



**Submission by the Office of the United Nations High Commissioner for Refugees in the case of  
*H.A. and Others v. Greece* (Appl. No. 19951/16) before the European Court of Human Rights**

**1. Introduction\***

1.1. UNHCR welcomes the opportunity to intervene in this case, as granted by the European Court of Human Rights ('the Court') in its letter of 6 March 2017. UNHCR has been entrusted by the United Nations General Assembly with the mandate to ensure international protection to refugees and, together with Governments, to seek solutions for the problem of refugees.<sup>1</sup> Moreover, UNHCR shall promote 'the conclusion and ratification of international conventions for the protection of refugees' and supervise their application.<sup>2</sup> UNHCR's supervisory responsibility is exercised in part by the issuance of interpretative guidelines on the meaning of provisions and terms contained in international refugee law instruments. Such guidelines include the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status ('UNHCR Handbook') and subsequent 'Guidelines on International Protection'<sup>3</sup>, as well as other guidelines such as the Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention ('2012 Detention Guidelines').<sup>4</sup>

1.2. In this submission, UNHCR addresses the domestic legislative framework and practice in Greece regarding the detention of unaccompanied and separated children (Part 2) and provides UNHCR's interpretation of the relevant principles of international refugee and human rights law governing such (Part 3).

**2. Legislative framework and practice in Greece regarding the detention of unaccompanied and separated children**

**2.1. Relevant legislative framework**

2.1.1. Unaccompanied and separated children (UASC) who are third country nationals may be detained in Greece on four distinct legal grounds: 1) restriction of liberty for identification purposes (2.1.2); 2) detention in view of removal (2.1.3); 3) detention of UASC seeking asylum (2.1.4); 4) detention under protective custody (2.1.5).

2.1.2 In relation to restriction of liberty for identification purposes, according to Article 14 L. 4375/2016<sup>5</sup>, third-country nationals or stateless persons, including UASC, entering without complying with the legal formalities in the country shall be transferred to a Reception and Identification Centre (RIC) to be subject to reception and identification procedures. In the RIC they shall be placed under a status of restriction of liberty by decision of the Manager of the Centre, to be issued within three (3) days of their arrival. If, upon expiry of the three days, the above procedures have not been completed, the Manager of the Centre may, without prejudice to provisions related to asylum seekers, decide to extend the restriction of liberty of the above mentioned persons until the completion of these procedures and for a period not exceeding twenty-five (25) days from their entry into the Centre.

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\* This submission does not constitute a waiver, express or implied, of any privilege or immunity which UNHCR and its staff enjoy under applicable international legal instruments and recognized principles of international law. UN General Assembly, *Convention on the Privileges and Immunities of the United Nations*, 13 February 1946, <http://www.refworld.org/docid/3ae6b3902.html>.

<sup>1</sup> UN General Assembly, *Statute of the Office of the United Nations High Commissioner for Refugees*, 14 December 1950, A/RES/428(V), para. 1, <http://www.unhcr.org/refworld/docid/3ae6b3628.html>.

<sup>2</sup> *Ibid.* para. 8(a).

<sup>3</sup> UNHCR Handbook, December 2011, HCR/IP/4/ENG/REV.3, <http://www.unhcr.org/refworld/docid/4f33c8d92.html>. The 'Guidelines on International Protection' complement the UNHCR Handbook and are intended to provide guidance for governments, legal practitioners, decision-makers and the judiciary, as well as UNHCR staff.

<sup>4</sup> UNHCR, 2012 Detention Guidelines, <http://www.refworld.org/docid/503489533b8.html>. The Detention Guidelines reflect the state of international law on detention for immigration-related purposes of asylum-seekers and other persons seeking international protection. They have been re-iterated and expanded in UNHCR's *Beyond Detention: A Global Strategy to support governments to end the detention of asylum-seekers and refugees*, 2014-2019, 2014, <http://www.refworld.org/docid/536b564d4.html>.

<sup>5</sup> L. 4375/2016 on the organization and operation of the Asylum Service, the Appeals Authority, the Reception and Identification Service, the establishment of the General Secretariat for Reception, the transposition into Greek legislation of the provisions of Directive 2013/32/EC "on common procedures for granting and withdrawing the status of international protection (recast) (L. 180/29.6.2013), provisions on the enjoyment of beneficiaries of international protection and other provisions.

2.1.3. In relation to detention for return purposes, third country national children entering or staying irregularly in the Greek territory are not exempted from the issuance of a deportation or a return decision<sup>6</sup> and may be subject to return procedures according to Article 76, L. 3386/2005<sup>7</sup> and Article 21, L. 3907/2011.<sup>8</sup> According to Article 32, L. 3907/2011, UASC may be detained in view of removal only as a measure of last resort, when no other adequate and less coercive measure can be used for the same purpose and for the shortest possible period of time. The child's best interests and family life shall be taken into consideration, according to Art. 20 L. 3907/2011. As for the maximum time limits provided under Greek Law for detention in view of removal, there are no specific provisions for minors and the maximum timeframe of 18 months set by the Returns Directive<sup>9</sup> is also applied in these cases.

2.1.4. Under Greek law, the detention of UASC seeking asylum shall be avoided, and shall not be detained, as a rule according to Art. 46 (10) (b) L. 4375/2016. Only in very exceptional cases, UASC who applied for international protection while in pre-removal detention may remain in detention, as a last resort, to ensure that they are safely referred to appropriate reception facilities for minors. This detention is to be exclusively imposed for the time necessary for the safe referral to appropriate reception facilities and cannot exceed twenty-five (25) days. When, due to exceptional circumstances, such as the significant increase in arrivals of unaccompanied children, and despite the reasonable efforts by competent authorities, it is not possible to provide for the timely safe referral to appropriate reception facilities, detention may be prolonged for a further twenty (20) days.

2.1.5. According to Art. 118 P.D. 141/1991, children can be placed under protective custody until they are referred to appropriate reception facilities or until they are reunited with the persons responsible for them. Protective custody under Greek law does not always amount to detention but, in practice, it has mostly been implemented through the detention of children in pre-removal detention facilities or police stations. In some cases, children have been placed under protective custody in hospitals, also under the care or supervision of police forces. According to the legal provisions on protective custody, there are no maximum time limits for the 'protective custody' of children, which could lead to lengthy detention, if there are no available places in the accommodation facilities for minors or other alternative care options. Furthermore, Art. 118 P.D. 141/1991 provides that persons under protective custody should not, in principle, be kept locked in police cells, unless there is no other way to prevent the risks that they might cause to themselves or to others.<sup>10</sup>

2.1.6. According to Art. 46 (9) L. 4375/2016 and Art. 32 L. 3907/2011, children shall be detained separately from adult detainees. They shall be given the possibility to access recreational activities appropriate for their age and shall have, depending on the duration of their stay, access to education.

2.1.7. Concerning the competent legal authority to which UASC should be referred upon identification, Art. 19 (1) P.D. 220/2007,<sup>11</sup> provides that the Public Prosecutor for Minors, and in the absence of the latter, the First Instance Public Prosecutor of the territory, acts as temporary guardian for UASC. The Public Prosecutor, as temporary guardian shall ensure that the accommodation needs of the child are covered by placing him/her with adult relatives; with a foster-family; in accommodation centres with special services for minors; or in other accommodation suitable for minors, and that this form of accommodation shall protect him/her from the risk of trafficking or exploitation. The Public Prosecutors are also the competent legal authority under Art. 19 P.D. 220/2007 in conjunction with Art. 118 P.D. 141/1991 to issue a decision regarding the placement of unaccompanied and separated children in protective custody.

## **2.2. Practice regarding the detention of unaccompanied and separated children**

2.2.1. The vast majority of unaccompanied and separated children being held in detention in Greece are detained for the purpose of their referral to an appropriate reception facility. This applies irrespective of the legal basis on which UASC are

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<sup>6</sup> According to art. 41 of L.3907/2011 children who are exempted from return are: a) a minor whose parents or persons having custody are legal residents in Greece; b) a minor to whom rehabilitation measures have been imposed by a decision of the Juvenile Court.

<sup>7</sup> Law 3386/2005, Codification of Legislation on the Entry, Residence and Social Integration of Third Country Nationals on Greek Territory.

<sup>8</sup> Law 3907/2011, on the establishment of the Asylum Service and the First Reception Service, transposition into Greek legislation of Directive 2008/115/EC 'on common standards and procedures in Member States for returning illegally staying third country nationals' and other provisions.

<sup>9</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, OJ L. 348/98-348/107; 16.12.2008, 2008/115/EC: <http://goo.gl/Wg4Dno>.

<sup>10</sup> See paragraph 4 of Art. 118 P.D. 141/1991 on the protective custody of persons, who due to their age or mental health, constitute a danger for the public order or expose themselves to danger.

<sup>11</sup> Presidential Decree No 220/2007, on the transposition into Greek legislation of Council Directive 2003/9/EC, 27 January 2003, laying down minimum standards for the reception of asylum seekers.

detained and even in cases where the Public Prosecutor has not specifically issued a decision on protective custody. The limited open reception capacity for UASC has led to prolonged detention periods in 2016 which, in some cases, exceeded the maximum time limits provided under the law (for example, the detention exceeded the 25 days in the context of restriction of liberty for reception and identification purposes), while longer detention has not always been formally justified by a Public Prosecutor decision on 'protective custody'. As per UNHCR's monitoring, the majority of UASC detained on the basis of their return/deportation decision, have also been in practice detained until their referral to appropriate reception facilities, as return procedures for UASC from the vast majority of countries have not materialized.

2.2.2. Prior to 2015, administrative detention was a widespread practice both for adults and minors and detention periods were significant.<sup>12</sup> With regard to minors, the maximum detention time, as observed by UNHCR during that period, could last up to four months until their transfer to appropriate open reception facilities. During the last two years, detention of persons in view of their removal as well as detention of asylum-seekers has become less restrictive in practice and in law. Both the number of the detainees<sup>13</sup> as well as the duration of detention have been significantly reduced.<sup>14</sup> However, as regards UASC, as mentioned above, detention in view of referral to open shelters has continued.

2.2.3. Following the closure of borders between Greece and some neighbouring countries in 2016, there was a significant increase in the number of children staying on a longer-term basis in Greece, which is reflected in the number of referrals for accommodation of UASC received by the National Centre of Social Solidarity (EKKA), which has been responsible for referrals to reception facilities since July 2011.<sup>15</sup> The increase in the number of referrals has meant that many children have been on the waiting list of EKKA for a significant period, waiting to be referred to an appropriate open reception facility.<sup>16</sup> Pending this referral children can be detained in police stations or pre-removal detention centers<sup>17</sup>, or even in closed sections in the RICs. The detention period is normally prolonged even following the referral of EKKA due to delays that may occur for the completion of the medical exams or as result of the escort procedure for the transfer of the UASC to the accommodation facilities.

2.2.4 As places for UASC have gradually increased, there has been a corresponding decrease in the numbers of UASC in detention awaiting referral in 2017. Apart from the increase in the number of available places in shelters for UASC,<sup>18</sup> the decrease is also due to the prioritization by EKKA of children in detention and the availability of some alternatives to detention, such as the implementation of a pilot scheme on safe zones for UASC in camp-like accommodation facilities.<sup>19</sup>

### **2.3. Conditions of detention in pre-removal detention centers, in police stations and in the RICs**

2.3.1 Regarding the conditions in pre-removal detention centers, UNHCR has observed lack of maintenance and gaps in the provision of services such as psychosocial support, medical care and legal assistance<sup>20</sup>. Moreover, the provision of information to children in pre-removal detention facilities in a language that they understand continues to be problematic due to the lack of interpreters and translation of the administrative decisions. As per UNHCR's monitoring, despite the fact that access to open air and courtyards has improved in most facilities, recreation and leisure activities especially for children or young adolescents are still limited. Insufficient heating and cooling in some of these detention centers also affects the health of the children. Furthermore, since December 2016 some pre-removal detention centres no longer keep children in a

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<sup>12</sup> The Greek Ombudsman and UNHCR documented that in the case of 240 detainees that were at the pre-removal Centre of Komotini, the average time of detention was 12-15 months, while, according to the law, this duration should be exceptional. *UNHCR observations on the current asylum system in Greece*, December 2014, p.28, <http://www.refworld.org/docid/54cb3af34.html>. The detention period for adults has in some cases exceeded the 18-month timeframe allowed by the Returns Directive.

<sup>13</sup> The number of detainees has been reduced from about seven thousands to a few hundred, the majority of which have been detained on the basis of constituting a risk to public order. UNHCR continues to raise concerns regarding administrative detention on such a ground (which is not provided by the Law 3907/2011 transposing the Return Directive) as well as on the inadequate reasoning of the relevant detention orders.

<sup>14</sup> According to the information received by EKKA, children from detention are currently placed in UAC accommodation facilities or safe zones within one week, from their referral to accommodation. However, the length of stay in detention might be longer due to the delays in the referrals or in the medical exams required, or the escort procedures.

<sup>15</sup> The total number of referrals of UASC to EKKA for accommodation in 2016 was just under five thousand (4,949), whereas the total number of referrals from 1 January 2017 until 10 March 2017, is less than one thousand (811). It is worth noting that the number of referrals for accommodation in 2016 is more than double the number in 2015 (2,248).

<sup>16</sup> According to oral preliminary data shared by EKKA, some UAC wait for placement in shelters for a period of seven months. Official analytical data will be published by EKKA in April 2017.

<sup>17</sup> Pre-removal Detention Centers have been established since summer 2012 to accommodate long-term immigration detention. The period of time in detention of UASC in pre-removal facilities reported to UNHCR by implementing partners, has been up to 4 months in 2016.

<sup>18</sup> The increasing accommodation needs have led to the establishment of 939 new places in shelters for UAC, during 2016, while 173 places are planned in the forthcoming months.

<sup>19</sup> According to the information received by EKKA based on their referrals until 20 March 2017, 18 children were in detention in the country. However, this number might be higher due to the delays in the referrals of children to EKKA by police authorities.

<sup>20</sup> UNHCR provides legal assistance and psychosocial support to UASC in Amygdaleza detention facility through the NGO Arsis, but most of the children detained in other locations remain without access to legal assistance or without the provision of psychosocial support.

separate section for minors; they are instead detained with adults in the section for families, which is not in compliance with related legal provisions.<sup>21</sup>

2.3.2. The same applies to detention facilities operated by the Police Directorates and in police stations, which based on UNHCR's observations are inappropriate for children and are not designed to hold persons for longer than a few days. Many lack outdoor access and there is usually a lack of ventilation and natural light. The conditions in these facilities are frequently poor and deteriorating due to overcrowding, insufficient maintenance and lack of refurbishment. In combination with serious concerns regarding hygiene conditions and lack of medical services, these facilities provide an environment, which constitutes a risk to the physical and mental health of children<sup>22</sup>. Furthermore, the police stations do not provide access to education for children nor to recreational activities, according to the age of the children as is legally required.

2.3.3. The situation in the RICs is slightly different though, where, despite the poor material conditions, there is provision of medical services and psychosocial support to minors on a daily basis together with the provision of informal education and recreational activities.

2.3.4. However, UNHCR notes that detention in some of the RICs<sup>23</sup> can be extensive given the current lengthy asylum procedures for UASC in the RICs. It is to be noted that the examination of asylum applications by UASC was not prioritized so as to coincide with the placement of the child in an appropriate accommodation facility; this practice has, recently, ended as the placement of UASC has accelerated. Regarding access to asylum, UNHCR has also observed impediments in registering the request of the children to apply for international protection in police stations or pre-removal detention facilities. This can be attributed partly to the lack of legal aid or the provision of information in a language the children understand on the asylum procedures.

2.3.5. It is also noteworthy that children in detention face the risk of being subject to standardized age assessment procedures whose reliability is open to question. The consequence of an erroneous assessment is their subsequent detention in facilities for adults and for a longer period.<sup>24</sup>

2.3.6. As far as current alternatives to detention for UASC are concerned, the Ministry of Migration Policy, based on a set of Minimum Standards drafted by the inter-agency Child Protection Sub Working Group (CPSWG) in April 2016, established 'safe zones' inside open camp-like accommodation facilities, in order to provide temporary alternatives to detention, until suitable medium and long-term care arrangements are in place. The concept was piloted in three existing sites near Thessaloniki: Lagkadikia, Diavata and Alexandria with spaces for up to 30 UAC in each. These zones have dedicated child protection actors providing a wide range of services, including case management. A new safe zone has recently been created by the Ministry of Migration Policy in collaboration with child protection actors in Elaionas with a total capacity of 16 children and new safe zones are planned in other camp-like accommodation facilities to operate as transit facilities for a limited period of time. However, the conditions in many camp-like accommodation facilities, and especially security concerns<sup>25</sup>, function as a deterrent to the expansion of the scheme in many of the sites.

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<sup>21</sup> Articles 4 and 46 (9), (10) L. 4375/2016 and Art. 32 L. 3907/2011. See also, UNHCR, Regional Refugee and Migrant response Plan for Europe January to December 2017, December 2016, p. 50-52, <http://www.unhcr.org/partners/donors/589497d07/2017-regional-refugee-migrant-response-plan-europe-january-december-2017.html?query=>

<sup>22</sup> UNHCR, Briefing Note Unaccompanied and Separated Children in Europe, June 2016, p. 2,

<http://www.unhcr.org/partners/partners/57da92de7/background-document-unaccompanied-separated-children-europe.html?query=> ;

<sup>23</sup> Children are detained in Fylakio, Evros, which operates as a closed facility, and partially in Lesvos, where the Public Prosecutor has issued an order for the extension of the restriction of liberty of UASC, although they get the permission to exit the RIC for a few hours on a daily basis. The other RICs operate currently as de facto open facilities.

<sup>24</sup> UNHCR recommends that age assessments should only be conducted in cases when a child's age is in doubt, and are part of a comprehensive assessment that takes into account the physical appearance and the psychological maturity of the child. This is because no method can determine age definitely. Most experts agree that age assessment is not a determination of chronological age but an estimated guess. Moreover, age assessments are to be conducted in a safe, child- and gender-sensitive and fair manner with due respect for human dignity and taking into account the ethnic and cultural background of the child. If medical testing is considered necessary, the least invasive means should be applied. Where doubts remain about the child's age after an assessment, the asylum-seeker is to be given the benefit of the doubt and assumed to be a child. See, UNHCR ExCom *Conclusion on Children at Risk* No. 107 (LVIII), 2007, <http://www.refworld.org/docid/471897232.html>. See also, *UNHCR observations on the use of age assessments in the identification of separated or unaccompanied children seeking asylum*, 1 June 2015, <http://www.refworld.org/docid/55759d2d4.html>.

<sup>25</sup> UNHCR has received reports of 38 security incidents from mid-October 2016 until end January 2017 in the camp-like accommodation facilities in the mainland of Greece. These incidents include SGBV incidents, drug abuse, physical assaults, and violent fights where vulnerable groups are targeted. There is a lack of adequate lighting in the night, a lack of service/guards personnel, and a lack of law enforcement officers in the sites to prevent and address these criminal incidents. Judicial redress is also lacking, due to a fear of retaliation from the perpetrators if one reports.

### 3. Principles of international refugee and human rights law regarding the detention of UASC

#### 3.1. International refugee and human rights law

3.1.1. The right to seek and enjoy asylum from persecution, serious human rights violations and other serious harm, derives from Article 14(1) of the *Universal Declaration of Human Rights* 1948<sup>26</sup>, and is grounded in the 1951 Convention and its 1967 Protocol, to which Greece is a State party.<sup>27</sup> Furthermore, the fundamental rights to liberty and security of the person<sup>28</sup> and freedom of movement<sup>29</sup> are expressed in all the major international and regional human rights instruments. The Executive Committee of the High Commissioner's Programme ('ExCom')<sup>30</sup> has also addressed the issue of the detention of asylum-seekers on a number of occasions.<sup>31</sup>

3.1.2. Article 31 of the 1951 Convention specifically provides for the non-penalisation of refugees having entered or stayed irregularly if they present themselves without delay and show good cause for their illegal entry or stay.<sup>32</sup> The material scope of Article 31 referring to the term 'penalties' is generally accepted to cover administrative detention in the immigration context.<sup>33</sup> The benefits provided under Article 31 are also applicable to asylum-seekers given the wording of these provisions applying to refugees physically in or lawfully in the territory of the concerned State as well as the declaratory nature of the refugee status determination.<sup>34</sup> Article 26 of the 1951 Convention further provides for the freedom of movement and choice of residence for refugees lawfully in the territory.<sup>35</sup> Asylum-seekers are considered lawfully in the territory for the purposes of benefiting from this provision.<sup>36</sup> These rights taken together – the right to seek asylum, the non-penalisation for irregular entry or stay and the rights to liberty and security of person and freedom of movement – mean that the detention of asylum-seekers should be a measure of last resort, with liberty being the default position.<sup>37</sup>

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<sup>26</sup> UN General Assembly, *Universal Declaration of Human Rights*, 1948 (UDHR) 10 December 1948, 217 A (III), <http://www.refworld.org/docid/3ae6b3712c.html>.

<sup>27</sup> 'Seeking asylum is not, therefore, an unlawful act'. UNHCR, 2012 Detention Guidelines, Guideline 1, para. 11.

<sup>28</sup> See, for example, Articles 3 and 9, UDHR; Article 9, *International Covenant on Civil and Political Rights*, 1966 (ICCPR); Articles 1 and 25, *American Declaration of the Rights and Duties of Man*, 1948 (ADRDM); Article 6, *African Charter on Human and Peoples' Rights*, 1981 (ACHPR); Article 7 *American Convention on Human Rights*, 1969 (ACHR); Article 5, *Convention for the Protection of Human Rights and Fundamental Freedoms* (as amended), 1950 (ECHR); Article 6, *Charter of Fundamental Rights of the European Union*, 2000 (CFREU).

<sup>29</sup> See, for example, Article 12, ICCPR, covers the right to freedom of movement and choice of residence for persons lawfully staying in the territory, as well as the right to leave any country, including one's own. See, also, Article 12, ACHPR; Article 22, ACHR; Article 2, ECHR; Article 2, Protocol No. 4 to the ECHR, *Securing Certain Rights and Freedoms Other Than Those Already Included in the Convention and the First Protocol Thereto*, 1963; Article 45, CFREU.

<sup>30</sup> ExCom was established in 1958 and functions as a subsidiary organ of the United Nations General Assembly. It has both executive and advisory functions; the latter includes issuing Conclusions on International Protection (referred to as 'ExCom Conclusions'). ExCom Conclusions are adopted by consensus by the States which are Members of the Executive Committee and can therefore be considered as reflecting their understanding of legal standards regarding the protection of refugees. At present, 98 States are Members of the Executive Committee, including Greece which has been a member since 1955: <http://www.unhcr.org/excom/announce/40112e984/excom-membership-date-admission-members.html>.

<sup>31</sup> See, ExCom, *Conclusion on Detention of Refugees and Asylum-Seekers*, No. 44 (XXXVII) 1986, para (b), and ExCom Conclusions Nos. 55 (XL) 1989, para (g); 85 (XLIX) 1998, paras (cc), (dd) and (ee); and 89 (LI) 2000, para 3, all available at: *Conclusions Adopted by the Executive Committee on the International Protection of Refugees, 1975-2009* (Conclusion No. 1-109) <http://www.refworld.org/docid/4b28bf1f2.html>.

<sup>32</sup> Article 31 reads as follows:

1. 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.

2. 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. The

Contracting States shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country.

<sup>33</sup> UNHCR, 2012 Detention Guidelines, Guideline 4.1.4 para. 32. '[C]riminalizing illegal entry into a country exceeds the legitimate interest of States to control and regulate illegal immigration and leads to unnecessary [and therefore arbitrary] detention.' UN Working Group on Arbitrary Detention, *Report to the Seventh Session of the Human Rights Council, A/HRC/7/4/*, 10 January 2008, para. 53, <http://www.refworld.org/docid/502e0eb02.html>.

<sup>34</sup> Given that a person is a refugee within the meaning of the 1951 Convention as soon as he or she fulfills the criteria contained in the refugee definition, refugee status determination is declaratory in nature. UNHCR Handbook, *supra*, para. 28.

<sup>35</sup> Article 26 of the 1951 Convention provides: '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>36</sup> UNHCR, '*Lawfully Staying*' – A Note on Interpretation, 1988, <http://www.unhcr.org/refworld/pdfid/42ad93304.pdf>; UNHCR Global Consultations: Reception of Asylum-Seekers, para. 3, <http://www.unhcr.org/refworld/docid/3bfa81864.html>.

<sup>37</sup> UNHCR, 2012 Detention Guidelines, Guideline 2 para. 14.

3.1.3. Restrictions on movement of refugees and asylum-seekers must be necessary, reasonable and proportionate<sup>38</sup> and can only be justified on grounds of public order<sup>39</sup>, public health or national security<sup>40</sup>. This requires authorities to consider whether there are less coercive or intrusive measures (that is, alternatives to detention) to achieve these goals.<sup>41</sup> Failure to do so could render detention arbitrary.<sup>42</sup> Furthermore, irrespective of the justification initially invoked for the person's detention, it should remain valid throughout the detention period and maximum limits on detention need to be established in law to protect the individual from arbitrary detention.<sup>43</sup> The UNHCR 2012 Detention Guidelines further provide that decisions to detain or to extend detention must be subject to minimum procedural safeguards.<sup>44</sup>

3.1.4. All of these general principles relating to detention apply *a fortiori* to children.<sup>45</sup> Furthermore, the Convention on the Rights of the Child ('CRC')<sup>46</sup> sets out a number of principles regarding the protection of children which apply throughout all stages of displacement,<sup>47</sup> including:

- The **best interests of the child** shall be a primary consideration in all actions affecting children, (Article 3);
- There shall be **no discrimination** on grounds of race, colour, sex, language, religion, political or other opinions, national, ethnic or social origin, property, disability, birth or other status, or on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians or family members (Article 2);
- Each child has a **fundamental right to life, survival and development** to the maximum extent possible (Article 6);
- Children should be assured the **right to express their views freely** and their views should be given "due weight" in accordance with the child's age and level of maturity (Article 12);<sup>48</sup>

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<sup>38</sup> UNHCR, 2012 Detention Guidelines, Guideline 4 para. 18.

<sup>39</sup> More particularly, the notion of 'public order' encompasses the following purposes: To prevent absconding and/or in cases of likelihood of non-cooperation; in connection with accelerated procedures for manifestly unfounded or clearly abusive claims; for initial identity and/or security verification; and in order to record, within the context of a preliminary interview, the elements on which the application for international protection is based, which could not be obtained in the absence of detention. UNHCR, 2012 Detention Guidelines, Guideline 4.1.

<sup>40</sup> UNHCR, 2012 Detention Guidelines, Guideline 4.1 para. 21.

<sup>41</sup> For UNHCR, 'alternatives to detention' refer to any legislation, policy or practice that allows children whether accompanied or not, to reside in the community or, when unaccompanied or separated, in appropriate reception or care arrangements where protection and assistance are provided to meet their specific needs. Alternatives to detention are, non-custodial and must not become alternative forms of detention. They should respect the principle of minimum intervention and fulfill the best interests of the child along with his/her rights to liberty and family life. UNHCR, *Options Paper 1: Options for governments on care arrangements and alternatives to detention for children and families*, 2015, <http://www.refworld.org/docid/5523e8d94.html>.

<sup>42</sup> UNHCR, 2012 Detention Guidelines, Guideline 4 para. 18.

<sup>43</sup> UNHCR, 2012 Detention Guidelines, Guideline 4.2.

<sup>44</sup> These safeguards include:

- The right to be informed at the time of arrest or detention of the reasons for their detention, and their rights in connection with the order, including review procedures, in a language and in terms which they understand;
- The right to be informed of the right to legal counsel. Lawyers need to have access to their client, to records held on their client, and be able to meet with their client in a secure, private setting;
- The right to be brought promptly before a judicial or other independent authority to have the detention decision reviewed. This review should ideally be automatic. The reviewing body must be independent of the initial detaining authority, and possess the power to order release or to vary any conditions of release;
- Following the initial review of detention, the right to benefit from a regular periodic review of the necessity for the continuation of detention before a court or an independent body, which the asylum-seeker and his/her representative would have the right to attend;
- The right to challenge the lawfulness of detention before a court of law at any time. In this regard, the authorities need to establish that there is a legal basis for the detention in question, that the detention is justified according to the principles of necessity, reasonableness and proportionality, and that other, less intrusive means of achieving the same objectives have been considered in the individual case;
- To contact and be contacted by UNHCR.

These safeguards also include access to a fair and efficient asylum procedure in order to ensure that persons in need of international protection are properly identified. Access to asylum procedures must be realistic and effective, and access to legal and linguistic assistance should be made available. UNHCR, 2012 Detention Guidelines, Guideline 7, para. 47.

<sup>45</sup> UNHCR, 2012 Detention Guidelines, Guideline 9.2. See also, Inter-American Commission on Human Rights report '*Human Rights of Migrants, Refugees, Stateless Persons, Victims of Human Trafficking and Internally Displaced Persons: Norms and Standards of the Inter-American Human Rights System*', 31 December 2015, OEA/Ser.L/V/II.;Doc. 46/15, <http://www.refworld.org/docid/5821c778b.html>.

<sup>46</sup> Ratified by Greece by Law 2101/1992. UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3, <http://www.refworld.org/docid/3ae6b38f0.html>.

<sup>47</sup> UN Committee on the Rights of the Child (CRC), CRC General Comment No. 6 (2005): *Treatment of Unaccompanied and Separated Children Outside their Country of Origin*, (CRC General Comment No. 6), 1 September 2005, CRC/GC/2005/6, paras 12-30, <http://www.unhcr.org/refworld/docid/42dd174b4.html>.

<sup>48</sup> UNHCR, *Guidelines on International Protection No. 8: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees*, (Guidelines on Child Asylum Claims) para. 5, 22 December 2009, HCR/GIP/09/08, <http://www.unhcr.org/refworld/docid/4b2f4f6d2.html>.

- States Parties shall, in accordance with their national laws, **ensure alternative care for such a child**. Such care could include, inter alia, foster placement or, if necessary, placement in suitable institutions for the care of children. When considering options, due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background (Article 20(2) and (3));
- Asylum-seeking and refugee children are entitled to receive **appropriate protection and humanitarian assistance** in line with the CRC and other international instruments (Article 22).

3.1.5. UNHCR's position is that children should not be detained<sup>49</sup> for immigration related purposes, irrespective of their legal/migratory status or that of their parents<sup>50</sup>, and detention is never in their best interests.<sup>51</sup> An ethic of care – not detention or enforcement – needs to govern all actions taken and the principles of minimal intervention and the best interests of the child should govern any measures taken by States.<sup>52</sup>

3.1.6. Recent studies<sup>53</sup> have indicated that detention of children can undermine their psychological and physical well-being and compromise their cognitive development. Furthermore, children held in detention are at risk of suffering depression and anxiety, and frequently exhibit symptoms consistent with post-traumatic stress disorder such as insomnia, nightmares and bedwetting.<sup>54</sup> There is indeed strong evidence that detention has a profound and negative impact on children's health and development, regardless of the conditions in which children are held, and even when detained for short periods of time or with their families.<sup>55</sup> The risk of exposure to other forms of harm, including sexual and gender-based violence, are also significant in many detention contexts.

3.1.7. UNHCR is concerned that detention of unaccompanied and separated children is often declared as a form of protective custody by authorities, though it exposes the children to serious protection risks and psychological distress.<sup>56</sup> Thus, 'all efforts, including prioritization of asylum processing, should be made to allow for the immediate release of

<sup>49</sup> UNHCR, *UNHCR's position regarding the detention of refugee and migrant children in the migration context*, ('UNHCR January 2017 Position Paper') January 2017, <http://www.refworld.org/docid/5885c2434.html>. Moreover, UNHCR notes that no other qualifications should be added to the baseline position of non-detention of children for immigration related purposes. References to the application of Art. 37(b), 'exceptional circumstances / measure of last resort', are not appropriate for cases of detention of any child for immigration related purposes. It is understood from the commentaries of the CRC (see footnote 49 below), that while Art. 37(b) may apply in other contexts (such as in cases of children in conflict with the law – see CRC/C/GC/10 from 2007), its application to detention in the immigration context would be in conflict with the principle of best interests of the child.

<sup>50</sup> 'Detention cannot be justified solely on the basis of the child being unaccompanied or separated, or on their migratory or residence status, or lack thereof.' UN CRC, *General comment No. 6, supra*, para. 61. Furthermore, the 'detention of a child because of their or their parent's migration status constitutes a child rights violation and always contravenes the principle of the best interests of the child. In this light, States should expeditiously and completely cease the detention of children on the basis of their immigration status.' UN CRC, *Report of the 2012 Day of General Discussion on the Rights of All Children in the Context of International Migration (UN CRC, 2012 DGD)*, 28 September 2012, <http://www.refworld.org/docid/51efb6fa4.html>. See also, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez, March 5, 2015, A/HRC/28/68, para. 80, concluding that '[w]ithin the context of administrative immigration enforcement, it is now clear that the deprivation of liberty of children based on their or their parents' migration status is never in the best interests of the child, exceeds the requirement of necessity, becomes grossly disproportionate and may constitute cruel, inhuman or degrading treatment of migrant children'.

<sup>51</sup> UNHCR January 2017 Position Paper, *supra*. See also, UN High Commissioner for Human Rights, who stated, '[l]et us be clear: immigration detention is never in the best interests of the child'. 'Children and families should never be in immigration detention - UN experts' <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21026&LangID=E#sthash.fwKB9IJR.dpuf>. Similarly, the UN Special Rapporteur on the human rights of migrants, has held that detention of children will never be in their best interests. See, UN *Report of the Special Rapporteur on the human rights of migrants, Jorge Bustamante*, A/HRC/11/7, 14 May 2009, para. 62, <http://www.refworld.org/docid/4a3b51702.html>.

<sup>52</sup> UNHCR January 2017 Position Paper, *supra*.

<sup>53</sup> Human Rights Watch (HRW) has documented, for more than 10 years in Europe and beyond, serious violations of children's rights arising from immigration detention of children; highlighting that children may be arbitrarily detained, held in cells with unrelated adults, and subjected to brutal treatment by police, guards and other authorities and are often held in poor conditions that fall far short of international standards governing appropriate settings for children deprived of their liberty. See: <https://www.hrw.org/topic/childrens-rights/refugees-and-migrants>.

<sup>54</sup> For more on the negative effects of detention on children, see: <http://endchilddetention.org/impact/> and also <http://www.fmreview.org/detention/farmer.html>.

<sup>55</sup> 'Children's emotional and behavioral responses to separation and to detention suggest that the experience is acutely stressful and, in some cases, traumatic, even when detention is brief. Distress and impairment may persist months after release.' See Kronick, Rousseau and Cleveland, *American Journal of Orthopsychiatry* 85(3):287-294, May 2015.

<sup>56</sup> UNHCR, *Briefing Note Unaccompanied and Separated Children in Europe*, June 2016, p. 2, <http://www.unhcr.org/partners/partners/57da92de7/background-document-unaccompanied-separated-children-europe.html?query=>; UNHCR, *Regional Refugee and Migrant response Plan for Europe January to December 2017*, December 2016, p. 50-51, <http://www.unhcr.org/partners/donors/589497d07/2017-regional-refugee-migrant-response-plan-europe-january-december-2017.html?query=>

children from detention and their placement in other forms of appropriate accommodation.<sup>57</sup> UNHCR has long advocated for the priority processing of all aspects of a child's claim, including the reduction of waiting times.<sup>58</sup> The Inter-American Court of Human Rights (IACtHR) has held that 'the principle of the best interest entails both its priority consideration in the design of public policies and the drafting of laws and regulations concerning childhood, and in its implementation in all the spheres that related to the life of the child.'<sup>59</sup>

In the context of migration, any immigration policy that respects human rights, as well as any administrative or judicial decision concerning the entry, stay or expulsion of a child, or the detention, expulsion or deportation of her or his parents associated with their own migratory status, must give priority to the assessment.<sup>60</sup>

3.1.8. Furthermore, pursuant to the non-discrimination principle, detention cannot be justified based solely on the fact that the child is unaccompanied or separated, or on the basis of his or her migration or residence status.<sup>61</sup> Moreover, children should never be criminalised or subjected to punitive measures because of their parents' migration status.<sup>62</sup> Alternatives to detention should be explored, preferably through family-based alternative care options or other suitable alternative care arrangements.<sup>63</sup> This is in accordance with international standards.<sup>64</sup>

### 3.2. Relevant EU standards

3.2.1. Article 18 of the Charter of Fundamental Rights of the European Union (the Charter)<sup>65</sup> provides for the right to asylum. Article 6 emphasizes that 'everyone has the right to liberty and security of person' while Article 24 (2) of the Charter highlights 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.' Article 52 specifies the necessity and proportionality requirements applicable in relation to 'any limitation on the exercise of the rights and freedoms recognized by this Charter'.<sup>66</sup> Article 52(3) further provides that 'in so far as this Charter contains rights which correspond to rights guaranteed by the 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*'<sup>67</sup> while this provision 'shall not prevent Union law providing more extensive protection'.

3.2.2. Under EU asylum law, the detention of unaccompanied and separated children seeking asylum is governed by Article 11(3) of the Reception Conditions Directive (recast) (RCD (recast))<sup>68</sup> which provide in particular the following:

- Unaccompanied minors shall be detained only in exceptional circumstances;
- All efforts shall be made to release the detained unaccompanied minor as soon as possible;
- Unaccompanied minors shall never be detained in prison accommodation;
- As far as possible, unaccompanied minors shall be provided with accommodation in institutions provided with personnel and facilities which take into account the needs of persons of their age;
- Where unaccompanied minors are detained, Member States shall ensure that they are accommodated separately from adults.

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<sup>57</sup> UNHCR, 2012 Guidelines on Detention, Guideline 9.2, para 57.

<sup>58</sup> UNHCR, *Guidelines on Child Asylum Claims*, *supra*, para. 66.

<sup>59</sup> *Advisory Opinion OC-21/14, 'Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection'*, Inter-American Court of Human Rights (IACtHR), para 70, 19 August 2014, [http://www.refworld.org/cases\\_IACRTHR\\_54129c854.html](http://www.refworld.org/cases_IACRTHR_54129c854.html).

<sup>60</sup> *Ibid.*

<sup>61</sup> UNHCR, 2012 Guidelines on Detention, Guideline 9.2, paras 54-57.

<sup>62</sup> 'Children should not be criminalized or subject to punitive measures because of their or their parents' migration status'. UN CRC, 2012 DGD, para. 78. See also, *A home away from home for refugee and migrant children*, Advocacy Brief, UNICEF, August 2016, [http://www.unicef.org/ceecis/A\\_home\\_away\\_from\\_home\\_29\\_08\\_2016.pdf](http://www.unicef.org/ceecis/A_home_away_from_home_29_08_2016.pdf).

<sup>63</sup> See UNHCR, 2012 Detention Guidelines, Annex A, and UNHCR, *Options Paper 1: Options for governments on care arrangements and alternatives to detention for children and families*, 2015, <http://www.refworld.org/docid/5523e8d94.html>.

<sup>64</sup> UN Special Rapporteur on Torture, Thematic Report on torture and ill-treatment of children deprived of their liberty, 5 March 2015 (A/HRC/28/68), para. 80; <http://www.refworld.org/pdfid/5501506a4.pdf>. See also, IACtHR, *Advisory Opinion OC-21/14, supra*, para. 6; UN CRC, *General comment No. 6, supra*; UN CRC, 2012 DGD, *supra*, para. 78.

<sup>65</sup> Charter of Fundamental Rights of the European Union, [http://www.europarl.europa.eu/charter/pdf/text\\_en.pdf](http://www.europarl.europa.eu/charter/pdf/text_en.pdf).

<sup>66</sup> Article 52 of the Charter Fundamental Rights of the European Union provides that:

1. Any limitation 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 or the need to protect the rights and freedoms of others. (...)

<sup>67</sup> Article 52(3) of the Charter, emphasis added.

<sup>68</sup> RCD (recast), <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013L0033&from=en>.



3.2.3. Article 11(2) of the RCD (recast) emphasizes that the minor's best interests shall be a primary consideration for Member States while Article 23(2) spells out specific safeguards in relation to this principle including:

- Member States shall ensure a standard of living adequate for the minor's physical, mental, spiritual, moral and social development;
- In assessing the best interests of the child, Member States shall in particular take due account of the family reunification possibilities, the minor's well-being and social development, safety and security considerations, the views of the minor in accordance with his or her age and maturity.

3.2.4. The Court of Justice of the EU (CJEU) further highlighted the importance of the principles of proportionality and necessity in applying the above provisions of the RCD (recast), with reference notably to UNHCR's 2012 Detention Guidelines.<sup>69</sup> In a recent judgment, the CJEU re-affirmed that 'the detention of applicants, constituting a serious interference with those applicants' right to liberty, [shall comply] with strict safeguards, namely the presence of a legal basis, clarity, predictability, accessibility and protection against arbitrariness'.<sup>70</sup>

### 3.3. Relevant ECHR standards

3.3.1. Before highlighting the general and specific standards relating to the protection from unlawful and arbitrary detention stemming from Article 5 ECHR, UNHCR recalls that, according to the Court, such standards should be interpreted 'in harmony with other rules of international law of which it forms part',<sup>71</sup> particularly where such other rules are found in human rights treaties (such as the 1951 Geneva Convention and the ICCPR).

3.3.2. In *Saadi v. United Kingdom*, the Court emphasized that 'detention must be compatible with the overall purpose of Article 5, which is to safeguard the right to liberty and ensure that no one should be dispossessed of his or her liberty in an arbitrary fashion'.<sup>72</sup> The Court further recalled the following general principles applicable to detention, irrespective of the ground at stake:<sup>73</sup>

- The detention will be 'arbitrary' where, despite complying with the letter of national law, there has been an element of bad faith or deception on the part of the authorities;
- Both the order to detain and the execution of the detention must genuinely conform with the purpose of the restrictions permitted by the relevant sub-paragraph of Article 5(1);
- There must in addition be some relationship between the ground of permitted deprivation of liberty on which reliance is placed and the location and conditions of detention.

3.3.3. With regard more specifically to the detention based on Article 5(1)(f), the Court held that 'to avoid being branded as arbitrary, [...] detention must be carried out in good faith; it must be closely connected to the purpose of preventing unauthorized entry of the person to the country; the place and conditions of detention should be appropriate [...] and the length of the detention should not exceed that reasonably required for the purpose pursued'.<sup>74</sup>

3.3.4. Regarding the appropriateness of the place and conditions of detention, the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), has stated that 'a prison is by definition not a suitable place in which to detain someone who is neither suspected nor convicted of a criminal offence'.<sup>75</sup> Likewise, this Court held in *Charahili v. Turkey*, that detention in ordinary police detention facilities, 'should be kept to the absolute minimum'.<sup>76</sup>

3.3.5. Drawing from the relevant provisions of the CRC highlighted above, the Court in *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium* set out a number of specific principles and standards regarding the detention of unaccompanied or separated children and stated that, '[t]he States' interest in foiling attempts to circumvent immigration rules must not

<sup>69</sup> CJEU, *J.N.*, C-601/15, 15 February 2016, paras 54, 56 and 63.

<sup>70</sup> CJEU, *Al Chodor*, C-528/15, 15 March 2017, para. 40, <http://www.refworld.org/cases,ECJ,58d545f44.html>.

<sup>71</sup> *Al-Adsani v. The United Kingdom*, (35763/97), ECtHR, 21 November 2001, para. 55, <http://www.refworld.org/docid/3fe6c7b54.html>; Vienna Convention on the Law of Treaties, 23 May 1969, UN Treaty Series, Article 31(3)(c), <http://www.refworld.org/docid/3ae6b3a10.html>.

<sup>72</sup> *Saadi v. The United Kingdom*, (13229/03), ECtHR, 11 July 2006, para. 66, <http://www.refworld.org/docid/44dc70a34.html>.

<sup>73</sup> *Ibid.*, para. 69.

<sup>74</sup> *Ibid.*, para. 74.

<sup>75</sup> See CPT Report, Ireland: Visit 2014. The CPT has further opined that where it is deemed necessary to deprive persons of their liberty for an extended period under aliens legislation, they should be accommodated in centres specifically designed for that purpose, offering material conditions and a regime appropriate to their legal situation and staffed by suitably qualified personnel. See paras 18-19, 18/03/2015, <http://hudoc.cpt.coe.int/eng?i=p-irl-20140916-en>.

<sup>76</sup> *Charahili v. Turkey*, Application no. 46605/07, ECtHR, 13 April 2010, <http://www.refworld.org/cases,ECHR,4bc5cec12.html>.

deprive aliens of the protection afforded by these conventions or deprive foreign minors, especially if unaccompanied, of the protection their status warrants.<sup>77</sup> The Court went on to recognize that the detention of unaccompanied or separated children in the same conditions as adults was at variance with Article 5(1) ECHR because of the ‘extremely vulnerable situation’ they find themselves in as illegal immigrants in a foreign land.<sup>78</sup>

3.3.6. This was further confirmed and expanded in *Rahimi v. Greece*.<sup>79</sup> The Court emphasized that, owing to the applicant’s particular situation as an unaccompanied Afghan asylum-seeking minor of 15 years old, he belonged “undoubtedly to the category of the most vulnerable persons of the society” and that the Greek authorities had a positive obligation under Article 3 ECHR to take care of him through adequate measures.<sup>80</sup> In addition, drawing from Article 19 of the Reception Conditions Directive and the relevant provisions of the CRC, the Court further recognized a large consensus, including in international law, about the primacy of the best interests of the child.<sup>81</sup> As a result, in the Court’s view, the authorities’ disregard for such principle in relation to the applicant’s detention and notably their failure to consider any alternative to detention raised doubts about their good faith.<sup>82</sup>

3.3.7. In subsequent judgments, the Court confirmed that the State’s failure to verify that the detention of children, whether accompanied<sup>83</sup> or not,<sup>84</sup> was a measure of last resort and to consider less severe alternatives deemed such detention arbitrary in breach of Article 5(1) ECHR.

3.3.8. Article 5(1)(d) allows for the ‘detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority’. UNHCR notes that while the Court has not previously pronounced on the application of Article 5(1)(d) ECHR in the asylum context, it has established a strict set of safeguards in relation to the protection from arbitrary detention. In its *Saadi* ruling, the Court recalled that the notion of arbitrariness in the context of sub-paragraph (d) ‘also includes an assessment whether detention was necessary to achieve the stated aim.’ The Court further emphasized that ‘the detention of an individual is such a serious measure that it is justified only as a last resort where other, less severe measures have been considered and found to be insufficient (...)’.<sup>85</sup>

#### 4. Conclusion

4.1. UNHCR recalls that ‘to guard against arbitrariness, any detention needs to be necessary in the individual case, reasonable in all the circumstances and proportionate to a legitimate purpose. Further, failure to consider less coercive or intrusive means could also render detention arbitrary.’<sup>86</sup> Moreover, UNHCR considers that children should not be detained for immigration related purposes, irrespective of their legal/migratory status or that of their parents, and detention is never in their best interests. The principle of the best interest entails both its priority consideration in the design and drafting of laws and policies, but also in its implementation in all spheres. The prioritization of children’s rights includes ensuring appropriate care arrangements and community-based programmes are in place in theory and in practice for the adequate reception of children. In light of the well-documented deleterious effects of detention on children, UNHCR further underlines that liberty and freedom of movement of children should always be the preferred solution.<sup>87</sup> Thus, it is essential for States to take positive actions to fully ensure effective protection and respect of the rights and best interests of the child.

UNHCR, 30 March 2017

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<sup>77</sup> *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, 13178/03, ECtHR, 12 October 2006, para. 81, <http://www.refworld.org/docid/45d5cef72.html>.

<sup>78</sup> *Ibid.*, para. 55 and para. 103

<sup>79</sup> *Rahimi v. Greece*, 8687/08, ECtHR, 5 April 2011, <http://www.refworld.org/docid/4d9c3e482.html>.

<sup>80</sup> *Ibid.*, para. 87.

<sup>81</sup> *Ibid.*, para. 108.

<sup>82</sup> *Ibid.*, para. 109.

<sup>83</sup> *Popov v. France*, 39472/07 and 39474/07, ECtHR, 19 January 2012, para. 119, <http://www.refworld.org/pdfid/4f1990b22.pdf>; *A.B. and Others v. France* (no. 11593/12), <http://www.refworld.org/pdfid/5784e34e4.pdf>; *R.M. and M.M. v. France* (no. 33201/11), *A.M. and Others v. France* (no. 24587/12), *R.K. v. France* (no. 68264/14) and *R.C. v. France* (no. 76491/14).

<sup>84</sup> *Yoh-Ekale Mwanje v. Belgium*, 10486/10, ECtHR, 20 December 2011, para. 124, <http://www.refworld.org/pdfid/520a18c64.pdf>

<sup>85</sup> *Saadi v. UK*, (13229/03), *supra*, para. 70.

<sup>86</sup> UNHCR, 2012 Guidelines on Detention, Guideline 4, para 18. See also Guideline 4.2 and 4.3.

<sup>87</sup> UNHCR January 2017 Position Paper, *supra*.