O.M. v. Hungary

Application no. 9912/15

WRITTEN SUBMISSIONS ON BEHALF OF

THE AIRE CENTRE (ADVICE ON INDIVIDUAL RIGHTS IN EUROPE),

THE EUROPEAN COUNCIL ON REFUGEES AND EXILES (ECRE)

ILGA-EUROPE (THE EUROPEAN REGION OF THE INTERNATIONAL LESBIAN, GAY, BISEXUAL, TRANS AND INTERSEX ASSOCIATION) AND

THE INTERNATIONAL COMMISSION OF JURISTS (ICJ)

INTERVENERS

pursuant to the Section Registrar's notification of 30 September 2015

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21 October 2015

Introduction

1. These written submissions are presented on behalf of the AIRE Centre (Advice on Individual Rights in Europe), the European Council on Refugees and Exiles (ECRE), the European Region of the International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA-Europe) and the International Commission of Jurists (ICJ), hereinafter "the interveners", pursuant to the grant of permission of the Vice-President of the First Section of the Court notified in a letter dated 30 September 2015 and addressed to the ICJ by the Section Registrar.

2. The interveners' submissions focus on:

   i. the relevance of the EU asylum *acquis*,[1] the EU Charter of Fundamental Rights and the 1951 UN Convention relating to the Status of Refugees, as amended by its 1967 Protocol,[2] to the determination of the scope and content of Contracting Parties' obligations under Art 5(1) of the European Convention on Human Rights (hereafter the "Convention"); and

   ii. the Contracting Parties' obligation under the Convention to take account of the particular risks that the detention of asylum-seekers entails, including, in particular, when deciding to detain those asylum-seekers who might have been exposed to abuse and/or may risk violence and discrimination on account of their sexual orientation while in detention.

i. The relevance of the EU asylum *acquis*, the EU Charter of Fundamental Rights and the Refugee Convention to the determination of the scope and content of Contracting Parties' obligations under Art 5(1) of the Convention

3. The interveners recall that people may be deprived of their liberty only for at least one of the purposes specified in Article 5(1) of the Convention.[3] Article 5(1)(f) of the Convention establishes that preventing "an unauthorised entry into the country" may be a legitimate ground to impose detention with a view to enforcing immigration control.[4]

4. In this context, however, while the first limb of that provision may permit the detention of asylum-seekers for that purpose, their detention must be compatible with the overall purpose of Article 5, namely, to safeguard liberty and ensure that no-one is deprived of his or her liberty in an arbitrary fashion.[5] In order "[t]o avoid being branded as arbitrary, therefore, such detention must be carried out in good faith; it must be closely connected to the purpose of preventing unauthorised entry of the person to the country; the place and conditions of detention should be appropriate, bearing in mind

[1] The EU asylum *acquis* is the *corpus* of law comprising all EU law adopted in the field of international protection claims. See, in particular, the Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers (hereafter the Reception Conditions Directive); the Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (hereafter the Qualification Directive); and the Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status (hereafter the Procedures Directive).

[2] The 1951 Convention relating to the Status of Refugees, 189 United Nations Treaty Series 137, entered into force 22 April 1954 (hereafter the Refugee Convention); as amended by the Protocol Relating to the Status of Refugees, 606 United Nations Treaty Series 267, entered into force 4 October 1967 (the Protocol or 1967 Protocol).

[3] See, .e.g., *Saadi v. the United Kingdom* [GC] (no. 13229/03), 29 January 2008, para. 43; *Lokpo and Touré v. Hungary* (No. 10816/10), 20 September 2011, para. 16; and *Nabil and others v. Hungary* (No. 62116/12), 22 September 2015, para. 26.

[4] See, e.g., *Nabil and others v. Hungary* (No. 62116/12), 22 September 2015, para. 18.

[5] See, e.g., *Saadi v. the United Kingdom* [GC] (no. 13229/03), 29 January 2008, para. 66; and *Khudoyorov v. Russia* (No. 6847/02), 8 November 2005, para. 137.

that "the measure is applicable not to those who have committed criminal offences but to aliens who, often fearing for their lives, have fled from their own country" [...]; and the length of the detention should not exceed that reasonably required for the purpose pursued."[6]

5. Moreover, the Convention lays down the obligation that the detention of asylum-seekers in this context is to conform to the substantive and procedural rules of national law.[7] The latter therefore must be taken into account whenever the lawfulness of an asylum-seeker's detention is at issue, including, in particular, with respect to the question of whether "a procedure prescribed by law" has been followed. Lack of arbitrariness and having been ordered in compliance with and pursuant to the substantive and procedural rules of national law will both be prerequisites to the lawfulness of detention.[8]

6. In addition to being concerned with domestic law, in requiring that detention must be "in accordance with a procedure prescribed by law", Article 5(1) of the Convention "also relates 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."[9] Indeed, the principle of the rule of law runs like a golden thread through the Convention.[10] As a result, the Convention requires that all measures carried out by the Contracting Parties that affect an individual's fundamental rights be "in accordance with the law", which in certain circumstances will be EU law.

7. In this context, for those Contracting Parties that are Member States of the European Union (EU), EU law in the field of asylum should be interpreted as constituting "national law" for the purposes of Article 5 of the Convention.[11] This should be the case unless the domestic law of the Contracting Party concerned provides for higher standards since the EU asylum *acquis* – while directly applicable in participating EU Member States – constitutes a minimum standard.[12]

8. In addition, while it is not generally the role of this Court to decide whether States have acted in accordance with EU law "unless and in so far as they may have infringed rights and freedoms protected by the Convention",[13] it is however for this Court to consider any EU Respondent Government's obligations under the applicable provisions of the EU asylum *acquis* – as interpreted and construed by the Court of Justice of the EU – when assessing whether a Contracting Party's proposed actions will be "in accordance with the law" under the Convention.[14] This Court must additionally ensure compliance with

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[6] *Saadi v. United Kingdom* [GC] (No. 13229/03), 29 January 2008, para. 74, citation reference in the original omitted.

[7] See, e.g., *Nabil and others v. Hungary* (No. 62116/12), 22 September 2015, para. 30.

[8] *Suso Musa v. Malta* (No. 42337/12), 23 July 2013, para. 92; *Nabil and others v. Hungary* (No. 62116/12), 22 September 2015, para. 30.

[9] *Lokpo and Touré v. Hungary* (No. 10816/10), 20 September 2011, para. 18.

[10] The Convention's preamble recalls the rule of law.

[11] Some EU Member States (Denmark, Ireland and UK) have opted out of some of the Directives that constitute the EU asylum *acquis*. Notwithstanding this, they remain bound by the EU Charter of Fundamental Rights.

[12] See, e.g., Article 5 of the Procedures Directive, which provides that, "Member States may introduce or maintain more favourable standards on procedures for granting and withdrawing refugee status, insofar as those standards are compatible with this Directive." See, also, Article 3 of the Qualification Directive and Article 4 of the Reception Conditions Directive.

[13] See *Jeunesse v. the Netherlands* [GC], no. 12738/10, judgment, 3 October 2014, §§ 110-111, and *Ullens de Schooten and Rezabek v. Belgium*, cited therein.

[14] *Aristimuño Mendizabal v. France*, no. 51431/99, judgment, 17 January 2006, § 69 and §§ 74-79. See also *Suso Musa v Malta* where the Court observed "where a State which has gone beyond its obligations in creating further rights or a more favourable position – a possibility open to it under Article 53 of the Convention – enacts legislation (of its own motion or pursuant to European Union law) explicitly authorising the entry or stay of immigrants pending an asylum application [….] an ensuing detention for the purpose of preventing an unauthorised entry may raise an issue as to the lawfulness of detention

Article 53 of the Convention by ensuring that its approach guarantees at least the protection required under the applicable EU law.

9. Within the EU asylum *acquis*, the Reception Conditions Directive, the Qualification Directive and the Procedures Directive are particularly relevant for the Court's determination of the present case. The Reception Conditions Directive provides for free movement within the territory of the host Member State or within an area assigned to them by that Member State.[15] The Procedures Directive, *inter alia*, prohibits the detention of people for the sole reason that they are asylum-seekers,[16] and guarantees the possibility of speedy judicial review to those asylum-seekers who, nonetheless, are detained.[17]

10. The EU Charter of Fundamental Rights has the same legal force as the EU Treaties. Its provisions are addressed, among others, to the Member States when implementing EU law[18] and are binding on them "when they act in the scope of Union law".[19] As the EU has developed a comprehensive set of asylum instruments, asylum decisions taken by Member States[20] come within the scope of EU law.[21] The Charter guarantees the right to asylum "with due respect for the rules of the Geneva [Refugee] Convention" and the 1967 Protocol.[22]

11. In light of the EU asylum *acquis* and the Refugee Convention, the right to asylum under Article 18 of the EU Charter of Fundamental Rights embraces the following elements: (a) access to fair and efficient asylum procedures and an effective remedy; (b) treatment in accordance with adequate reception conditions, including in respect of persons who are in detention and whose reception should be specifically designed to meet their needs in that situation; (c) detention only allowed in in exceptional circumstances, e.g. to check the identity of the asylum applicant; and (d) the grant of asylum in the form of refugee or subsidiary protection status when the criteria are met.

12. In this context, the interveners moreover recall that, under international human rights law, everyone has the right to leave any country, including his or her own,[23] and to

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under Article 5 § 1 (f). Indeed, in such circumstances 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", *Suso Musa v Malta*, no. 42337/12, judgment, 23 July 2013, § 97.

[15] Reception Conditions Directive, Article 7(1).

[16] Procedures Directive, Article 18(1).

[17] Procedures Directive, Article 18(2).

[18] Charter of Fundamental Rights of the EU, Article 51(1).

[19] Explanations relating to the Charter of Fundamental Rights, Official Journal of the European Union 2007/C 303/32 (14 December 2007). The Explanations set out the sources of the provisions of the Charter, and "shall be given due regard by the courts of the Union and of the Member States"; Charter of Fundamental Rights of the EU, Article 52(7).

[20] Court of Justice of the European Union, Case 5/88 Wachauf, para. 19: the requirements of the protection of the fundamental rights in the EU legal order are binding on the Member States when they implement EU rules. Also Case C-260/89 ERT, para. 42.

[21] S. Peers, 'Human Rights in the EU Legal Order: Practical Relevance for EC Immigration and Asylum Law', in: S. Peers & N. Rogers (eds.), EU Immigration and Asylum Law – Text and Commentary (2006), p. 137, cited at: Laurens Lavrysen, 'European Asylum Law and the ECHR: An Uneasy Coexistence', Goettingen Journal of International Law 4 (2012) 1, p. 202.

[22] Charter of Fundamental Rights of the EU, Article 18.

[23] See, e.g. *Riener v Bulgaria* (no. 46343/99, 23 May 2006), where the applicant had complained, in particular, about a ban preventing her from leaving Bulgaria and where this Court held that there had been, *inter alia*, a violation of Article 2(2) of Protocol No. 4, finding the authorities had, among other things, failed to give due consideration to the principle of proportionality according to which a restriction on the right to leave one's country on grounds of unpaid debt could only be justified as long as it serves its aim – recovering the debt; *Földes and Földesné Hajlik v. Hungary* (no. 41463/02, 31 October 2006) where the Court also found a violation of Article 2(2) of Protocol No. 4, noting that the travel ban had amounted to an automatic, blanket measure of indefinite duration and had run contrary to the

return to his or her country.[24] Furthermore, Article 31 of the Refugee Convention prohibits States from imposing penalties – including, in particular, detention – on asylum-seekers entering the State without authorization, where they come "directly", fleeing persecution, "provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence."[25] The same Article further prohibits restrictions on the movements of such persons, "other than those which are necessary". Article 26 of the Refugee Convention provides for the freedom of movement and choice of residence for refugees lawfully in the territory.

13. In this context, the interveners recall the role of the UNHCR in the supervision of the application of the Refugee Convention. The UNHCR is mandated by the UN General Assembly to provide international protection to refugees and to supervise the application of treaties relating to refugees, pursuant to its 1950 Statute.[26] Its supervisory responsibility is also reflected in the preamble[27] to and in Article 35 of the 1951 Refugee Convention,[28] and Article II of its 1967 Protocol.[29]

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authorities' duty to take appropriate care that any interference with the right to leave one's country should be justified and proportionate; and *Nalbantski v. Bulgaria* (no. 30943/04, 10 February 2011), where this Court found, in particular, that the prohibition on leaving the country imposed on the applicant by the authorities on account of his criminal conviction violated Article 2(1) of Protocol No. 4. The Court reasoned, among other things, that the mere fact that an individual had been criminally convicted and had not yet been rehabilitated could not justify the imposition of restriction of his or her freedom to leave the country. See also, "As states increase border controls, UNHCR calls for sensitivity for those fleeing persecution", issued by the UNHCR on 7 January 2011 and available at http://www.refworld.org/docid/4d2ac6962.html.

[24] E.g., Article 13 of the Universal Declaration of Human Rights; ICCPR, Article 12(1) ('Everyone shall be free to leave any country, including his own'); International Convention on the Elimination of All Forms of Racial Discrimination Article 5; General Assembly Declaration on the Human Rights of Individuals who are not Nationals of the Country in which they Live; Human Rights Committee (HRC), General Comment No. 27, Freedom of Movement (Article 12) (1999), available at: http://www2.ohchr.org/english/bodies/hrc/comments.htm.

[25] Article 31(1) of the Refugee Convention provides 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." See *Ad Hoc* Committee on Statelessness and Related Problems, UN Doc. E/AC.32/2 Annex (1950), p. 46, referenced by Noll, G, "Article 31", in Zimmerman, A. (ed), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: a Commentary* (Oxford University Press, Oxford, 2011) p. 1249.

[26] UN General Assembly, *Statute of the Office of the United Nations High Commissioner for Refugees*, 14 December 1950, A/RES/428(V), Annex, paragraph 8(a) of which states "8. The High Commissioner shall provide for the protection of refugees falling under the competence of his Office by: (a) Promoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto". While not explicitly elaborated in the Statute, the UNHCR has an implied competence to define and adopt the measures that are reasonably necessary to achieve the purpose of the international legal framework governing the protection of persons of concern to UNHCR; see, Volker Türk (then Director of International Protection, UNHCR), Keynote address at the International Conference on Forced Displacement, Protection Standards, Supervision of the 1951 Convention and the 1967 Protocol and Other International Instruments, York University, Toronto, Canada, 17-20 May 2010, p.5. Further, the need for international cooperation is also recognized in the preamble to the Refugee Convention (recital 4). The 2004 Qualification Directive refers in its preamble to consultations with the UNHCR, which "may provide valuable guidance for Member States when determining refugee status" (recital 15).

[27] The preamble to the Convention states: "Noting that the United Nations High Commissioner for Refugees is charged with the task of supervising international conventions providing for the protection of refugees, and recognizing that the effective co-ordination of measures taken to deal with this problem will depend upon the co-operation of States with the High Commissioner".

[28] Article 35(1) reads: "The Contracting States undertake to cooperate with the Office of the United Nations High Commissioner for Refugees, or any other agency of the United Nations which may succeed it, in the exercise of its functions, and shall in particular facilitate its duty of supervising the application of the provisions of this Convention."

[29] Article II(1) reads: "The States Parties to the present Protocol undertake to cooperate with the office of the United Nations High Commissioner for Refugees, or any other agency which may succeed it, in the

14. In the exercise of its supervisory mandate, in 2012 the UNHCR published a set of Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention. The Guidelines provide authoritative guidance on substance and procedure and "are intended to provide guidance to governments, parliamentarians, legal practitioners, decision-makers, including the judiciary, as well as other international and national bodies working on detention and asylum matters, including non-governmental organisations, national human rights institutions and UNHCR staff."[30]

15. In light of and consistent with Articles 31 and 26 of the Refugee Convention and the provisions of other relevant international law and standards,[31] the UNHCR's Detention Guidelines underscore a presumption against detention: "the detention of asylum-seekers should be a measure of last resort, with liberty being the default position".[32]

16. Given that the applicable EU law should be interpreted in light of relevant UNHCR guidance, the interveners submit, in summary, that, in order to establish that detention in pursuit of immigration control for each and every case is not arbitrary, taking into account the specific circumstances of the individual asylum-seeker concerned, including his or her sexual orientation, the State must show that detention is: (i) provided for by national law; (ii) carried out in pursuit of a legitimate objective prescribed in national law; (iii) non-discriminatory; (iv) necessary; (v) proportionate and reasonable; (vi) as short as possible; and (viii) carried out in accordance with the procedural and substantive safeguards of international[33] and domestic law. Effective judicial review with certain procedural guarantees is also required.[34]

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exercise of its functions, and shall in particular facilitate its duty of supervising the application of the provisions of the present Protocol."

[30] UNHCR Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention, 2012 (hereafter UNHCR Detention Guidelines), available at: http://www.refworld.org/docid/503489533b8.html.

[31] E.g., Article 9 of the International Covenant on Civil and Political Rights (ICCPR), enshrining the right to liberty and security of person. See also, General comment No. 35, Article 9 (Liberty and security of person), Human Rights Committee, CCPR/C/GC/35, 16 December 2014, para. 18, which, *inter alia*, states, "[a]sylum seekers who unlawfully enter a State party's territory may be detained for a brief initial period in order to document their entry, record their claims and determine their identity if it is in doubt"; see also para. 3. In *A. v. Australia*, the Human Rights Committee concluded that, "[t]he State must provide more than general reasons to justify detention: in order to avoid arbitrariness, the State must advance reasons for detention particular to the individual case. It must also show that, in the light of the author's particular circumstances, there were no less invasive means of achieving the same ends", CCPR, Communication No. 560/1993, Views of 30 April 1997, para. 9.3. See also, *Saed Shams and Others v. Australia*, HRC, Communication No.1255/2004, 11 September 2007; *Samba Jalloh v. the Netherlands*, HRC, CCPR, Communication No. 794/1998, Views of 15 April 2002: "arbitrariness" must be interpreted more broadly than "against the law" to include elements of unreasonableness. See also, Committee of Ministers of the Council of Europe, *Guidelines on human rights protection in the context of accelerated asylum procedures,* 1 July 2009, 1062nd meeting of the Ministers' Deputies, principle XI.1, which reads as follows: "XI. Detention 1. Detention of asylum seekers should be the exception [….] 3. In those cases where other vulnerable persons are detained they should be provided with adequate assistance and support. 4. Asylum seekers may only be deprived of their liberty if this is in accordance with a procedure prescribed by law and if, after a careful examination of the necessity of deprivation of liberty in each individual case, the authorities of the state in which the asylum application is lodged have concluded that the presence of the asylum seekers for the purpose of carrying out the accelerated procedure cannot be ensured as effectively by another, less coercive measure [….] 6. Detained asylum seekers shall have ready access to an effective remedy against the decision to detain them, including legal assistance. 7. Detained asylum seekers should normally be accommodated within the shortest possible time in facilities specifically designated for that purpose, offering material conditions and a regime appropriate to their legal and factual situation and staffed by suitably qualified personnel. Detained families should be provided with separate accommodation guaranteeing adequate privacy."

[32] UNHCR, Detention Guidelines, para. 14.

[33] In the context of considering detention for immigration control purposes, in its recent General comment No. 35, the Human Rights Committee has emphasized that, "[t]he decision must consider relevant factors case by case and not be based on a mandatory rule for a broad category; must take

17. Moreover, to demonstrate the necessity and proportionality of the detention of an individual asylum-seeker, it must be shown, in particular, that other less coercive measures have been considered in the context of an individualized assessment and found to be insufficient.[35] In order to ensure that this be the case, each individual decision to detain and to extend its duration in time must be necessary for the specified purpose. Moreover, the UNHCR Detention Guidelines further emphasize that detention must never be automatic and should only be used as a last resort where there is evidence that other less restrictive measures would be inadequate in the particular circumstances of the case.[36]

18. Because of UNHCR's role as guardian of the Refugee Convention, the precepts enshrined in the UNHCR Detention Guidelines should inform the Court's interpretation of the scope and content of the Contracting Parties' obligation under Article 5 of the Convention (i.e., ECHR) in the context of determining the lawfulness of detaining asylum-seekers, and any inconsistency of national laws and practices with these norms should be an indicator of arbitrariness under Article 5(1)(f).

19. Accordingly, the interveners submit that the circumstances in which it is permissible to detain an asylum-seeker on the ground of seeking to prevent "an unauthorised entry into the country" under the Convention should be interpreted in a manner consistent with the UNHCR Detention Guidelines which, in turn, would further circumscribe the Contracting Parties' latitude in their resort to detention of asylum-seekers on this ground. In particular, depriving asylum-seekers of their liberty for the sole purpose of preventing their "unauthorised entry into the country" is permitted only where their detention can be shown to be closely connected to that purpose, for its entire duration. Conversely, such detention becomes arbitrary where it is prolonged beyond what is reasonably necessary to pursue that purpose.

ii. The Contracting Parties' obligation under the Convention to take account of the particular risks that the detention of asylum-seekers entails, including, in particular, when deciding to detain those asylum-seekers who might have been exposed to abuse and/or may risk violence and discrimination on account of their sexual orientation while in detention.

20. Throughout the Court's jurisprudence, its assessment of risk factors and vulnerabilities has been closely linked with preventing prejudice and stigmatization,[37] as well as social

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into account less invasive means of achieving the same ends, such as reporting obligations, sureties or other conditions to prevent absconding; and must be subject to periodic re-evaluation and judicial review", see para. 18. On this point, please note that footnote 45 of General comment No. 35 featured at the end of the above-mentioned quote refers to the UNHCR Detention Guideline 4.3 and annex A (describing alternatives to detention) as authority for those propositions.

[34] See also *Louled Massood v. Malta* (No. 24340/08), 27 July 2010, para. 71; UNHCR Detention Guidelines, Guideline 7.

[35] Alternatives to detention need to be considered. In designing alternatives to detention, States must observe the principle of minimum intervention and pay close attention to the specific situation of particular vulnerable groups. UNCHR, Detention Guidelines, Guideline 4.1, 4.2, 4.3. See also, Guiding Principle, 9.1.1. of Resolution 1707 (2010) of the Parliamentary Assembly of the Council of Europe, adopted on 28 January 2010 (7th Sitting) on Detention of asylum seekers and irregular migrants in Europe, which states that, "the detention of asylum seekers and irregular migrants shall be exceptional and only used after first reviewing all other alternatives and finding that there is no effective alternative", available at http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17813&lang=en. See also the Recast Reception Conditions Directive which provides that Member States may detain an applicant for a number of strictly limited purposes, "if other less coercive alternative measures cannot be applied effectively." Reception Conditions Directive (recast), Article 8(2); see also Article 8(3).

[36] UNCHR Detention Guidelines, Guideline 4.1, 4.2.

[37] See, among others, as regards Roma minorities, *D.H. and others v. Czech Republic* (No. 57325/00), 13 November 2007 (GC); *Sampanis and others v. Greece* (No. 32526/05), 5 June 2008; *Oršuš and others v. Croatia* (No. 15766/03), 16 March 2010 (GC); *V.C. v. Slovakia* (No. 18968/07), 8 November 2011. As regards persons with mental disabilities *Alajos Kiss v. Hungary* (No. 38832/06), 20 May 2010.

disadvantage[38] and material deprivation. In the context of asylum proceedings, in *M.S.S. v. Belgium and Greece*, the Grand Chamber in its findings regarding the applicant's detention conditions, considered that, among other things, asylum seekers' complete dependence on the State[39] and "everything he had been through during his migration and the traumatic experience he was likely to have endured previously" entailed that "the applicant, being an asylum-seeker, was particularly vulnerable", which was critical to the Court's finding of a violation of Article 3.[40] The interveners submit that these considerations apply equally, *mutatis mutandis*, in the assessment of lawfulness of detention under Article 5(1)(f).

21. The UNHCR's Detention Guidelines set out that, "decisions to detain are to be based on a detailed and individualised assessment of the necessity to detain in line with a legitimate purpose" and that appropriate assessment tools should take into account the special circumstances or needs of particular categories of asylum-seekers.[41] As regards the latter, the UNHCR Detention Guidelines state that, "[m]easures may need to be taken to ensure that any placement in detention of lesbian, gay, bisexual, transgender or intersex asylum-seekers avoids exposing them to risk of violence, ill-treatment or physical, mental or sexual abuse".[42] In this context, the UNHCR, the International Detention Coalition and the Association for the Prevention of Torture have specifically recommended that immigration detention staff should be appropriately trained in "non-discrimination and equality in relation to gender identity and sexual orientation, and sensitized to the particular needs of LGBTI persons" in order to provide support and ensure safety of lesbian, gay, bisexual transgender and intersex (LGBTI) people.[43]

22. In the report on the UNHCR's *Response to Vulnerability in Asylum* project, it is noted that "[a]sylum-seekers are vulnerable persons *per se* as those forced to leave their home become detached from familiar sources of support and are faced with a number of difficult challenges related to negotiating asylum procedures and establishing a new life. However, within the asylum-seeking population there are those that may face particular difficulties and thus may require specific support and/or be in need of special procedural guarantees."[44] UNHCR's own procedural standards for Refugee Status Determination in this regard state that applicants who "may be vulnerable or have special needs" include, among others, "persons manifestly in need of protection intervention",[45] who are further defined as "persons who may be subject to … arbitrary arrest or detention in the host country, or who may have other serious legal or protection needs".[46] With respect to this, a 2009 survey of Fundamental Rights Agency (FRA) of the EU emphasizes that, "LGBT asylum seekers in detention centres lack

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As regards people living with HIV, *Kiyutin v. Russia* (No. 2700/10), 10 March 2011. In *X v. Turkey* (no. 24626/09, 9 October 2012), this Court found a violation of Article 14 of the Convention taken in conjunction with Article 3, when it held that the applicant in that case had suffered discrimination on the grounds of his sexual orientation, given that his homosexuality, as opposed to his need for protection, had been the main reason for placing him in solitary confinement for a total of over 8 months (paras. 50 and 56-58).

[38] See *Yordanova v. Bulgaria* (No. 25446/06), 24 April 2012, in which the Court held that the State had failed to recognize "the applicants' situation as an outcast community and one of the socially disadvantaged groups" (para. 129), stopping a mass eviction of Roma that would have violated Article 8. It however found no separate issues arose under Article 14 (para. 149).

[39] *M.S.S. v. Belgium and Greece* (No. 30696/09), 21 January 2011 (GC), para. 253-254.

[40] *M.S.S. v. Belgium and Greece* (No. 30696/09), 21 January 2011 (GC), para. 232.

[41] UNHCR, Detention Guidelines, Guideline 4, para. 19.

[42] UNHCR, Detention Guidelines, Guideline 9.7, para. 65.

[43] See, Monitoring Immigration Detention, Practical manual produced jointly by the UN Refugee Agency (UNHCR), the APT and the International Detention Coalition (IDC), pp. 194-195 available at: http://www.apt.ch/en/resources/monitoring-immigration-detention-practical-manual/?cat=62.

[44] Chrystala Katsapaou, *Response to Vulnerability in Asylum – Project Report* (UNHCR Regional Representation for Central Europe, December 2013), p. 9.

[45] UNHCR, Procedural Standards for Refugee Status Determination under UNHCR's Mandate, S. 3.4.1. Available at http://www.refworld.org/pdfid/42d66dd84.pdf.

[46] *Ibid.*, S. 3.4.2.

information and may experience social isolation and abuse because of their sexual orientation or gender identity".[47] In the same vein the Report of the Office of the United Nations High Commissioner for Human Rights on discrimination and violence against individuals based on their sexual orientation and gender identity highlights that "[r]efugees and migrants are sometimes subjected to violence and discrimination while in detention facilities". [48] Furthermore, among other things, the Appendix to Recommendation CM/Rec(2010)5 of the Committee of Ministers of the Council of Europe to member states on measures to combat discrimination on grounds of sexual orientation or gender identity emphasizes that, "[a]sylum seekers should be protected from any discriminatory policies or practices on grounds of sexual orientation or gender identity; in particular, appropriate measures should be taken to prevent risks of physical violence, including sexual abuse, verbal aggression or other forms of harassment against asylum seekers deprived of their liberty, and to ensure their access to information relevant to their particular situation."[49]

23. Under the EU asylum *acquis*, as under the Convention,[50] due diligence must be exercised when detaining individuals. In any case, "Member States shall take into account the special needs of vulnerable persons".[51] In order to guarantee that the treatment of vulnerable asylum-seekers is in accordance with this provision, Member States are required to carry out an individualized evaluation of the person's situation, within a reasonable time.[52]

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[47] FRA, 2009, Homophobia and Discrimination on Grounds of Sexual Orientation and Gender Identity in the EU Member States, Part II – The Social Situation, (Updated version), available at http://fra.europa.eu/sites/default/files/fra_uploads/397-FRA_hdgso_report_part2_en.pdf, pp. 99-101. "There is evidence that LGBT asylum seekers face social isolation and lack of information in the centres. Furthermore, verbal, physical and sexual abuse is prevalent there, as shared rooms and facilities do not allow for privacy, the lack of which contributes to marginalisation and harassment from other applicants. LGBT asylum seekers can also be socially marginalised, as they often have no family or social network for support. Moreover, LGBT asylum seekers often do not, or do not want to, integrate with people from the same country or region of origin to avoid disclosing their sexual orientation. Furthermore, there is some evidence that gender segregation in the centres can be particularly problematic regarding transgender persons", footnotes in the original omitted.

[48] Report of the Office of the United Nations High Commissioner for Human Rights on discrimination and violence against individuals based on their sexual orientation and gender identity, UN Doc. A/HRC/29/23, 4 May 2015, para. 65, footnotes in the original omitted.

[49] Recommendation CM/Rec(2010)5 of the Committee of Ministers to member states on measures to combat discrimination on grounds of sexual orientation or gender identity (Adopted by the Committee of Ministers on 31 March 2010 at the 1081st meeting of the Ministers' Deputies), Appendix to Recommendation CM/Rec(2010)5, X. Right to seek asylum, para. 44, available at https://wcd.coe.int/ViewDoc.jsp?id=1606669. In addition, in the context of the detention of members of sexual minorities in prisons, the Special Rapporteur of the Commission on Human Rights on the question of torture and other cruel, inhuman or degrading treatment or punishment warned that, "members of sexual minorities in detention have been subjected to considerable violence, especially sexual assault and rape, by fellow inmates and, at times, by prison guards. Prison guards are also said to fail to take reasonable measures to abate the risk of violence by fellow inmates or even to have encouraged sexual violence, by identifying members of sexual minorities to fellow inmates for that express purpose. Prison guards are believed to use threats of transfer to main detention areas, where members of sexual minorities would be at high risk of sexual attack by other inmates. In particular, transsexual and transgendered persons, especially male-to-female transsexual inmates, are said to be at great risk of physical and sexual abuse by prison guards and fellow prisoners if placed within the general prison population in men's prisons." See, the report of the Special Rapporteur on the question of torture and other cruel, inhuman or degrading treatment or punishment, A/56/156, 3 July 2001, para. 23. See also, Report of the Office of the United Nations High Commissioner for Human Rights on discrimination and violence against individuals based on their sexual orientation and gender identity, UN Doc. A/HRC/29/23, 4 May 2015, paras. 34-38.

[50] *Chahal v. United Kingdom* (No. 22414/93), 15 November 1996 (GC), para. 113; *A. v. United Kingdom* (No. 3455/05), 19 February 2009 (GC), para. 164.

[51] Reception Conditions Directive (recast), Article 21.

[52] Reception Conditions Directive (recast), Article 22.

24. While the Recast Reception Conditions Directive defines "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"[53] as vulnerable persons in a non-exhaustive list of categories, specific support or procedural needs may vary on a case by case basis.[54] In its Annotated Comments to Directive 2013/33/EU of the European Parliament and Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast), UNHCR expressly called for inclusion of LGBTI persons in the non-exhaustive list of vulnerable persons and urged the Member States to take into account specific needs faced by them when making reception arrangements.[55]

25. As submitted above, the interveners consider that for those Contracting Parties that are bound by the EU asylum *acquis*, EU law must be interpreted as constituting "national law" for the purposes of Article 5 of the Convention. Furthermore, the interveners submit that, under the Convention, in the light of, and in harmony with, other international law standards, Contracting Parties are obliged to consider the particular risk factors that may arise in respect of the detention of LGBTI individuals when deciding whether to detain asylum-seekers and/or in any decision concerned with prolonging their detention. Indeed, those factors may altogether foreclose or limit the lawful imposition and prolongation of detention of such asylum-seekers.

26. In any case, considering the limits imposed by refugee law and EU law, the failure to take into account asylum-seekers' sexual orientation in the context of the decision to detain them or to continue their detention, *ipso facto* would render their deprivation of liberty arbitrary and thus unlawful under the Convention.

27. In a series of cases concerning "vulnerable" asylum-seekers, the Court has found the measure of detention not to have been carried out in good faith as the national authorities did not consider less severe coercive measures, despite a situation of vulnerability.[56] This is in line with the UN Human Rights Committee's opinion in *C v. Australia*, where it found a violation of the right to liberty under Article 9 ICCPR because the respondent State "had not demonstrated that, in the light of the author's particular circumstances, there were not less invasive means of achieving the same ends, that is to say, compliance with the State party's immigration policies".[57] With respect to this, the interveners submit that, in order to ensure compliance with Article 53 of the Convention, this Court must ensure that its interpretation of the Contracting Parties' obligation under Article 5 guarantees at least the protection required under the Article 9 of the International Covenant on Civil and Political Rights.

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[53] Reception Conditions Directive (recast), Article 21.

[54] See in this regard also the findings of the project 'Enhancing Vulnerable Asylum-seekers' Protection' (EVASP), which advances the position that vulnerability is a complex and composite phenomenon of various dimensions. Vulnerable asylum-seekers also encompass those whose physical safety may be compromised, which may be due to a person's sexual orientation. EVASP, *Transnational Report 2009-2010*. Available at http://evasp.eu.

[55] UNHCR, Annotated Comments to Directive 2013/33/EU of the European Parliament and Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast), April 2015, p. 50, available at http://www.refworld.org/docid/5541d4f24.html.

[56] *Yoh-Ekale Mwanje v. Belgium* (No. 10486/10), 20 December 2011; *Mubilanzile Mayeke and Kaniki Mitunga v. Belgium* (No. 13178/03), 12 October 2006; *Rahimi v. Greece* (No. 8687/08), 5 April 2011.

[57] UN Doc. CCPR/C/76/D/900/1999 (13 November 2002), para. 8.2. In its General Comment on Article 9 of the ICCPR, the right to liberty and security of person, the Human Rights Committee, while stressing the need of assessing the necessity and proportionality of the measure of immigration detention and the availability of alternatives to detention, states that, "[d]ecisions regarding the detention of migrants must also take into account the effect of the detention on their physical or mental health", para. 18.

28. In the report by the Council of Europe's Commissioner for Human Rights following his visit to Hungary in July 2014, he expressed particular concern over the arbitrariness that characterized the asylum detention regime: "Although the law specifies that an individual assessment should take place, in practice asylum seekers are reportedly detained according to criteria such as … the nationality of the asylum seeker". The Commissioner expressed concern at the lack of effective judicial review and noted that the Supreme Court of Hungary found the judicial review in immigration detention cases to be ineffective, since it led to detention being discontinued in only three cases out of 8000 decisions adopted in 2011, while for the rest detention was simply prolonged without any individualized reasoning. The report also noted that "[a]ccording to a number of the Commissioner's interlocutors, the asylum system in Hungary is not properly equipped to deal with vulnerability. In particular, a screening mechanism to identify persons with special needs is lacking".[58]

29. In light of the foregoing, the interveners submit that an asylum applicant's sexual orientation, established pursuant to an individualized assessment of his or her situation,[59] must be taken into account when ordering or maintaining detention at the start of the refugee status determination process. The failure to do so, in light of LGBTI applicants' specific vulnerability, would render the deprivation of liberty arbitrary, in violation of Article 5(1)(f). Moreover, as already stated above, to demonstrate the necessity and proportionality of the detention of an individual asylum-seeker, it must be shown, in particular, that other less coercive measures have been considered in the context of an individualized assessment and found to be insufficient.

[58] Report by Nils Muižnieks, Commissioner for Human Rights of the Council of Europe, following his visit to Hungary from 1 to 4 July 2014, CommDH(2014)21, para. 156-158.

[59] Incidentally, the interveners would point out that, any system that relies exclusively on the individual concerned self-identifying as vulnerable, including in LGBTI cases, is inherently ineffective. See, UNHCR Response to vulnerability in Asylum.