*Ait-Mouhoub v France* App no 22924/93 (ECtHR 28 October 1998), paras 57-58; *Garcia Manibardo v Spain*, App no 38695/97 (ECtHR 15 February 2000), paras 38-45; *Kreuz v Poland (no1)*, App no 28249/95 (ECtHR 19

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preventing or limiting the possibilities of applying to a court.<sup>1381</sup> The right of access to a court is not absolute, but may be subject to limitations permitted by implication.<sup>1382</sup> The limitations applied must not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired. The limitation must pursue a legitimate aim and there must be a reasonable relationship of proportionality between the means employed and the aim sought to be achieved.<sup>1383</sup>

### **Standard 22. Automatic judicial review or detainee's right to initiate judicial review of the lawfulness of detention (including conditions of detention)<sup>1384</sup>**

Under secondary EU law, a judicial review of the lawfulness of detention (including conditions of detention) may be provided *ex officio* from the beginning of detention or/and at the request of the applicant after the launch of the relevant proceedings.<sup>1385</sup> However, according to Article 5(4) of the ECHR, everyone who is deprived of his/her liberty by arrest or detention “*shall be entitled to take proceedings*” by which the lawfulness of his/her detention shall be decided.<sup>1386</sup> A difference between EU law and the ECHR could imply that the ECtHR may find a breach of Article 5(4) of the ECHR, because proceedings could only be

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June 2001), paras 60-67; *Podbielski and PPU PolPure v Poland* App no 39199/98 (ECtHR 26 July 2005), paras 65-66; *Weissman and others v Romania* App no 63945/00 (ECtHR 24 May 2006), para 42.

<sup>1380</sup>*Melnyk v Ukraine* App no 23436/03 (28 February 2006), para 26; *Yagtzilar and Others v Greece* App no 41727/98 (6 December 2001), para 27.

<sup>1381</sup>*Perez de Rada Cavanilles v Spain* App no 28090/95 (ECtHR 28 October 1998), para 49; *Miragall Escolano And Others v Spain* App no 38366/97 (ECtHR 25 January 2000), para 38; *Sotiris and Nikos Koutras Attee v Greece*, App no 39442/98 (ECtHR 16 February 2001), para 20; *Beles and Others v Czech Republic* App no 47273/99 (ECtHR 12 November 2002), para 50; *RTBF v Belgium* App no 50084/06 (ECtHR 29 March 2011), paras 71, 72, 74; *Annoni di Gussola and Others v France* App no 31819/96, 33293/96 (ECtHR 14 November 2000), para 56; *The Holy Monasteries v Greece* App nos 13092/87, 13984/88 (ECtHR 9 December 1994), para 83; *Philis v Greece* App nos 12750/87, 13780/88, 14003/88 (ECtHR 27 August 1981), para 65.

<sup>1382</sup>*Golder v United Kingdom* App no 4451/70 (ECtHR 21 February 1975), para 38; *Stanev v Bulgaria (Grand Chamber)* App no 36760/06 (ECtHR 17 January 2012), para 230.

<sup>1383</sup>*Ashingdane v United Kingdom* App no 8225/78 (ECtHR 28 May 1985), para 57; *Fayed v United Kingdom* App no 17101/90 (ECtHR 21 September 1994), para 65; *Markovic and Others v Italy* App no 1398/03 (ECtHR 14 December 2006), para 99. For more details about these aspects of effective and practical right to access to a court, see standard no 22 in the Explanatory Note to Check-list 1 of the Statement) and the European Court of Human Rights Guide on Article 6, Right to fair trial (civil limb) (Council of Europe/European Court of Human Rights, 2013), p. 15.

<sup>1384</sup>As regards conditions of detention, see standard no 33 of this Check-list.

<sup>1385</sup>Article 9(3) of the Recast Reception Directive. See also Article 26(2) of the Recast Procedures Directive, which imposes an obligation to the Member States to ensure a possibility to speedy judicial review.

<sup>1386</sup>This option should not be merely hypothetical; see, for example: *Abdi Mahamud, v Malta* App no 56796/13 (ECtHR 3 May 2016), para 53.

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initiated *ex officio*, for example by the prosecutor, meaning that the applicant himself had no right to bring proceedings.<sup>1387</sup> Article 5(4) is the *lex specialis* which cannot be bypassed by relying on the right to an effective remedy under Article 13 ECHR read together with Article 5. However, where the complaint concerns the conditions of detention, Article 13 can be invoked together with Article 3. However, even if the ECtHR does not find a violation of Article 3 of the ECHR, it may find a violation of Article 13 taken together with Article 3 of the ECHR.<sup>1388</sup>

While the ECtHR has generally held that Article 5(4) can only be invoked while the person remains in detention, which means that that Article 5(4) had no application for the purpose “of obtaining, after release, a declaration that a previous detention or arrest was unlawful,”<sup>1389</sup> Article 3 complaints can be invoked anytime. Nevertheless, Article 5(4) complaint might be admissible if lodged while the applicant is still in detention, even if he/she is subsequently released, if the applicant did not have an effective remedy to challenge the lawfulness of his/her detention during the time he/she was detained; likewise, the ECtHR has recognised that a complaint concerning the “speediness” of the review can be raised even after the person has been released.<sup>1390</sup> Furthermore, complaints under Article 3 of the ECHR may be raised not just based on Article 5(4) of the ECHR, but also based on Article 13 of the ECHR.<sup>1391</sup>

A difference between EU law, which regulates alternatively automatic judicial review and detainee’s right to initiate judicial review, and the ECHR, which guarantees the right to initiate judicial review, could imply that the ECtHR may find a breach of Article 5(4) of the

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<sup>1387</sup>*Nasrulloev v Russia* App no 656/06 (ECtHR 11 October 2007), paras 88-90. For some further examples of automatic review under the case-law of the ECtHR (including of persons of unsound mind), see standard no 22 in the Explanatory Note to Check-list 1 of the Statement.

<sup>1388</sup>See, for example: *Ilias and Ahmed v Hungary* App no 47287/15 (ECtHR 14 March 2017), paras 98-101.

<sup>1389</sup>*Stephens v Malta (no 1)* App no 11956/07 (ECtHR 21 April 2009), para 102; *Fox, Campbell and Hartley v United Kingdom* App nos 12244/86; 12245/86; 12383/86 (ECtHR 30 August 1990), para 45; *Slivenko v Latvia* App no 48321/99 (ECtHR 9 October 2003), para 155; *X v Sweden* App no 10230/82 (ECtHR 11 May 1983); *Richmond Yaw and Others v Italy* App nos 3342/11, 3391/11, 3408/11, 3447/11 (ECtHR 6 October 2016), para 82.

<sup>1390</sup>*Abdullahi Elmi and Aweys Abubakar v Malta* App 25794/13 and 28151/13 (ECtHR 22 November 2016), paras 117-119.

<sup>1391</sup>*Khlaifia and Others v Italy* (Grand Chamber) App no 16483/12 (ECtHR 15 December 2016), para 267.



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ECHR where proceedings could only be initiated *ex officio*, for example, by the prosecutor, meaning that the applicant had no right to bring proceedings.<sup>1392</sup>

At the same time, the requirement deriving from the ECtHR case law that the detainee be “entitled to take proceedings” suggests that there is no requirement for automatic review, even where the detainee may find it difficult to initiate proceedings (for example, where there are language difficulties or he/she is not represented).<sup>1393</sup> As regards distinction between judicial protection concerning lawfulness of detention and judicial protection concerning compensation in the case of unlawful detention see standard no. 31 of this Check-list.

### **Standard 23. Right to judicial review before an “independent and impartial tribunal/court established by law”**

Article 9(3) of the Recast Reception Directive and Article 26(2) of the Recast Procedures Directive do not define the concrete character of the institution which must provide a “judicial review”. A logical conclusion might be that “judicial” review may only be provided by a judicial authority. Article 9(3) of the Recast Reception Directive taken in conjunction with Article 47(1) and (2) of the Charter provide a guarantee that the “judicial review” on detention is provided by an “*independent and impartial tribunal.*”<sup>1394</sup> Furthermore, Article 6 of the Charter corresponds to Article 5(4) of the ECHR (a *lex specialis* to Article 13 of the ECHR), which gives a right to take proceedings by which the lawfulness of detention will be decided by a “*court.*” The CJEU has already stated: “*limitations which may legitimately be imposed on the exercise of the rights laid down in Article 6 of the Charter may not exceed those permitted by the ECHR.*”<sup>1395</sup> In the case of H.I.D. the CJEU has put that “*the first*

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<sup>1392</sup>For some further examples of automatic review under the case-law of the ECtHR (including of persons of unsound mind), see standard no 22 in the Explanatory Note to Check-list 1 of the Statement.

<sup>1393</sup>See: *J.N. v United Kingdom* App no 37289/12 (ECtHR 19 May 2016).

<sup>1394</sup>“*Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in a compliance with the conditions laid down in this Article*” (Article 47(1) of the Charter). “*Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law*” (first sentence of Article 47(2) of the Charter).

<sup>1395</sup>C-601/15 (PPU) *J.N.* EU:C:2016:84, para 47.

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*sentence of recital 27 in the preamble to the Procedures Directive 2005/85 states that, in accordance with a fundamental principle of European Union law, the decisions taken in relation to an application for asylum and the withdrawal of refugee status must be subject to an effective remedy before a court or tribunal within the meaning of Article 267 TFEU.*<sup>1396</sup>

Based on this starting point, the CJEU then developed standards on independence of courts or tribunals with a reference to the settled case-law of the CJEU in relation to the question whether a “*body making a reference is a court or tribunal for the purposes of Article 267 TFEU.*”<sup>1397</sup> In respect of determination of courts or tribunals, unlike the recital 27 in the preamble of the Procedures Directive 2005/85, the recital 15 in the preamble of the Recast Procedures Directive no longer refers to Article 267 of the TFEU. Since the standards on the notions of “*tribunal/court*”, “*established by law*”, “*independence and impartiality*” in the case-law of the CJEU in the field of rights of asylum-seekers are limited to the interpretation provided by the preliminary ruling in the *H.I.D.* case, additional guidance for the interpretation of these standards may be found in the case-law of the ECtHR.<sup>1398</sup>

### **Standard 24. Right to “speedy” judicial review of the lawfulness of detention**

Under the provisions of Article 9(3) of the Recast Reception Directive and Article 26(2) of the Recast Procedures Directive, according to which administrative authorities order detention, Member States shall provide for a speedy judicial review of the lawfulness of detention. Under the Recast Reception Directive, a judicial review of the lawfulness of detention may be provided as speedily as possible *ex-officio* from the beginning of detention or/and as speedily as possible at the request of the applicant after the launch of the relevant proceedings. A Member State has an obligation to define in national law the period within which the judicial review (*ex-officio* and/or at the request of the applicant) shall be conducted.<sup>1399</sup>

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<sup>1396</sup>C-175/11 H.I.D EU:C:2013:45, para 81.

<sup>1397</sup>*Ibid.* para 83.

<sup>1398</sup>For the concrete standards on “independence” and “impartiality” of courts “established by law” that are developed by the CJEU in the case of H.I.D. and by the ECtHR, see *mutatis mutandis* standard no 23 in the Explanatory Note to Check-list 1 of the Statement.

<sup>1399</sup>Article 9(3) of the Recast Reception Directive.

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Under the standards of the ECHR, “*speediness*” is in itself a virtue to be protected regardless of the outcome of the proceedings in question.<sup>1400</sup> As a starting point, the ECtHR has taken the moment when the application for release was made/proceedings were instituted. The relevant period comes to an end with the final determination of the legality of the applicant’s detention, including any appeal.<sup>1401</sup> If an administrative remedy has to be exhausted before recourse can be taken to a court, time starts running when the administrative authority is seized of the matter.<sup>1402</sup> If the proceedings have been conducted over two levels of jurisdiction, an overall assessment of the speediness of judicial review must be made in order to determine whether the requirement of speediness has been complied with.<sup>1403</sup> 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). The question whether a right to the speedy decision has been respected must be determined in light of the circumstances of an individual case.<sup>1404</sup> 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.<sup>1405</sup> 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 is not to be addressed in the abstract but in the context of a general assessment of the information, taking into account the circumstances of the case, particularly in the light of the complexity of the case, any specificities of the domestic procedure and the applicant’s behaviour in the course of the proceedings*”.<sup>1406</sup>

Thus, the ECtHR in its case-law decided that where an individual's personal liberty is at stake,

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<sup>1400</sup>*Doherty v United Kingdom App no 76874/11 (18 February 2016)*, para 80.

<sup>1401</sup>*Sanchez-Reisse v Switzerland App no 9862/82 (ECtHR 21 October 1986)*, para 54; *E. v Norway App no 11701/85 (ECtHR 29 August 1990)*, para 64.

<sup>1402</sup>*Sanchez-Reisse v Switzerland App no 9862/82 (ECtHR 21 October 1986)*, para 54.

<sup>1403</sup>*Hutchison Reid v United Kingdom App no 50272/99 (ECtHR 20 Feb 2003)*, para 78; *Navarra v France App no 13190/87 (ECtHR 23 November 1993)*, para 28; European Court of Human Rights, *Guide on Article 5 – Right to Liberty and Security* (Council of Europe/European Court of Human Rights, 2014), p. 33/points 211-213.

<sup>1404</sup>*Karimov v Russia App no 54219/08 (ECtHR 29 July 2010)*, para 123; *Rehbock v Slovenia App no 29462/95 (ECtHR 28 November 2000)*, para 84.

<sup>1405</sup>*Karimov v Russia App no 54219/08 (ECtHR 29 July 2010)* paras 125-126.

<sup>1406</sup>*Khlaifia and others v Italy (Grand Chamber) App no 16483/12 (ECtHR 15 December 2016)*, para 131.

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the ECtHR has very strict standards concerning the State's compliance with the requirement of a speedy review of the lawfulness of detention. In the cases of *Kadem v Malta* (paras. 44-45) and *Rehbock v Slovenia* (paras. 82-86), the ECtHR considered periods of seventeen (17) and twenty-six (26) days excessive for deciding on the lawfulness of the applicant's detention. In *Mamedova v Russia* (para. 96), the length of appeal proceedings lasting, *inter alia*, twenty-six days (26), was found to be in breach of the speediness requirement.<sup>1407</sup> In *Karimov v Russia*, the ECtHR established that delays of thirteen (13) to twenty (20) days in examining the appeals against detention order may be incompatible with the "speediness" requirement of Article 5(4) of the ECHR.<sup>1408</sup> It is thus for a State to organise its judicial system in such a way as to enable the courts to comply with the requirements of Article 5(4) of the ECHR.<sup>1409</sup> Neither an excessive workload nor a vacation period can justify a period of inactivity on the part of the judicial authorities.<sup>1410</sup>

### **Standard 25. Right to judicial review of the continuing detention**

*"Detention shall be reviewed by a judicial authority at reasonable intervals of time, ex-officio and /or at the request of the applicant concerned, in particular whenever it is of a prolonged duration, relevant circumstances arise or new information becomes available which may affect the lawfulness of detention."*<sup>1411</sup> Also from the standpoint of ECHR, it is not sufficient that the lawfulness of detention is determined at the time of an arrest. There must be a possibility of subsequent review to ensure that the continuing detention does not become unlawful or arbitrary. For example, in *Kim v Russia* (para. 42), the ECtHR expressly recognised that during a long period of detention new factors may come to light which impact on the lawfulness of detention, and the detained person should have the possibility of bringing new proceedings before a court which has jurisdiction to consider the complaint "*speedily*".

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<sup>1407</sup>*Aden Ahmed v Malta* App no 55352/12 (ECtHR 23 June 2013), para 115.

<sup>1408</sup>*Karimov v Russia* App no 54219/08 (ECtHR 29 July 2010), para 127.

<sup>1409</sup>*Ibid.* para 123.

<sup>1410</sup>*E. v Norway* App no 11701/85 (ECtHR 29 August 1990), para 66; *Bezicheri v Italy* App no 11400/85 (ECtHR 25 October 1989), para 25. For further examples of decisions as regards speediness of judicial review, see standard no 24 in the Explanatory Note to Check-list 1 of the Statement.

<sup>1411</sup>Article 9(5) of the Recast Reception Directive. See *mutatis mutandis* standard no 29 on the right to judicial review of the continuing detention or its extension in case of detention under the Return Directive (Section 5 of the Statement).

### **Standard 26. The scope and intensity of judicial review including procedural guarantees**

The Recast Reception Directive does not regulate specifically the scope or intensity of the judicial review of a detention order. The relevant standards should, therefore, be derived from the general principle of effectiveness of legal remedies under EU law<sup>1412</sup> in conjunction with Article 47(1) of the Charter. Furthermore, in this respect, the CJEU's interpretation of the right to an effective legal remedy in cases of the extension of detention under the Return Directive and the case-law of the ECtHR under Article 5(1)(f) and 5(4) of the ECHR concerning expulsion of irregular migrants, are relevant, too. Thus, based on the standards developed in the *Mahdi* case, a judicial authority must be able to rule on all relevant matters of fact and of law in order to determine whether a detention is justified. This requires an in-depth examination of the matters of fact specific to each individual case. Where detention is no longer justified, the judicial authority must be able to substitute its own decision for that of the administrative authority and to make a decision on whether to order an alternative measure or to release the third country national concerned. To that end, the judicial authority must be able to take into account both the facts stated and the evidence adduced by the administrative authority and any observations that may be submitted by a third-country national. Furthermore, a judicial authority must be able to consider any other elements that are relevant for its decision should it so deem necessary. Accordingly, the powers of the judicial authority in the context of an examination can under no circumstances be confined only to the matters adduced by the administrative authority concerned. Any other interpretation would result in an ineffective examination by the judicial authority and would thereby jeopardize the achievement of the objectives pursued.<sup>1413</sup> The reviewing court must have jurisdiction to decide on whether or not deprivation of liberty has become unlawful in the light of new factors, which have emerged

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<sup>1412</sup>For more on this, see mutatis mutandis standard no 26 in the Explanatory Note to Check-list 1 of this Statement.

<sup>1413</sup>C-146/14 PPU *Mahdi* EU:C:2014:1320, paras 62-64.

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subsequently to the initial decision depriving a person of his/her liberty.<sup>1414</sup>

Under the case-law of the ECtHR, the scope and intensity of judicial review on detention is explained in a slightly different way as this is decided by the CJEU in the case of Mahdi. *“Article 5(4) of the ECHR does not guarantee a right to judicial review of such a scope as to empower the court, on all aspects of the case including questions of pure expediency, to substitute its own discretion for that of the decision-making authority. The review should, however, be wide enough to bear on those conditions, which are essential for the lawful detention of a person according to Article 5(1) of the ECHR. The reviewing court must not have merely advisory functions but must have the competence to decide the lawfulness of the detention and to order release if the detention is unlawful. The requirement of procedural fairness under Article 5(4) does not impose a uniform, unvarying standard to be applied irrespective of the context, facts and circumstances. Although it is not always necessary that an Article 5(4) procedure be attended by the same guarantees as those required under Article 6 for criminal or civil litigation, it must have a judicial character and provide guarantees appropriate to the type of deprivation of liberty in question. Thus, the procedure must be adversarial and must always ensure equality of arms between the parties. An oral hearing may be necessary, for example in cases of detention on remand.”*<sup>1415</sup>

Equality of arms is not ensured if the applicant, or his/her counsel, is denied access to those investigation file documents which are essential in order to challenge effectively the lawfulness of his/her detention.<sup>1416</sup> It may also be essential that the individual concerned not only has the opportunity to be heard in person but that he/she also has the effective assistance of his/her lawyer.<sup>1417</sup> 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

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<sup>1414</sup>*Azimov v Russia* App no 67474/11 (ECtHR 18 April 2013), paras 151-152; Article 9(5) of the Recast Reception Directive.

<sup>1415</sup>*A and Others v United Kingdom* (Grand Chamber) App no 3455/05 (ECtHR 19 February 2009), para 204; *Reinprecht v Austria* App 67175/01 (ECtHR 15 November 2005), para 31; see also: *Khlaifia and others v Italy* (Grand Chamber) App no 16483/12 (ECtHR 15 December 2016), para 128.

<sup>1416</sup>*Ovsjannikov v Estonia* App no 1346/12 (ECtHR 20 February 2014), para 72; *Fodale v Italy* App no 70148/01 (1 June 2006), para 41; *Korneykova v Ukraine* App no 56660/12 (ECtHR 24 March 2016), para 68.

<sup>1417</sup>*Cernák v Slovakia* App no 36997/08 (ECtHR 17 December 2013), para 78.

intervals.<sup>1418</sup>

### **Standard 27. Restrictions on the right to a defence and/or equality of arms based on national (public) security, public policy or public order**

If in a given case a Government ascertains the existence of a risk to national security either in relation to Article 8(3)(e) or in relation to any other ground for detention under Article 8(3) of the Recast Reception Directive, because a person had been, for example, concerned in the commission, preparation or instigation of acts of international terrorism and were members of, belong to, or had links with an international terrorist group, then certain limitations as regards standards of equality of arms and/or the right to a defence, such as restricted access to a court file, may be imposed.<sup>1419</sup> The right to have access to a court file (as being part of the right from Article 5(4) of the ECHR or Article 47(1) and (2) of the Charter in conjunction with Article 9(3) of the Recast Reception Directive) may be restricted for reason of national security and public order in accordance with principle of proportionality under Article 52(1) of the Charter.<sup>1420</sup>

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<sup>1418</sup>*Çatal v Turkey* App no 26808/08 (ECtHR 17 March 2012), para 33; *Altınok v Turkey* App no 31610/08 (ECtHR 29 November 2011), para 46.

<sup>1419</sup>See circumstances of national security concerns in the case of *A and Others v United Kingdom* (Grand Chamber) App no 3455/05 (ECtHR 19 February 2009), para 166. The recital 37 of the Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) (Official Journal of the EU, L 337, 20. 12. 2011) states that the notion of national security and public order also covers cases in which a third-country national belongs to an association which supports international terrorism or supports such an association.

<sup>1420</sup>See *mutatis mutandis*: C-300/11 ZZ EU:C:2013:363, para 50-51; *J.N. v United Kingdom* App no 37289/12 (ECtHR 19 May 2016), para 50; C-402/05 P and C-415/05 *Kadi and Al Barakaat* (Grand Chamber) EU:C:2008:461. For further comparison, see approach of the CJEU concerning the risk of “public policy” in the case of C-554/13 *Z.Zh. and O* EU:C:2015:377 paras 48, 50, 56, 60, 65) and standard no 27 in the Explanatory Note to Check-list 1 of the Statement. In the case *J.N.* the CJEU states that strict circumscription of the power of the competent national authorities to detain an applicant on the basis of Article 8(3)(e) of the Recast Reception Directive is also ensured by the interpretation which the case-law of the CJEU gives to the concepts of “national security” and “public order” found in other directives and which applies in the case of Recast Reception Directive (C-601/15 PPU, *J.N.*, 15 February 2016, para 64).

### **Standard 28. Right to be released immediately in cases of unlawful detention**

The second sub-paragraph of Article 9 of the Recast Reception Directive states that “*where, as a result of the judicial review, detention is held to be unlawful, the applicant concerned shall be released immediately.*” However, not every irregularity in the exercise of the rights for the defence in an administrative procedure will constitute an infringement of those rights, and therefore, not every such breach will automatically require the release of the person concerned.<sup>1421</sup>

Similarly, Article 5(4) of the ECHR states that for “*everyone who is deprived of his liberty /.../ the “lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.”* The Grand Chamber of the ECtHR in *Stanev v Bulgaria* states that “*the reviewing court must not have merely advisory functions but must have the competence to decide the lawfulness of the detention and to order release if the detention is unlawful*” (see *Ireland v the United Kingdom*, 18 January 1978, § 200, Series A no. 25; *Weeks v the United Kingdom*, 2 March 1987, § 61, Series A no. 114; *Chahal v the United Kingdom*, 15 November 1996, § 130, Reports of Judgments and Decisions 1996-V; and *A. and Others v the United Kingdom* [GC], no. 3455/05, § 202, ECHR 2009).<sup>1422</sup> The court must have the power to order release if it finds that the detention is unlawful, because a mere power of recommendation is insufficient.<sup>1423</sup> It is inconceivable that in a State subject to the rule of law a person should continue to be deprived of his liberty despite the existence of a court order for his release.<sup>1424</sup> Therefore, while the ECtHR recognises that some delay in carrying out a decision to release a detainee is understandable and often inevitable, the national

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<sup>1421</sup>C-383/13 PPU, M.G., N.R. EU:C:2013:533, para 39.

<sup>1422</sup>*Stanev v Bulgaria (Grand Chamber)* App no 36760/06 (ECtHR 17 January 2012), para 168; see also: *Amie v Bulgaria* App no 58149/08 (ECtHR 12 February 2013), para 80; *A and Others v United Kingdom (Grand Chamber)* App no 3455/05 (ECtHR 19 February 2009), para 202; *Khlaifia and others v Italy (Grand Chamber)* App no 16483/12 (ECtHR 15 December 2016), para 131.

<sup>1423</sup>*Benjamin and Wilson v United Kingdom* App no 28212/95 (26 September 2002), paras 33-34. In case the ECtHR finds a violation of Article 5 of the ECHR, it may decide in the operative part of the judgment that the respondent State must ensure immediate release of applicants from detention (see, for example *L.M. And Others v Russia* App nos 40081/14, 40088/14 and 40127/14 (ECtHR 10 October 2015), point 9 of the operative part of the judgment, para 169 and the last paragraph of section 3.5. of the ELI Statement).

<sup>1424</sup>*Assanidze v Georgia (Grand Chamber)* App no 71503/01 (ECtHR 8 April 2004), para 173.



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authorities must attempt to keep it to a minimum.<sup>1425</sup> This rule needs to be applied in conjunction with standards on the right to speedy judicial review.<sup>1426</sup> If a judgment of the first instance court on unlawfulness of detention with a judicial order to release a detainee is not final due to the possibility of the administrative authority appealing against the judgment of the first instance court to the appellate court, then it is highly probable that standards of immediate release and speedy judicial review cannot be guaranteed, unless the first instance court issues an effective interim measure regarding the release of a detainee or if the first instance court applies the principle of direct effect of the second sub-paragraph of article 9(3) of the Recast Reception Directive. In this respect, it is also relevant that pursuant to Article 47 of the Charter, “*the principle of effective judicial protection affords an individual a right of access to a court or tribunal but not to a number of levels of jurisdiction.*”<sup>1427</sup> Also, under the case-law of the ECtHR, States are not obliged to set up a second level of jurisdiction for the examination of the lawfulness of detention.<sup>1428</sup> However, if a State institutes such a system, it must in principle accord to detainees the same guarantees on appeal as at first instance<sup>1429</sup> and this includes the principle of adversarial proceedings and equality of arms.<sup>1430</sup>

For the standards on immediate release in case of infringement in the right to be heard before the detention order is issued, see *mutatis mutandis* standard no. 10 on the right to information and to personal interview before the detention order is issued in the Explanatory Note to Check-list 1 of the Statement.

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<sup>1425</sup> *Giulia Manzoni v Italy* App no 19218/91 (ECtHR 1 July 1997), para 25. In the case of *Quinn v France*, a delay of eleven hours in executing a decision to release the applicant “forthwith” was found to be incompatible with Article 5(1) of the ECHR (*Quinn v France* App no 18580/91 (ECtHR 22 March 1995), para 39-43; European Court of Human Rights, *Guide on Article 5 – Right to Liberty and Security* (Council of Europe/European Court of Human Rights, 2014), p. 11/point 40). In the case of *Mahamed Jama v Malta*, the applicant remained in detention for five days following a decision granting her subsidiary protection and the ECtHR found violation of article 5(1) of the ECHR (*Mahamed Jama v Malta* App no 10290/13 (ECtHR 26 November 2015), paras 154-159).

<sup>1426</sup> See standard no 24 of this Check-list.

<sup>1427</sup> *C-69/10, Diouf* EU:C:2011:524, para 69.

<sup>1428</sup> *A.M. v the Netherlands* App no 29094/09 (ECtHR 5 July 2016), para 70.

<sup>1429</sup> *Kučera v Slovakia* App no 48666/99 (ECtHR 17 July 2007), para 107; *Navarra v France* App no 13190/87 (ECtHR 23 November 1993), para 28; *Toth v Austria* App no 11894/85 (ECtHR 12 December 1991), para 84.

<sup>1430</sup> *Çatal v Turkey* App no 26808/08 (ECtHR 17 March 2012), paras 33-34.

**Standard 29. The impact of interim measures (under Rule 39 and national law) on the lawfulness of detention<sup>1431</sup>**

The ECtHR has held that the grant of an interim measure under Rule 39 does not in itself render the detention of the person concerned unlawful.<sup>1432</sup> However, the authorities must still envisage expulsion at a later stage.<sup>1433</sup> Therefore, in a number of cases, in which respondent States refrained from deporting applicants in compliance with a Rule 39 measure, the ECtHR accepted that expulsion proceedings were temporarily suspended, but nevertheless remained “in progress”, with the consequence that the applicant’s continued detention did not violate Article 5(1) of the ECHR.<sup>1434</sup> Similarly, when expulsion is suspended or blocked as a consequence of internal judicial review proceedings, the ECtHR considers them as a part of the deportation proceedings being ‘in progress’.<sup>1435</sup> Nevertheless, suspension of the domestic proceedings due to the indication of an interim measure by the ECtHR should not result in a situation where the applicant languishes in detention for an unreasonably long period.<sup>1436</sup>

**Standard 30. Derogation from obligations under Article 5(1) of the ECHR<sup>1437</sup>**

In regards to Article 15 of the ECHR, the ECtHR states that by reason of their direct and continuous contact with the pressing needs of the moment, the national authorities are in principle better placed than an international judge to decide both on the presence of such

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<sup>1431</sup>Rule 39(1) states that Chamber or, where appropriate, the President of the Section or a duty judge appointed pursuant to paragraph 4 of this Rule may, at the request of a party or of any other person concerned, or of their own motion, indicate to the parties any interim measure which they consider should be adopted in the interests of the parties or of the proper conduct of the proceedings (Rules of Court, Registry of the Court, Strasbourg, 1 January 2016).

<sup>1432</sup>*Gebremedhin v France* App no 25389/05 (ECtHR 26 April 2007), para 74.

<sup>1433</sup>*S.P. v Belgium* App no 12572/08 (ECtHR 14 June 2011).

<sup>1434</sup>*Al Hanchi v Bosnia and Herzegovina* App no 48205/09 (ECtHR 15 November 2011), paras 49-51; *Al Husin v Bosnia and Herzegovina* App no 3727/08 (ECtHR 7 February 2012), paras 67-69; *Umirov v Russia* App no 17455/11 (ECtHR 11 February 2013), paras 138-42.

<sup>1435</sup>*Alim v Russia* App no 39417/07 (ECtHR 27 September 2011), para 60.

<sup>1436</sup>*A.H. and J.K. v Cyprus* App nos 41903/10 and 41911/10 (ECtHR 21 July 2015), para 188.

<sup>1437</sup>Article 15 of the ECHR states that “*in time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.*”

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an emergency and on the nature and scope of the derogations necessary to avert it. Accordingly, in this matter a wide margin of appreciation should be left to the national authorities. Nonetheless, Contracting Parties do not enjoy an unlimited discretion. It is for the ECtHR to rule whether, *inter alia*, the States have gone beyond the extent strictly required by the exigencies of the crisis. The domestic margin of appreciation is thus accompanied by European supervision. In exercising this supervision, the ECtHR must give appropriate weight to such relevant factors as the nature of the rights affected by the derogation and the circumstances leading to, and the duration of, the emergency situation.<sup>1438</sup> If the highest domestic court has examined the issues relating to the States' derogation, the ECtHR considers it would be justified in reaching a contrary conclusion only if satisfied that the national court had misinterpreted or misapplied Article 15 or the ECtHR's jurisprudence under that Article or reached a conclusion which was manifestly unreasonable.<sup>1439</sup>

### **Standard 31. Right to compensation in the case of unlawful detention**

Explanations relating to the Charter provide that *"the rights in Article 6 are the rights guaranteed by Article 5 of the ECHR, and in accordance with Article 52(3) of the Charter, they have the same meaning and scope. Consequently, the limitations which may legitimately be imposed on them, may not exceed those permitted by the ECHR."*<sup>1440</sup> Article 5(5) of the ECHR states that *"everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation."* In the case of *Richmond Yaw and others v Italy* the ECtHR confirmed that mere recognition given by the Supreme Court of the irregularity of the prolongation of detention does not constitute a

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<sup>1438</sup>*A and Others v United Kingdom* (Grand Chamber) App no 3455/05 (ECtHR 19 February 2009), para 173.

<sup>1439</sup>*Ibid.* para 174. For the standards on "public emergency threatening the life of the nation" and on the measures "strictly required by the exigencies of the situation", see standard no 30 in the Explanatory Note to Check-list 1 of the Statement.

<sup>1440</sup>Explanations Relating to the Charter of Fundamental Rights (Official Journal of the EU, C 303, 14. 12. 2007). The third sub-paragraph of Article 6(1) of the Treaty of the Consolidated Version of the Treaty on European Union states that the rights freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions.

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sufficient redress for the victim of a violation of Article 5(1)(f) of the ECHR.<sup>1441</sup> Under the case-law of the ECtHR, the right to compensation set forth in paragraph 5 presupposes that a violation of one of the paragraphs has been established, either by a domestic authority or by the Court.<sup>1442</sup> Article 5(5) of the ECHR is complied with where it is possible to apply for compensation in respect of a deprivation of liberty affected in conditions contrary to paragraphs 1, 2, 3 or 4.<sup>1443</sup> The arrest or detention may be lawful under domestic law, but still in breach of Article 5, which makes Article 5(5) of the ECHR applicable.<sup>1444</sup> Article 5(5) creates a direct and enforceable right to compensation before the national courts.<sup>1445</sup> An enforceable right to compensation must be available either before or after the ECtHR's judgment.<sup>1446</sup> The effective enjoyment of the right to compensation must be ensured with a sufficient degree of certainty.<sup>1447</sup> Compensation must be available both in theory<sup>1448</sup> and in practice.<sup>1449</sup> In considering compensation claims, the domestic authorities are required to interpret and apply domestic law in the spirit of Article 5, without excessive formalism.<sup>1450</sup> The right to compensation relates primarily to financial compensation. It does not confer a right to secure the detained person's release, which is covered by Article 5(4) of the ECHR.<sup>1451</sup> In the case of *Abdi Mahamud v Malta*, the ECtHR established that action in tort cannot be considered as an effective remedy for the purpose of a complaint about conditions of detention under Article 3 of the ECHR. In that case the ECtHR established that it has not been satisfactory established that action in tort may give rise to compensation for

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<sup>1441</sup>*Richmond Yaw and Others v Italy* App nos 3342/11, 3391/11, 3408/11, 3447/11 (ECtHR 6 October 2016), para 50.

<sup>1442</sup>*N.C. v Italy (Grand Chamber)* App no 24952/94 (ECtHR 18 December 2012), para 49; *Pantea v Romania*, App no 33343/96 (ECtHR 3 June 2003), para 262; *Vachev v Bulgaria* App no 42987/98 (ECtHR 8 July 2004), para 78.

<sup>1443</sup>*Michalák v Slovakia* App no 30157/03 (ECtHR 8 February 2011), para 204; *Lobanov v Russia* App no 15578/03 (ECtHR 2 February 2010), para 54.

<sup>1444</sup>*Harkmann v Estonia* App no 2192/03 (ECtHR 11 July 2006), para 50.

<sup>1445</sup>*A and Others v United Kingdom (Grand Chamber)* App no 3455/05 (ECtHR 19 February 2009), para 229; *Storck v Germany* App no 61603/00 (ECtHR 16 June 2005), para 122.

<sup>1446</sup>*Stanev v Bulgaria (Grand Chamber)* App no 36760/06 (ECtHR 17 January 2012), paras 183-84; *Brogan and Others v United Kingdom* App no 11386/85 (ECtHR 29 November 1988), para 67.

<sup>1447</sup>*Ciulla v Italy* App no 11152/84 (ECtHR 22 February 1989), para 44; *Sakik and Others v Turkey* App no 87/1996/706/898-903 (ECtHR 26 November 1997), para 60.

<sup>1448</sup>*Dubovik v Ukraine* App nos 33210/07 and 41866/08 (ECtHR 15 October 2009), para 74.

<sup>1449</sup>*Chitayev and Chitayev v Russia* App no 59334/00 (ECtHR 18 January 2007), para 135.

<sup>1450</sup>*Shulgin v Ukraine* App no 29912/05 (ECtHR 8 December 2011), para 65; *Houtman and Meeus v Belgium* App no 22945/07 (ECtHR 17 March 2009), para 46.

<sup>1451</sup>*Bozano v France* App no 9990/82 (ECtHR 18 December 1986).

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any non-pecuniary damage and that it was not a preventive remedy as it cannot impede the continuation of the violation alleged or provide the applicant with an improvement in the detention conditions.<sup>1452</sup>

Article 5(5) of the ECHR does not prohibit the Contracting States from making the award of compensation dependent upon the ability of the person concerned to show damage resulting from the breach. There can be no question of “compensation” where there is no pecuniary or non-pecuniary damage to compensate.<sup>1453</sup> However, excessive formalism in requiring proof of non-pecuniary damage resulting from unlawful detention is not compliant with the right to compensation.<sup>1454</sup>

Article 5 (5) of the ECHR does not entitle the applicant to a particular amount of compensation.<sup>1455</sup> However, compensation which is negligible or disproportionate to the seriousness of the violation would not comply with the requirements of Article 5 (5) of the ECHR as this would render the right guaranteed under that provision theoretical and illusory.<sup>1456</sup> An award cannot be considerably lower than that awarded by the ECtHR in similar cases.<sup>1457</sup>

For the general principles and standards regarding state liability where an individual suffered loss or damage as a result of the breach of EU law by a Member State, see paragraph 13 of Section 3.3. of this Statement.

### **Standard 32. Right to reasoned judicial decisions and their enforcement (execution)**

In general, the fundamental right to fair legal process enshrined in Article 47 of the Charter

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<sup>1452</sup>*Abdi Mahamud, v Malta* App no 56796/13 (ECtHR 3 May 2016), para 50.

<sup>1453</sup> *Wassink v the Netherlands* App no 12535/86 (ECtHR 27 September 1990), para 38.

<sup>1454</sup> *Danev v Bulgaria* App no 9411/05 (ECtHR 2 September 2010), para 34-35.

<sup>1455</sup> *Damian-Burueana and Damian v Romania* App no 6773/02 (ECtHR 26 May 2009), para 89; *Şahin Çağdaş v Turkey* App no 28137/02 (ECtHR 11 April 2006), para 34.

<sup>1456</sup> *Cumber v United Kingdom* App no 28779/95 (ECtHR 27 November 1996); *Attard v Malta (decision)* App no 46750/99 (ECtHR 28 September 2000).

<sup>1457</sup> *Ganea v Moldova* App no 2474/06 (ECtHR 17 May 2011), para 30; *Cristina Boicenco v Moldova* App no 25688/09 (ECtHR 27 September 2011), para 43.

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entails an obligation “to provide a relevant and adequate statement of reasons”.<sup>1458</sup> Concerning disputes on detention of asylum seekers, the secondary EU law explicitly regulates that decisions on detention, which must be ordered in writing by judicial or administrative authorities, shall state “the reasons in fact and in law on which the decision is based”.<sup>1459</sup> Since Article 47 of the Charter is not limited to civil rights (and obligations and criminal charges) as is the case with Article 6 of the ECHR,<sup>1460</sup> more detailed standards regarding the obligation to state reasons in judgments may be inspired by the guarantees enshrined in Article 6(1) of the ECHR. Under case-law of the ECtHR, these guarantees include the obligation for courts to give “sufficient” reasons for their decisions.<sup>1461</sup> A reasoned decision shows the parties that their case has truly been heard. Although a domestic court has a certain margin of appreciation when choosing arguments and admitting evidence, it is obliged to justify its activities by giving reasons for its decisions.<sup>1462</sup> Article 6(1) of the ECHR obliges courts to give reasons for their decisions, but cannot be understood as requiring a detailed answer to every argument.<sup>1463</sup> The extent to which this duty to give reasons applies may vary according to the nature of the decision,<sup>1464</sup> and can only be determined in the light of the circumstances of the case. It is necessary to take into account, *inter alia*, the diversity of the submissions that a litigant may bring before the courts and the differences existing in the contracting States with regard to statutory provisions, customary rules, legal opinion and the presentation and drafting of judgments.<sup>1465</sup> However, where a party’s submission is decisive for the outcome of the proceedings, it requires a specific and express reply.<sup>1466</sup> The

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<sup>1458</sup>C-439/11 P *Ziegler* EU:C:2013:513, para 104.

<sup>1459</sup>Article 9(2) of Reception Directive 2013/33/EU.

<sup>1460</sup>*Maaouia v France* App no 39652/98 (ECtHR 5 October 2000), paras 33-41.

<sup>1461</sup>*H. v Belgium* App no 8950/80 (ECtHR 30 November 1987), para 53.

<sup>1462</sup>*Suominen v Finland* App no 37801/97 (ECtHR 01 July 2003), para 36.

<sup>1463</sup>*Van de Hurk v the Netherlands* App no 16034/90 (ECtHR 19 March 1994), para 61; *Garcia Ruiz v Spain* (Grand Chamber) App no 30544/96 (ECtHR 21 January 1999), para 26; *Jahnke and Lenoble v France* App no 40490/98 (ECtHR 29 August 2000); *Perez v France* (Grand Chamber) App no 47287/99 (ECtHR 12 February 2004), para 81; see *mutatis mutandis*: *C-439/11 P, Ziegler (Appeal)* EU:C:2013:513, para 82.

<sup>1464</sup>*Ruiz Torija v Spain* App no 18390/91 (ECtHR 9 December 1994), para 29; *Hiro Balani v Spain* App no 18064/91 (ECtHR 9 December 1994), para 27.

<sup>1465</sup>*Ibid.*

<sup>1466</sup>*Ruiz Torija v Spain* App no 18390/91 (ECtHR 9 December 1994), para 30; *Hiro Balani v Spain* App no 18064/91 (ECtHR 9 December 1994), para 28.

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courts are therefore required to examine the litigants' main arguments<sup>1467</sup> and/or pleas concerning the rights and freedoms guaranteed by the ECHR and its Protocols with particular rigour and care.<sup>1468</sup>

Furthermore, the right to enforcement (execution) of judicial decisions, given by any court, is an integral part of the right of access to court.<sup>1469</sup> The effective protection of the litigant and the restoration of legality therefore presuppose an obligation on the administrative authorities' part to comply with the judgment.<sup>1470</sup> Thus, while some delay in the enforcement (execution) of a judgment may be justified in certain circumstances, the delay may not be such as to impair the litigant's right to enforcement of the judgment.<sup>1471</sup> Enforcement (execution) must be full and exhaustive and not just partial,<sup>1472</sup> and may not be prevented, invalidated or unduly delayed.<sup>1473</sup>

### **Standard 33. Conditions of detention**

Standards for the reception of applicants that will suffice to ensure them a dignified standard of living and comparable living conditions in all Member States should be laid down. The harmonisation of conditions for the reception of applicants should help to limit the secondary movements of applicants influenced by the variety of conditions for their reception.<sup>1474</sup>

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<sup>1467</sup>*Buzescu v Romania* App no 61302/00 (ECtHR 24 May 2005), para 67; *Donadze v Georgia* App no 74644/01 (ECtHR 7 March 2006), para 35.

<sup>1468</sup>*Wagner and J.M.W.L. v Luxembourg* App no 76240/01 (ECtHR 28 June 2007), para 96; European Court of Human Rights Guide on Article 6, Right to fair trial (civil limb) (Council of Europe/European Court of Human Rights, 2013), pp. 45-46/points 237-242.

<sup>1469</sup>*Hornsby v Greece* App no 18357/91 (ECtHR 19 March 1997), para 40; *Scordino v Italy (no1)* (Grand Chamber) App no 36813/97 (ECtHR 29 March 2006), para 196.

<sup>1470</sup>*Hornsby v Greece* App no 18357/91 (ECtHR 19 March 1997), para 41; *Kyrtatos v Greece* App no 41666/98 (ECtHR 22 May 2003), paras 31-32.

<sup>1471</sup>*Burdov v Russia*, App no 33509/04 (ECtHR 15 January 2009), paras 35-37.

<sup>1472</sup>*Matheus v France* App no 62740/00 (ECtHR 31 March 2005), para 58; *Sabin Popescu v Romania* App no 48102/99 (ECtHR 2 March 2004), paras 68-76.

<sup>1473</sup>*Immobiliare Saffi v Italy*, (Grand Chamber) App no 22774/93 (28 July 1999), para 74. See also standard no 28 of this check-list on the right to be immediately released in case of unlawful detention.

<sup>1474</sup>Recitals 11 and 12 of the Recast Reception Directive. See also Article 2(f) and (g) of the Recast Reception Directive. For further details on this issue, see also standards of the European Committee for the

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The standard no. 33 is composed of 9 particular elements that are described under points 33.1. - 33.9. below.

### **Standard 33.1. General conditions of detention: respect for human dignity, prohibition of inhuman/degrading treatment and the protection of family life**

*“Applicants who are in detention should be treated with full respect for human dignity and their reception should be specifically designed to meet their needs in that situation.”*<sup>1475</sup> The CJEU in the case of *Cimade* states that *“further to the general scheme and purpose of the Reception Directive 2003/9 and the observance of fundamental rights, in particular the requirements of Article 1 of the Charter, under which human dignity must be respected and protected, the asylum seeker may not /.../ be deprived - even for a temporary period of time after the making of the application for asylum and before being actually transferred to the responsible Member State - of the protection of the minimum standards laid down by that directive.”*<sup>1476</sup>

As a rule, detention shall take place in specialised detention facilities. If this is not possible, the detained applicant shall, in so far as possible, be kept separately from ordinary prisoners and detention conditions, as provided for in the Recast Reception Directive.<sup>1477</sup> This exception (derogation) must be interpreted strictly,<sup>1478</sup> because the separated accommodation of third-country nationals and ordinary prisoners is an unconditional obligation.<sup>1479</sup>

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Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT, /Inf(2017)3, Factsheet, March 2017, Council of Europe).

<sup>1475</sup>First sentence of recital 18 of the Recast Reception Directive.

<sup>1476</sup>C-179/11 *Cimade* EU:C:2012:594, para 56.

<sup>1477</sup>Article 10(1) of the Recast Reception Directive. See also standards on separation of facilities for detainees who are irregular migrants from ordinary prisoners in: C-473/13 and C-514/13 *Bero* EU:C:2014:2095; C-474/13 *Pham* EU:C:2014:2096.

<sup>1478</sup>See for comparison: C-473/13 and C-514/13 *Bero* EU:C:2014:2095, para 25.

<sup>1479</sup>C-474/13 *Pham* EU:C:2014:2096, para 17. This stands even if a person concerned wishes to be detained together with ordinary prisoners (*Ibid.* para 23). The third sentence of Recital 19 of the Recast Reception Directive states that derogations should only be applied in exceptional circumstances and should be duly justified, taking into consideration the circumstances of each case, including the level of severity of the derogation applied, its duration and its impact on the applicant concerned.



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When assessing conditions of detention, account has to be taken of the cumulative effects, as well as of specific allegations made by the applicant. In particular, the major factors will be the length of the period during which the applicant was detained in the impugned conditions and where overcrowding reaches a certain level, the lack of space in an institution may also constitute a key factor to be taken into account.<sup>1480</sup>

Moreover, where children are detained (either alone or together with their parents), the jurisprudence of the ECtHR shows that Article 3 of the ECHR is not the only right that may be engaged. In the case of *Mubilanzila Mayeka and Kaniki Mitunga v Belgium* the Court found that the detention of an unaccompanied five-year old violated the Article 3 and Article 8 rights of both the child and her mother in DRC.<sup>1481</sup> In the case of *A.B et autres c. France*, which concerned the administrative detention of accompanied foreign minors, the Court not only held that the conditions of detention violated the children's Article 3 rights, but also that there had been an interference with the whole family's Article 8 rights.<sup>1482</sup> In this context, the ECtHR has also adjudicated that the sole fact that a family unit is maintained does not necessarily guarantee respect for the right to a family life, particularly where the family is detained.<sup>1483</sup> The fact of confining the applicants to a detention centre, for fifteen days, thereby subjecting them to custodial living conditions typical of that kind of institution, can be regarded as an interference with the effective exercise of their family life.<sup>1484</sup> Such interference must be in accordance with the law and necessary in a democratic society.<sup>1485</sup> Authorities have a duty to strike a fair balance between the competing interests of the individual and society as a whole. In assessing proportionality, the child's best interests must be paramount. The protection of the child's best interests involves both keeping the family together as far as possible, and considering alternatives to detention so that the detention of minors is only a measure of last resort.<sup>1486</sup>

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<sup>1480</sup>C-474/13 *Pham* EU:C:2014:2096, for example para 97. See more on this in standard 33.3 of this Check-list.

<sup>1481</sup>*Mubilanzila Mayeka and Kaniki Mitunga v Belgium* App no 13178/03, paras 72-85.

<sup>1482</sup>*A.B. and Others v France* App no 11593/12 (ECtHR 12 July 2016), paras 139-156.

<sup>1483</sup>*Popov v France* App nos 39472/07 and 39474/07 (ECtHR 19 January 2012), para 134.

<sup>1484</sup>*Ibid.* para 134.

<sup>1485</sup>*Ibid.* para 135.

<sup>1486</sup>*Ibid.* 139-141. See also standard no 33.5 of this check-list on minors and standard no 37.1 in the Explanatory Note to Check-list 2 of the Statement.

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From the standpoint of EU law, there is a “*general principle*” that in implementing the Reception Directive Member States shall take into account the specific situation of vulnerable persons such as minors, unaccompanied minors, disabled people, elderly people, pregnant women, single parents with minor children, victims of human trafficking, persons with serious illnesses, persons with mental disorders and persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence, such as victims of female genital mutilation<sup>1487</sup> in order to ensure that such reception is specifically designed to meet their special reception needs.<sup>1488</sup>

### **Standard 33.2. Inhuman/degrading treatment in detention: threshold and onus**

Article 3 of the ECHR enshrines one of the most fundamental values of democratic societies and prohibits in absolute terms torture and inhuman or degrading treatment or punishment, irrespective of the circumstances and of the victim’s conduct. In view of the absolute nature of Article 3 of the ECHR, the “margin of appreciation” does not apply where there is an alleged breach of the substantive Article. In order to fall within the scope of Article 3, ill-treatment must attain a minimum level of severity. The assessment of this minimum is relative; it depends on all the circumstances of the case, such as the duration of the treatment and its physical or mental effects and, in some instances, the sex, age and state of health of the victim.<sup>1489</sup> Article 3 of the ECHR requires the State to ensure that detention conditions are compatible with respect for human dignity, that the manner and method of the execution of the measure do not subject the detainees to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention and that, given the practical demands of imprisonment, their health and well-being are adequately secured.<sup>1490</sup> From the standpoint of Article 3 of the ECHR, the ECtHR “*attaches considerable importance to the applicant's status as an asylum seeker and, as such, a member of a particularly underprivileged and vulnerable population group in need of special*

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<sup>1487</sup>Article 21(1) and Recital 14 of the Reception Directive.

<sup>1488</sup>Recital 14 of the Recast Reception Directive.

<sup>1489</sup>*M.S.S. v Belgium and Greece* (Grand Chamber) App no 30696/09 (ECtHR 21 January 2011), para 219; *Kudła v Poland* (Grand Chamber) App no 30210/96 (ECtHR 26 October 2000), para 91; *Khlaifia and others v Italy* (Grand Chamber) App no 16483/12 (ECtHR 15 December 2016), paras 158-159.

<sup>1490</sup>*M.S.S. v Belgium and Greece* (Grand Chamber) App no 30696/09 (ECtHR 21 January 2011), para 221.

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*protection*".<sup>1491</sup>

In order to determine whether the threshold of severity has been reached, the ECtHR also takes other factors into consideration, in particular: the purpose for which the ill-treatment was inflicted, although the absence of an intention to humiliate or debase the victim cannot conclusively rule out its characterisation as degrading; the context in which the ill-treatment was inflicted, such as an atmosphere of heightened tension and emotions; whether the victim is in a vulnerable situation, which is normally the case for persons deprived of their liberty, but there is an inevitable element of suffering and humiliation involved in custodial measures and this as such, in itself, will not entail a violation of Article 3 of the ECHR.<sup>1492</sup>

The ECtHR considers treatment to be "*inhuman*" when it was "*premeditated, was applied for hours at a stretch and caused either actual bodily injury or intense physical or mental suffering*".<sup>1493</sup> The treatment is considered to be "*degrading*" when it humiliates or debases an individual, showing a lack of respect for, or diminishing, his or her human dignity, or arousing feelings of fear, anguish or inferiority capable of breaking an individual's moral and physical resistance.<sup>1494</sup> It may suffice that the victim is humiliated in his or her own eyes, even if not in the eyes of others. Although the question whether the purpose of the treatment was to humiliate or debase the victim is a factor to be taken into account, the absence of any such purpose cannot conclusively rule out a finding of a violation of Article 3 of the ECHR.<sup>1495</sup> In practice, the ECtHR will not always distinguish between inhuman treatment and degrading treatment, sometimes preferring instead to simply find that there has been a breach of Article 3. In other cases, it might make a specific finding that the treatment in question is either inhuman or degrading.

With regard to the burden of proof, the ECtHR generally relies on the rule that allegations of ill-treatment must be supported by appropriate evidence. In other words, the applicant

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<sup>1491</sup>*Ibid.* para 251.

<sup>1492</sup>*Khlaifia and others v Italy* (Grand Chamber) App no 16483/12 (ECtHR 15 December 2016), para 160.

<sup>1493</sup>*M.S.S. v Belgium and Greece* (Grand Chamber) App no 30696/09 (ECtHR 21 January 2011), para 220.

<sup>1494</sup>*Ibid.* para 220; *Kudła v Poland* App no 30210/96 (26 October 2000), para 92; *Pretty v United Kingdom* App no 2346/02 (ECtHR 29 April 2002), para 52.

<sup>1495</sup>*M.S.S. v Belgium and Greece* (Grand Chamber) App no 30696/09 (ECtHR 21 January 2011), para 220; *Khlaifia and others v Italy* (Grand Chamber) App no 16483/12 (ECtHR 15 December 2016), para 169.

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bears the responsibility of providing evidence of treatment contrary to Article 3. However, the ECtHR has noted that cases concerning allegations of inadequate conditions of detention do not lend themselves to a rigorous application of the principle *affirmanti incumbit probatio* (he who alleges something must prove that allegation) because in such instances the respondent Government alone has access to information capable of corroborating or refuting these allegations. Accordingly, applicants might experience certain difficulties in procuring evidence to substantiate a complaint in that connection. Nevertheless, in such cases applicants may well be expected to submit at least a detailed account of the facts complained of and provide – to the greatest possible extent – some evidence in support of their complaints.<sup>1496</sup> However, after the ECtHR has given notice of the applicant’s complaint to the Government, the burden is on the latter to collect and produce relevant documents. A failure on their part to submit convincing evidence on material conditions of detention may give rise to the drawing of inferences as to the well-foundedness of the applicant’s allegations.<sup>1497</sup> *“In assessing evidence, the ECtHR has generally applied the standard of proof beyond reasonable doubt. However, such proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of facts”*.<sup>1498</sup>

### **Standard 33.3. Conditions of detention: overcrowding, ventilation, access to light and natural air or to exercise in the open air, quality of heating, health requirements, basic sanitary and hygiene requirements**

The ECtHR has found overcrowding by itself to be sufficient to breach Article 3 where the personal space granted to the applicant was less than 3 m<sup>2</sup> of floor surface per detainee (including space occupied by furniture but not counting the in-cell sanitary facility). In multi-occupancy accommodation this ought to be maintained as the relevant minimum standard

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<sup>1496</sup>See *Visloguzov v Ukraine* App no 32362/02 (ECtHR 20 May 2010), para 45.

<sup>1497</sup>See: *Gubin v Russia* App no 8217/04 (ECtHR 17 June 2010), para 56; *Khudoyorov v Russia* App no 6847/02 (ECtHR 8 November 2005), para 113; *Alimov v Turkey* App no 14344/13 (ECtHR 6 September 2016), para 74.

<sup>1498</sup>*Koktysh v Ukraine* App no 43707/07 (ECtHR 10 December 2009), para 90; *Salman v Turkey*, (Grand Chamber) App no 21986/93 (ECtHR 27 June 2000), para 100; *Khlaifia and others v Italy* (Grand Chamber) App no 16483/12 (ECtHR 15 December 2016), paras 127, 168.

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for its assessment under Article 3 of the ECHR.<sup>1499</sup> A weighty but not irrebuttable presumption of a violation of Article 3 arose when the personal space available to a detainee fell below 3 sq. m in multi-occupancy accommodation. The presumption could be rebutted in particular by demonstrating that the cumulative effects of the other aspects of the conditions of detention compensated for the scarce allocation of personal space. In that connection, the ECtHR takes into account such factors as the length and extent of the restriction, the degree of freedom of movement and the adequacy of out-of-cell activities, as well as whether or not the conditions of detention in the particular facility are generally decent.”<sup>1500</sup>

In *Aden Ahmed v Malta* (para. 87) the ECtHR had regard not just to the floor space afforded to each detainee, but also to whether each detainee had an individual sleeping place in the cell, and whether the overall surface area of the cell was such as to allow detainees to move freely between the furniture items. Based on standards from *Aden Ahmed v Malta*, in deciding whether or not there has been a violation of Article 3 on account of the lack of personal space, the ECtHR has to have regard to the following three elements: “*each detainee must have an individual sleeping place in a cell; each detainee must dispose of at least three square meters of floor space; and the overall surface area of the cell must be such as to allow the detainees to move freely between the furniture items. The absence of any above elements creates in itself a strong presumption that the conditions of detention amounted to degrading treatment and were in breach of Article 3.*”<sup>1501</sup> As the fourth element, the ECtHR refers to “*other aspects.*” Where overcrowding was not significant enough to raise itself an issue under Article 3, the ECtHR has taken into account “*other aspects*” of detention

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<sup>1499</sup>*Khlaifia and others v Italy* (Grand Chamber) App no 16483/12 (ECtHR 15 December 2016), para 166; see also: *Kadikis v Latvia* App no 62393/00 (ECtHR 4 May 2006), para 55; *Andrei Frolov v Russia* App no 205/02 (ECtHR 29 March 2007), paras 47-49; *Kantayev v Russia* App no 37213/02 (ECtHR 21 June 2007), paras 50-51; *Sulejmanovic v Italy* App no 22635/03 (ECtHR 16 July 2009), para 43; *Torreggiani and Others v Italy* App nos 43517/09, 46882/09, 55400/09 (ECtHR 8 January 2013), para 68.

<sup>1500</sup>*Khlaifia and others v Italy* (Grand Chamber) App no 16483/12 (ECtHR 15 December 2016), para 166. For example, the ECtHR notes that scarce space in relative terms may in some circumstances be compensated for by the possibility to move about freely within the confines of a detention facility and by unobstructed access to natural light and air (*Alimov v Turkey* App no 14344/13 (ECtHR 6 September 2016), para 78) or by the freedom to spend time away from the dormitory rooms (*Mahamed Jama v Malta* App no 10290/13 (ECtHR 26 November 2015), para 92). See also: *Abdi Mahamud, v Malta* App no 56796/13 (ECtHR 3 May 2016), paras 81-83.

<sup>1501</sup>*Aden Ahmed v Malta* App no 55352/12 (ECtHR 23 June 2013), para 87.

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conditions, including the ability to use the toilets privately,<sup>1502</sup> available ventilation, access to light and natural air, the quality of heating and balanced meals<sup>1503</sup> and respect for basic health requirements. Therefore, in cases where each detainee had 3 to 4 m<sup>2</sup>, the ECtHR found a violation of Article 3 where the lack of space was accompanied by a lack of ventilation and light,<sup>1504</sup> limited access to outdoor exercise,<sup>1505</sup> or a total lack of privacy in cells.<sup>1506</sup> The ECtHR mentions the Prisons Standards developed by the Committee for the Prevention of Torture, which specifically deal with outdoor exercise and consider it a basic safeguard of prisoners' well-being that all of them, without exception, should be allowed at least one hour of exercise in the open air every day, preferably as part of a broader programme of out-of-cell activities.<sup>1507</sup> Under the standards of the ECHR “*access to outdoor exercise is a fundamental component of the protection afforded to persons deprived of their liberty under Article 3 and as such it cannot be left to the discretion of the authorities.*”<sup>1508</sup> For that reason, physical characteristics of outdoor exercise facilities are also relevant.<sup>1509</sup>

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<sup>1502</sup>For the compliance with basic sanitary and hygienic requirements, see, for example: *Anayev and Others v Russia* App nos 42525/07, 60800/08 (ECtHR 10 January 2012), paras 156-159, *Aden Ahmed v Malta* App no 55352/12 (ECtHR 23 June 2013), para 88; *Moiseyev v Russia* App no 62936/00 (ECtHR 9 October 2008), para 124.

<sup>1503</sup>See, for example, *Mahamed Jama v Malta* App no 10290/13 (ECtHR 26 November 2015), paras 96, 98; *Abdi Mahamud v Malta* App no 56796/13 (ECtHR 3 May 2016), paras 84, 85, 89).

<sup>1504</sup>*Torreggiani and Others v Italy* App nos 43517/09, 46882/09, 55400/09 (ECtHR 8 January 2013), para 69; see also *Babushkin v Russia* App no 5993/08 (ECtHR 16 October 2014), para 44; *Vlasov v Russia* App no 51279/09 (ECtHR 20 September 2016), para 84; *Moisseiev*, paras 124-127.

<sup>1505</sup>*István Kovács Gábor v Hungary* App no 15707/10 (ECtHR 17 January 2012), para 26; see also *Mandič and Jović v Slovenia* App nos 5774/10, 5985/10 (ECtHR 20 October 2011), para 78; *Babar Ahmad and Others v United Kingdom* App nos 24027/07, 11949/08, 36742/08, 66911/09, 67354/09 (ECtHR 10 April 2012), paras 213-214.

<sup>1506</sup>*Novoselov v Russia* App no 66460/01 (ECtHR 2 June 2005), paras 32 and 40-43; *Khoudoyorov v Russia*, paras 106-107; *Belevitski v Russia* App no 72967/01 (ECtHR 1 March 2007), paras 73-79.

<sup>1507</sup>*Abdullahi Elmi and Aweys Abubakar v Malta* App nos 25794/13 and 28151/13 (ECtHR 22 November 2016), para 102.

<sup>1508</sup>This is so regardless of how good the material conditions might be in the cells (*Alimov v Turkey* App no 14344/13 (ECtHR 6 September 2016), para 83. See also: *Mahamed Jama v Malta* App no 10290/13 (ECtHR 25 November 2015), para 93).

<sup>1509</sup>For instance, an exercise yard that is just two square metres larger than the cell, is surrounded by three-metre-high walls, and has an opening to the sky covered with metal bars and a thick net does not offer inmates proper opportunities for recreation and recuperation (*Mahamed Jama v Malta* App no 10290/13 (ECtHR 26 November 2015), para 93; see also paras 94-95).

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Under EU secondary law, there is a special provision which says that detained applicants shall have access to open-air spaces.<sup>1510</sup>

In addition, the time during which an individual was detained in the contested conditions is an important factor to consider.<sup>1511</sup> As regards the notion of the so called “continuous detention”, the ECtHR stated that when complaints in relation to conditions of detention do not simply relate to a specific event, but which concern a whole range of problems regarding sanitary conditions, the temperature in cells, overcrowding, lack of adequate medical treatment, which have affected an inmate throughout his or her incarceration, the ECtHR regards this as a “continuing situation”, even if the person concerned has been transferred between various detention facilities in the relevant period.<sup>1512</sup>

For concrete examples of circumstances where the ECtHR did (not) find a violation of Article 3 of the ECHR, see summaries of cases in the judgment of the *Khlaifia and others v Italy* (paras. 171-177) and standard 34.3 in the Explanatory Note to Check-list 1 of the Statement.

### **Standard 33.4. Right to communication and information in detention**

In regards to the right to communication, representatives of the UNHCR or of the organisation which is working on the territory of the Member State concerned (on behalf of the UNHCR) pursuant to an agreement with that Member State, shall have the possibility to communicate and visit applicants in conditions that respect privacy.<sup>1513</sup> Member States shall ensure that family members, legal advisers or counsellors and persons representing relevant non-governmental organisations recognised by the Member State concerned have the possibility to communicate with and visit applicants in conditions that respect privacy. Restrictions on access to the detention facility may be imposed only where, by virtue of national law, they are objectively necessary for the security, public order or administrative management of the detention facility, provided that access is not thereby severely restricted

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<sup>1510</sup>Article 10(2) of the Recast Reception Directive.

<sup>1511</sup>*Kalashnikov v Russia* App no 47095/99 (ECtHR 15 July 2002), para 102; *Kehayov v Bulgaria* App no 41035/98 (ECtHR 18 January 2005), para 64, *Alver v Estonia* App no 64812/01 (ECtHR 8 November 2005), para 50.

<sup>1512</sup>*Alimov v Turkey* App no 14344/13 (ECtHR 6 September 2016), para 59.

<sup>1513</sup>Article 10(3) of the Recast Reception Directive.

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or rendered impossible.<sup>1514</sup> In addition, regarding rules applied in detention facilities and rights and obligations of detainees, Member States shall ensure that applicants in detention are systematically provided with information that explains those rules, rights and obligations. They must be informed in a language which they understand or are reasonably supposed to understand. Member States may derogate from this obligation in duly justified cases and for a reasonable period which shall be as short as possible, in the event that the applicant is detained at a border post or in a transit zone.<sup>1515</sup>

### **Standard 33.5. Minors**

According to Article 2(d) of the Recast Reception Directive “minor” means a third country national or a stateless person below the age of 18 years. *“The minor’s best interest, as prescribed in Article 23(2), shall be a primary consideration for Member States.”*<sup>1516</sup> This includes taking due account of family reunification possibilities; the minor’s well-being and social development, taking into particular consideration the minor’s background; safety and security considerations, in particular where there is a risk of the minor being a victim of human trafficking; and the views of the minor in accordance with his or her age and maturity.<sup>1517</sup> The child’s extreme vulnerability is the decisive factor and takes precedence over considerations relating to the status of illegal migrants.<sup>1518</sup>

The second sentence of Recital 18 of the Recast Reception Directive states that Member States should in particular ensure that Article 37 of the 1989 United Nations Convention on the Rights of the Child is applied. Apart from general conditions and procedural requirements that are described in other standards of this check-list, Article 37 of the UN Convention on the Rights of the Child among other things provides that deprivation of liberty of a child *“shall be used only as a measure of last resort and for the shortest*

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<sup>1514</sup>Article 10(4) of the Recast Reception Directive.

<sup>1515</sup>The derogation shall not apply in cases referred to in Article 43 of Directive 2013/32/EU (Article 10(5) of the Recast Reception Directive).

<sup>1516</sup>Second sub-paragraph of Article 11(2) of the Recast Reception Directive.

<sup>1517</sup>See also standard no 12 on the best interests of a child.

<sup>1518</sup>*Popov v France* App nos 39472/07 and 39474/07 (ECtHR 19 January 2012), para 91; *Mubilanzila Mayeka and Kaniki Mitunga v Belgium* App no 13178/03 (ECtHR 12 October 2006), para 55.



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*appropriate period of time” /.../ and “in a manner which takes into account the needs of persons of his or her age” /.../.<sup>1519</sup> Every child deprived of liberty “shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances /.../ and shall have the right to prompt access to legal and other appropriate assistance.”<sup>1520</sup> When minors are detained, they shall have the possibility to engage in leisure activities, including play and recreational activities appropriate to their age.”<sup>1521</sup> In general, from the standpoint of Article 3 of the ECHR, several criteria need to be taken into consideration in cases concerning the detention of children: whether the child is accompanied or not; the age of the child, his/her state of health, including eventual feelings of fear, anguish, inferiority; the duration of detention and its physical and mental effects; and the particular circumstances in the detention centre, including circumstances in the close surrounding area.<sup>1522</sup>*

### **Standard 33.6. Unaccompanied Minors**

Unaccompanied by an adult responsible for him or her whether by law or by the practice of the Member State concerned, and for as long as he or she is not effectively taken into the care of such a person; it includes a minor who is left unaccompanied after he or she entered the territory of the Member State.<sup>1523</sup>

*“Unaccompanied minors shall be detained only in exceptional circumstances. All efforts shall be made to release the detained unaccompanied minor as soon as possible.”<sup>1524</sup>*

Unaccompanied minors have to be accommodated separately from adults<sup>1525</sup> and shall

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<sup>1519</sup>Those needs have to be considered also in the light of the right to primary education under Article 28 of the UN Convention on the Rights of the Child.

<sup>1520</sup>Article 37(c) and (d) of the UN Convention on the Rights of the Child.

<sup>1521</sup>Third sub-paragraph of Article 11(2) of the Recast Reception Directive.

<sup>1522</sup>*A.B. and Others v France* App no 11593/12 (ECtHR 12 July 2016), paras 109-115; *Rahimi v Greece* App no 8687/08 (ECtHR 5 July 2011), para 59; *Mubilanzila, Mayeka and Kaniki Mitunga v Belgium* App no 13178/03 (ECtHR 12 Jan 2007), para 48. See concrete examples of violation of Article 3 of the ECHR in standard no 34.5 in the Explanatory Note to Check-list 1 of the Statement.

<sup>1523</sup>Article 2(e) of the Recast Reception Directive.

<sup>1524</sup>First sub-paragraph of Article 11(3) of the Recast Reception Directive.

<sup>1525</sup>Fourth sub-paragraph of Article 11(3) of the Recast Reception Directive.

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never be detained in prison accommodation.<sup>1526</sup> As far as possible, they shall be provided with accommodation in institutions provided with personnel and facilities which take into account the needs of persons of their age.<sup>1527</sup>

### **Standard 33.7. Ill-health and special medical conditions**

As regards detention of persons with special medical needs, the case-law of the ECtHR has considered the situation of detainees with mental illness, suicidal tendencies, detainees who are HIV-positive, paraplegics who are confined to a wheelchair and pregnant women. Besides, the UN Convention on the Rights of Persons with Disabilities<sup>1528</sup>, to which the EU became a party, provides “programmatically” standards that need to be implemented by the adoption of subsequent measures which are the responsibility of the Contracting Parties in relation to the detention of people with disabilities.<sup>1529</sup>

### **Standard 33.8. Elderly**

The ECtHR has not expressly considered the detention of elderly persons in the expulsion context. However, the ECtHR has routinely stated that age and state of health will be relevant to the assessment of the level of severity of ill-treatment, and there are a number of cases in which the ECtHR has addressed the vulnerability of this group within the domestic prison regime.<sup>1530</sup>

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<sup>1526</sup>Second sub-paragraph of Article 11(3) of the Recast Reception Directive.

<sup>1527</sup>Third sub-paragraph of Article 11(3) of the Recast Reception Directive. See also standard 33.5. on minors and standard no 34.6. in the Explanatory Note to Check-list 1 of the Statement.

<sup>1528</sup>Council Decision of 26 November 2009 concerning the conclusion, by the European Community, of the United Nations Convention on the Rights of Persons with Disabilities, Official Journal of the EU, L 23, 27. 1. 2010.

<sup>1529</sup>See also standard no 34.7 the Explanatory Note to Check-list 1 of the Statement.

<sup>1530</sup>See, for example: *Sawoniuk v United Kingdom* App no 63716/00 (ECtHR 29 May 2001), *Papon v France* App no 54210/00 (ECtHR 25 July 2002), *Farbtuhs v Latvia* App no 4672/02 (ECtHR 2 December 2004), and *Enea v Italy* App no 74912/01 (ECtHR 17 September 2009), *Haidn v Germany* App no 6587/04 (ECtHR 13 January 2011), *Contrada (no 2) v Italy* App no 7509/08 (ECtHR 11 February 2014). See also standard no 34.8. in the Explanatory Note to Check-list 1 of the Statement.

**Standard 33.9. Other vulnerable persons (female applicants, mothers, LGBT etc.)**

“Where female applicants are detained, Member States shall ensure that they are accommodated separately from male applicants, unless the latter are family members and all individuals concerned consent thereto.” Exceptions may apply to the use of common spaces designated for recreational or social activities, including the provision of meals.<sup>1531</sup>

“Where vulnerable persons are detained, Member States shall ensure regular monitoring and adequate support taking into account their particular situation, including their health.”<sup>1532</sup> In case of female detainees, a lack of female staff in the centre, may be relevant, too.<sup>1533</sup> In the case of *Mahamad Jama v Malta*, irrespective of health concerns or age factor the ECtHR considered the female applicant more vulnerable than any other adult asylum seeker detained at the time.<sup>1534</sup> Detained families shall be provided with separate accommodation guaranteeing adequate privacy.<sup>1535</sup>

In the case of *O.M. v Hungary* the ECtHR decided that the authorities failed to exercise particular care in order to avoid situations which may reproduce the conditions that forced that person to flee in the first place. The authorities ordered the applicant's detention without considering the extent to which vulnerable individuals - for instance, LGBT were safe or unsafe in custody among other detained persons, many of whom had come from countries with widespread cultural or religious prejudice against such persons.<sup>1536</sup> For further concrete examples in the case-law of the ECtHR on the detention of vulnerable persons, see standard no. 34.9 in the Explanatory Note to Check-list 1 of the Statement.

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<sup>1531</sup>Article 11(5) of the Recast Reception Directive.

<sup>1532</sup>Second sub-paragraph of Article 11(1) of the Recast Reception Directive.

<sup>1533</sup>See, for example: *Mahamed Jama v Malta* App no 10290/13 (ECtHR 26 November 2015), para 97; *Abdi Mahamud, v Malta* App no 56796/13 (ECtHR 3 May 2016), paras 84, 86, 89.

<sup>1534</sup>*Ibid.* para 100.

<sup>1535</sup>Article 11(4) of the Recast Reception Directive.

<sup>1536</sup>*O.M. v Hungary* App no 9912/15 (ECtHR 5 July 2016), para 53.

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