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# Child rights strategic litigation on deprivation of liberty for migration-related reasons: Review of selected cases in Asia and Europe

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**Abstract:** *The position of children deprived of liberty for migration-related reasons entails key challenges to children's rights and "child rights strategic litigation" (CRSL) emerges as one way to tackle them while feeding more broadly into national and international advocacy efforts. Litigation practice in this regard has emerged on the issue of deprivation of liberty in the third decade after the coming into force of the United Nations Convention on the Rights of the Child. This article analyses some pertinent litigation efforts undertaken in Asia and Europe. In considering selected case-law (already decided or in the process of litigation) at both national and international/regional levels, it addresses the main issues arising in relation to migration detention and children's rights, how this litigation has been done, the actors involved, the legal standards employed, and eventually the courts' reasoning. Concluding remarks for a children's rights preparedness are articulated, reflecting on the pivotal importance of stakeholders' approaches towards litigation strategies that are consistent with children's rights and aim to advance children's enjoyment of their rights, in order to contribute effectively to tackle such a harmful practice and bring changes against it. It is thus argued that CRSL can be a valuable means to advance access to justice for migrant children.*

**Key-words:** ***children's rights; strategic litigation; migration-related detention; Asia; Europe.***

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## 1. Introduction

The detrimental practice of children deprived of liberty for migration-related reasons has been condemned in different parts of the world, as the findings and recommendations of the United Nations Global Study on Children Deprived of Liberty show (UNGSCDL 2019: 430-495). Children are detained for reasons related to their or their parents' migration status, or for other official justifications (including identity verification, health and security screening, facilitated deportation, age assessment procedures) or even for claimed protection purposes, or because of a declared state of emergency (UNGSCDL 2019: 441-445). There is international consensus that such practice violates international law (Smyth 2019). It is emphasised that "deprivation of liberty of an asylum-seeking, refugee, stateless or migrant child, including UASCs is prohibited" (UNWGAD 2018: para 11, citing A/HRC/30/37: para 46; E/CN.4/1999/63/Add.3: para 37; A/HRC/27/48/Add.2: para 130; A/HRC/36/37/Add.2: paras 41-42) (see also CMW/C/GC/4-CRC/CGC/23: paras 5 and 10).

This critical area results in multiple violations of children's rights and requires preparedness for effective ways to tackle such a harmful practice. In particular, the position of children deprived of liberty for migration-related reasons entails challenges to children's rights which can be addressed through "child rights strategic litigation" (CRSL) while feeding more broadly into national and international advocacy efforts. This kind of litigation is defined by distinguished scholars as seeking "to bring about positive legal and/or social change in terms of children's enjoyment of their rights" (Nolan, Skelton and Ozah, 2022a: 5). Importantly, they have identified a number of factors as likely indicative of whether a case qualifies as CRSL: (i) the process that let up to the case; (ii) the way in which the case was developed or shaped by child rights during the duration of the litigation; (iii) the remedy granted; or (iv) the outcome of the case (both legal and extra-legal).

It is worth also referring to scholars' two key questions in identifying cases that are CRSL. The first question relates to the litigants and/or the litigators, who "may include any parties in the case: applicants, plaintiffs, defendants, appellants, petitioners, authors, amici curiae, third-party intervenors", with a list of relevant ones: "a child or group of children; an adult such as a parent, guardian, curator/guardian ad litem who expressly acts on behalf of a child or children with a broader aim than merely meeting the needs of the individual child; a human rights or civil society organisation (often but not always a children's rights organisation) acting on behalf of a child/children, in the child-specific public interest or in the interests of children generally; national human rights institutions (NHRIs), ombudspersons or children's commissioners, children's rights' defenders or human rights public defenders with a child rights related mandate" (Nolan, Skelton and Ozah, 2022a, 21). The second question relates to the objective(s) of

the litigation, which generally "will need to be a broader one than merely resolving a legal, child rights related problem for an individual child. The litigation will need to seek to advance the rights of more than one child and/or to bring about social change that will benefit all children or a category of children. However, even where the main parties in the case may have a more limited or individualised aim (for instance, defending a particular child in the criminal justice system), an amicus or third party intervenor admitted to the case may have a different, more strategic intention" (Nolan, Skelton and Ozah, 2022a, 22).

Litigation practice in this regard has dealt with the issue of deprivation of liberty since the third decade after the coming into force of the UN Convention on the Rights of the Child (CRC) (Nolan and Skelton 2022: 7). This article analyses selected litigation efforts relating to children deprived of liberty for migration-related reasons in two major regions of concern, namely Asia and Europe, where various countries face persisting systemic issues and there are local practitioners working on them. In considering selected case-law (already decided or in the process of litigation) at both national and international/regional levels, the article addresses the main issues arising in relation to migration detention and children's rights, how this litigation has been done, the actors involved, the legal standards employed, and eventually the courts' reasoning. The selective choice of legal cases draws heavily on the findings of the author's research conducted for one component of the ACRiSL (Advancing Child Rights Strategic Litigation) project, a three-year international research collaboration bringing together partners from advocacy and academia, under the auspices of the Global Campus of Human Rights and Rights Livelihood cooperation (ACRiSL 2020-2023).

Concluding remarks for a children's rights preparedness are articulated at the end of the article, meaning that respecting, protecting and fulfilling children's rights remain crucial in facing and overcoming the challenges posed by the practice of deprivation of liberty for migration-related reasons. It is therefore highlighted the need to reflect on the importance of stakeholders' approaches towards litigation strategies that are consistent with children's rights and aim to advance children's enjoyment of their rights, in order to contribute effectively to tackle such a harmful practice and bring changes against it.

## 2. Malaysia

Key stakeholders in the country include, ***inter alia***, Malaysian Bar Council Legal Aid Centre (Kuala Lumpur)/Collin's Law Chambers and Asylum Access Malaysia. It is worth considering two effective cases litigated at the national level which can be qualified as CRSL.

In particular, *J.b.M.R. v. Public Prosecutor* (High Court in Shah Alam 2017) concerns a Rohingya minor detained and prosecuted for an immigration offence, namely not having any valid documents, under section 6(1)(c) of the Immigration Act 1959/63. He was not registered with the UNHCR at the time of his arrest and subsequent prosecution. Collin's Law Chambers filed at the High Court an application to challenge the legality of the immigration charge against asylum seeking minors and an application to secure his release from prison pending the full disposal of his case. The lawyers claimed that his detention was in violation of the Child Act 2001 and Article 22 CRC. When this application was filed, the applicant was 15 years old and was held in remand since December 11, 2016, for 3 months at Kajang prison, with adult offenders (after the application for his bail was denied by Sepang Magistrate Court). Notably, the National Human Rights Institution (SUHAKAM) held a watching brief in this case.

The most important aspect taken into account by the Court was the applicant's welfare. It also considered that during the 3 months in prison the young applicant mingled with offenders who faced various criminal charges, exposing him to risk of becoming a future criminal. The immigration charge against the child was eventually withdrawn. Importantly, in granting bail to the minor despite a vigorous objection by the prosecutor, the Court held: "Whether the applicant is a citizen or not, a bail order has to be taken into account so that the potential risks faced by the applicant in prison would not adversely affect the applicant's future. Furthermore, the applicant is only a child of 16 years of age" (High Court in Shah Alam 2017, para 14). It imposed a RM 2,000.00 bail with one surety of Malaysian citizen, and additional conditions: (a) the applicant was ordered to be placed at the Chow Kit Foundation Centre, at all times until the trial of the charge against him was concluded; (b) this centre had to manage his transport to and from the Court each time he was required to be present; (c) the centre was also responsible for his welfare and safety for the entire time he was placed there.

The successful outcomes of this case were multiple. First, the High Court granted an alternative to immigration detention (by way of bail pending the resolution of an immigration charge), a landmark decision in Malaysia. The decision by the Prosecution to appeal the bail of an individual charged on immigration grounds — even after the dismissal of the charge rendered the appeal academic — is a testament to the potential precedential value of such an order. Second, a number of key judicial and government stakeholders were sensitised regarding the practice of arresting and detaining asylum-seeking children and on relevant child protection laws. A third outcome was the public awareness raising value of the media attention gained. The counsel for the Rohingya minor petitioned the media at all stages of the case, which was reported across a range of media sources (Yatim 2017; Nazlina 2017; Tong 2017; Anbalagan 2017). He also

mobilised the support of prominent Malaysian NGOs, including the Suara Rakyat Malaysia (SUARAM) who spoke out against the prosecution and detention of asylum-seeking children, which have contributed to greater public awareness regarding the issue (SUARAM 2017; Yen 2017). This organisation emphasised that the Rohingya minor's detention revealed the Malaysian government's failure in fulfilling its obligations to provide appropriate protection and humanitarian assistance to refugee children under Article 22 CRC.

Another relevant case is *R.R.b.M.S. and 6 Ors v. Komandan, Depot Imigresen Belantik, Kedah & 3 Ors* (High Court in Alor Setar 2018) concerning a boat of 56 Rohingya individuals who arrived on Malaysian shores in April 2018. They arrived after a 23-day long journey from Rakhine state, Myanmar. The boat was intercepted by the Malaysian Maritime Law Enforcement Authorities at the waters of the Langkawi Island, Kedah. These individuals (19 men, 17 women and 20 children) were referred and handed over to the Malaysian Immigration Department and were transferred to the Belantik Immigration Detention Centre. Between April and June, the UNHCR unsuccessfully wrote to the authorities requesting access to these individuals for the purposes of screening and interviewing them. On September 10, 2018, a Notice of Motion for *habeas corpus* application was filed by Collin's Law Chambers against the government, at the High Court in Alor Setar, for seven minors (five boys aged 10 to 14, one girl aged 14, and one aged 5) who were among the boat arrivals and were seeking asylum. The counsels could only act for them as only their family members could be located. The application sought an order for the seven children to be brought to court and released; a declaration that their continued detention was illegal and/or in conflict with their rights under Articles 5 and 8 of the Federal Constitution, the Child Act 2001 read together with Article 22 CRC; a further order that they were not re-arrested and/or detained solely on account of their immigration status; in the alternative, an order that they be released from immigration detention and placed at a children's shelter (instead of punitive indefinite immigration detention) until reunification with their families, or for such time and conditions decided by the court. In particular, the litigators claimed that the children's rights to consult and be defended by a lawyer upon their arrest (under Article 5(3) of the Federal Constitution) was violated, as the refusal to allow them to meet their lawyers or family allegedly amounted to an oppression of their rights to know why they were being detained and also denied their rights to challenge the detention. They also claimed that the children's detention was unlawful, irrational, arbitrary and unreasonable. Additionally, the Rohingya children's indefinite detention was claimed to be invalid as they may not be deported due to their statelessness. Notably, the Malaysian Bar Council, Asylum Access, and the National Human Rights Institution (SUHAKAM) held a watching brief in this case, while UNHCR appeared as an observer.

The Court considered the detention order against the seven applicants as valid since they were non-citizens and therefore have no permission to enter and remain in Malaysia, and so Article 5 of the Federal Constitution was not infringed (High Court in Alor Setar 2018, para 10(h)). Nonetheless, the learned Judge Datuk Ghazali Cha accepted the applicants' alternative plea that "they are allowed to be placed at a shelter which can protect and provide the necessary welfare to them" (para 10l), as an alternative to immigration detention for refugee children. The Court also recognised the rights of asylum seeking minors under Article 22 CRC and the Preamble of the Child Act 2001 as a substantive right: "[W]ithout deliberating further, this Court is of the view that the continued detention of the Applicants at the Belantik Immigration Detention Centre is a direct violation of their rights as a child pursuant to the Convention on the Rights of the Child and the Child Act 2001 which guarantees protection and assistance to be given to children in all circumstances without regard to race, colour, gender, language, religion or distinction of any kind" (para 10k). The Court ordered the release of the seven minors who had been held for more than seven months at the Belantik IDC in Kedah and their placement at the Yayasan Chow Kit Shelter in Kuala Lumpur on a bail bond of RM500.00 per each applicant with a Malaysian surety. It then ordered that "the applicants' safety and welfare are also to be ensured at all times they are at the shelter and they should be made available at all times whenever the authorities require them for their further action, including to attend Court to answer to any charge (if any)" (para 10m). Focusing on the enforcement, on November 21, 2018, the counsel contacted the Deputy Public Prosecutor (DPP) advocating for the children's release, and the day after they agreed to petition the court for clarification on its decision of November 18. Clarification was sought in chambers with the following outcome: the DPP conceded that the parties are satisfied with the court's decision and will not appeal against it to the Federal Court; it was also recorded in court that the minors be released directly to the UNHCR on November 22, as part of the Immigration Department's further action.

Therefore, the High Court's landmark decision comprised three positive precedents against child detention: the acknowledgement of Article 22 CRC and the Preamble of the Child Act 2001 as a substantive right towards asylum seeking children from protracted detention; the acknowledgment of a shelter as an alternative to immigration detention of asylum seeking children; and the acknowledgment of immigration authorities' action(s) to release the children to the UNHCR being the mandated institution to protect and assist asylum seeking children from further detention. The case was widely reported in newspapers and online articles (Lim 2018; Bedi 2018).

## 3. Republic of Korea

Key stakeholders in the country include, inter alia, Duroo Association for Public Interest Lawyers, Dongcheon Foundation, and GongGam Human Rights Law Foundation. It is worth considering a recent case that can be qualified as CRSL. Precisely, Duroo (in cooperation with other three NGOs) has litigated the case 2020 HunGa 1, for which on January 23, 2020, the Suwon District Court requested the Constitutional Court of the Republic of Korea to rule on the constitutionality of Article 63(1) of the national Immigration Act (amended by Act Decree 12421 on March 18, 2014). This is the first time that the detention of migrant children is under consideration at the Constitutional Court level in the country.

The case concerns a 17-year-old asylum-seeker, national from Egypt, who had overstayed in the Republic of Korea after obtaining a 30-day tourist visa and entering the country on July 23, 2018 as an unaccompanied child and was detained for about two months (UNHCR 2020, paras 8-9). The head of the Suwon Immigration Service detained the petitioner in accordance with Article 51(3) of the Immigration Act on October 17, 2018, and issued the deportation order pursuant to Articles 46(1) 3, 46(1) 8, 11(1) 8, and 17(1) as well as the detention order pursuant to Article 63(1) of the Act thereof on October 18, 2018. The plaintiff filed the lawsuit seeking revocation of these orders (Suwon District Court 2019 Ku-Dan6240), applied for the adjudication on the constitutionality of Article 63(1) of the Immigration Act during the above trial (Suwon District Court 2019 Ah 4057), and the Court accepted the application for Article 63(1) and requested the case of adjudication for its constitutionality on January 23, 2020. The plaintiff argued that Article 63(1) remains a legal ground for indefinite detention of migrants in practice as it states that persons under deportation orders who cannot be immediately repatriated can be detained in any detention facility pending when deportation is carried out. It was also argued that the immigration detention of a child must not be used even as last resort.

In June 2022, Manfred Nowak and the author drafted a written opinion which was translated to Korean and submitted to the Court in July, seeking to assist it and inform its consideration and decision about the issues raised in the above case under the Constitution of the Republic of Korea in light of the general principles and standards enshrined in the CRC. They expressed a shared interest in ensuring that the protection of children from deprivation of liberty within the Korean legal system is rigorous in a national context where: (1) the constitutionality of Article 63 of the Immigration Act is being debated at the Constitutional Court level; and (2) the Ministry of Justice announced in November 2021 that it will initiate a series of legislative and policy changes to improve the immigration detention regime, but has been in its position that there

should be a room for detention of migrant children over 14 (aligning with the criminal detention of children). Therefore, they underlined that this case highlights the paramount importance to address the confinement of children for purely migration-related reasons in the country, especially in view of the findings and recommendations of the UNGSCDL, in particular its Chapter 11, which concludes that purely migration-related detention of children violates the CRC, in particular its provisions on the right to personal liberty (Article 37(b)), the best interests of the child (Article 3), the right to life and development (Article 6), the right to the enjoyment of the highest attainable standard of health (Article 24) and the right of refugee children to receive appropriate protection and humanitarian assistance (Article 22). In October 2022, the Court mentioned the aforementioned expert opinion and the CRC in a public hearing of this case. The parties are awaiting its decision. In the meantime, Duroo and other civil society organisations in the country have approached Members of Parliament to discuss the potential adoption of a provision completely prohibiting the immigration detention of children, considering several elements to make amendments to the Immigration Act.

## 4. Hungary

Due to the general situation in the country, strategic litigation of migration-related cases has mostly been done in the European Union (EU) and Council of Europe (CoE) fora. The Hungarian Helsinki Committee (HHC) is one of the key actors. It litigated several cases before the Court of Justice of the EU (CJEU)) regarding the placement of asylum seekers in the "transit zones" on the border with Serbia. These efforts, combined with persistent advocacy, resulted in the closing down of such zones on May 21, 2020, following the judgement of the CJEU (a week before) in the joined cases C-924/19 PPU and C-925/19 PPU, which ruled that the automatic and indefinite placement of asylum-seekers in such zones at the Hungarian-Serbian border without a formal decision and due process safeguards amounted to arbitrary detention.

Regarding the "transit zones" regime that Hungary used from March 2017 to May 2021 to automatically detain all asylum seekers upon arrival, including unaccompanied children above the age of 14 or any children with families for the whole duration of the asylum procedure, HHC took extensive litigation efforts also before the European Court of Human Rights (ECtHR) to challenge the arbitrariness of detention and to convince it to deliver a decision in which the "transit zones" would be found as places of detention. The HHC submitted more than 70 cases, including children as applicants, to the ECtHR (e.g., *N.A. and Others v. Hungary* 37325/17; *H.M. and Others v. Hungary* 38967/17; *A.S. and Others v. Hungary*, 34883/17; *Ahmed AYAD v. Hungary and 4 other applications* 26819/15; *Masood Hamid v. Hungary* 10940/17; *Azizi v. Hungary* 49231/18; *F.S. and A.S. v. Hungary* 50872/18).

The ECtHR delivered its first judgement regarding the detention of families with children in such zones on March 2, 2021, in *R.R. and Others v. Hungary* 36037/17 concerning an Iranian-Afghan asylum-seeking family with three children held in *Röszke* "transit zone" for almost 4 months. HHC strategically litigated the case, also directly including the children as applicants alongside their parents. In its submission to the Court, UNHCR ***inter alia*** highlighted the CRC principles (under Article 3 in conjunction with Article 22, and Articles 2, 6, 12, 20(2) and (3)) which apply throughout all stages of displacement (UNHCR 2017, para 3.2.3 referring to the CRC-Committee's General Comment n. 6). Reiterating the state obligations under Article 22(1) CRC, relevant EU directives and its own case law, the Court stated that the confinement of minors raises particular issues, since children, whether accompanied or not, are considered extremely vulnerable and have specific needs related in particular to their age and lack of independence, but also to their asylum-seeker status (ECtHR 2021, para 49). It stressed that the obligation to protect children and take adequate measures as part of its positive obligations under Article 3 does not evaporate if children are accompanied by their parents (para 59). In view of the conditions of the containers where they were accommodated, the unsuitability of the facilities for children, the lack of professional psychological assistance, the children's young age, the mother's pregnancy and health situation and the length of their stay in such zone, the Court found that they were subjected to treatment which exceeded the threshold of severity required to engage Article 3 and so violated it (paras 62-65). It finally acknowledged that in the circumstances of the case (with lack of domestic legal provisions fixing the maximum duration of that stay, its excessive duration and considerable delays in the domestic examination of the applicants' asylum claims, as well as the conditions in which the applicants were held) their stay in such zone amounted to *de facto* deprivation of liberty (para 83), thus in contrast with the Grand Chamber's standpoint in *Ilias and Ahmed* (ECtHR 2019, para 249). Furthermore, the Court acknowledged that their detention could not be considered lawful under Article 5(1) (ECtHR 2021, paras 74-92), as there was no strictly defined statutory basis for it in Hungarian legislation (para 89) and the national authorities had not issued a formal decision complete with reasons for detention. It also considered that the applicants did not have an avenue in which the lawfulness of their detention could have been decided on promptly by a court, thereby violating Article 5(4). Nonetheless, the ECtHR did not follow the CJEU's decision and failed to provide a more substantial analysis of the nature of confinement in the "transit zones", focusing rather on the concrete situations and vulnerabilities of the children concerned. It ordered Hungary to remedy the adult applicants with EUR 4.500 each and EUR 6.500 to each of the applicant children in respect of non-pecuniary damage, as well as to all applicants jointly EUR 5.000 in respect of costs and expenses.

In some judgments of 2022, the ECtHR similarly found that placement in a "transit zone" constitutes detention in other cases concerning families with children (*M.B.K. and Others v. Hungary* 73860/17; *A.A.A. and Others v. Hungary* 37327/17; *W.O. and Others* 36896/18; *H.M. and Others v. Hungary* 38967/17). However, it also issued disappointing decisions which did not recognise the placement in such zones as detention because the related period was too short, declaring the cases inadmissible: *A.S. and others v. Hungary* 34883/17 (concerning a family with children, 40 days); *N.A. and others v. Hungary* 37325/17 (concerning a family with children, 27 days).

Focusing on unaccompanied children's detention in Hungarian "transit zones", it is worth referring to a recent CRSL effort tried in relation to *M.H. v. Hungary* 652/18, litigated by the HHC and communicated by the ECtHR on February 7, 2022,[1] concerning the confinement of an unaccompanied child for about 3 months pending the examination of asylum request. In April 2022, Manfred Nowak and the author prepared and submitted a request for leave for the purpose of submitting a third-party intervention (TPI). The applicant invoked Article 5(1) and (4); relying on Article 3, taken alone and in conjunction with Article 13, the applicant further complained about the allegedly inhuman or degrading conditions in which he was held in the "transit zones" and the lack of an effective remedy in this respect. Therefore, the TPI would have sought to assist the Court in considering the issues raised in the application under the cited provisions of the ECHR as interpreted in accordance with the general principles and standards enshrined in the CRC. This would have been done in view of the practice of interpreting ECHR provisions in the light of other international texts and instruments.[2] The proposed intervention would have covered contextual information drawn from the findings and recommendations of the UNGSCDL. It would have primarily elaborated on its recommendations concerning Article 37(b) CRC, which could have informed the Court's consideration and decision about the deprivation of liberty of the unaccompanied child in such zones. Precisely, Recommendation no. 8 indicates that: "Since migration-related detention cannot be considered as a measure of last resort (as required by Article

1 The Court posed the following questions to the parties: (1) Has there been a violation of Article 3 of the Convention on account of the applicants' living conditions and their treatment in the border transit zones, having regard to their particular circumstances (see *R.R. and Others v. Hungary*, 36037/17, §§ 48-52 and 58-65, 2 March 2021)? (2) Did the applicants have at their disposal an effective domestic remedy for their above complaints under Article 3 of the Convention, as required by Article 13 of the Convention? (3) Were the applicants deprived of their liberty in the border transit zones in breach of Article 5 § 1 of the Convention (see *R.R. and Others v. Hungary*, 36037/17, §§ 74-92, 2 March 2021)? (4) Did the applicants have at their disposal an effective procedure by which they could challenge the lawfulness of their detention, as required by Article 5 § 4 of the Convention (see *R.R. and Others v. Hungary*, 36037/17, §§ 97-99, 2 March 2021)?

2 See: *Tyrer v. the United Kingdom* 5856/72 (1978), para 31; *Marckx v. Belgium* 6833/74 (1979), para 41; *Christine Goodwin v. the United Kingdom* [GC] 28957/95 (2002), para 85; *Demir and Baykara v. Turkey* [GC] 34503/97, paras 65-86; *Hassan v. the United Kingdom* [GC] 29750/09, para 102.

37(b) CRC) and is never in the best interests of the child (Article 3 CRC), it is prohibited under international law and should, therefore, be forbidden by domestic law" (UNGSCDL 2019: 491). Regrettably, in June 2022 the President of the Court section decided to refuse their request "as he considers that – in light of the fact that the case is subject of the Court's well-established case-law – the intervention requested is not necessary in 'the interests of the proper administration of justice'." Nevertheless, a TPI would have helped the Court to address better than in *R.R. and Others* the nature of confinement in the "transit zones". The parties are still awaiting the related judgement.

In the 2014-2018 period, HHC also initiated several cases before the ECtHR in relation to the detention of unaccompanied asylum-seeking children whose age was disputed. A few of them were communicated to the government and the observation phase finished (e.g., *M.M. v. Hungary* 326819/15; *S.B. v. Hungary* 15977/17; *Hamid v. Hungary* 10940/17; *Azizi v. Hungary* 49231/18; *F.S. and A.S. v. Hungary* 50872/18). No judgments on the age assessment issue have been delivered yet.

Overall, the Hungarian litigators contacted by the author look forward to getting more favourable decisions by the ECtHR in the pending cases, especially on age assessment in detention as well as detention at the border, which can have positive influence on other countries as well.

## 5. Bulgaria

Key stakeholders in the country include, *inter alia*, the Center for Legal Aid - Voice in Bulgaria (CLA), the Foundation for Access to Rights (FAR) and the Bulgarian Helsinki Committee (BHC). At the national level, several detention-related cases were litigated by BHC especially after 2015, whereas other organisations such as CLA supported these judicial processes. These joint efforts had resulted in a decrease of arbitrary detention cases, especially of children both accompanied and unaccompanied. However, there seems to be a limited possibility to influence changes of both laws and practices on migration-related detention of children before Bulgarian courts, while regional mechanisms can play a more effective role for CRSL cases.

A leading case that can be qualified as CRSL is *S.F. and Others v. Bulgaria* 8138/16. It was litigated by the *Service d'Aide Juridique aux Exilé-e-s* (SAJE) on behalf of an Iraqi family including three children (aged 16, 11, and one and a half years), who lodged their application to the ECtHR about the conditions in which they had been kept in a border police's detention facility in Vidin for a few days in 2015. On September 20, 2016, the ECtHR gave Bulgaria notice of the complaints concerning these children's detention conditions. Reiterating its settled case-law on the treatment of immigration detainees and the particular vulnerability of children, it

noted that while the time spent by the applicants in detention was shorter (between 32 and 41 hours), the conditions were considerably worse than those in similar cases where a violation was found (ECtHR 2017, paras 83-87). The Court also noted that "a facility in which a one-and-a-half-year-old child is kept in custody, even for a brief period of time, must be suitably equipped for that purpose" (para 88). The combination of these factors affected the children considerably, both physically and psychologically, with particularly nefarious effects on the youngest of them due to his very young age (para 89). By keeping them in such conditions, even for a brief period of time, the Bulgarian authorities subjected them to inhuman and degrading treatment (para 90). It cannot be said that it was practically impossible for them "to ensure minimally decent conditions in the short-term holding facilities in which they decided to place minor migrants immediately after their interception and arrest" (para 91). In view of the absolute character of Article 3 ECHR, an increased influx of migrants cannot be a justification for not fulfilling the related obligations, which requires to guarantee to people deprived of their liberty "conditions compatible with human dignity" (para 92). In respect of non-pecuniary damage, Bulgaria was ordered to pay to each of the child applicants EUR 600 and jointly to all applicants EUR 1.000 in respect of costs and expenses. Notably, the children were directly involved in the litigation and acted as applicants alongside their parents and were remedied separately from their parents for non-pecuniary damage suffered.

Focusing on the enforcement of the judgement, Bulgarian authorities paid the applicants compensation. Regarding general measures, the authorities provided information, *inter alia*, on the legislative framework, the creation of new detention premises and the efforts to renovate existing renovation premises. The action plan was received in December 2018 (DH-DD(2018)1260), whereas the comments of the Department for the Execution of Judgments were sent to the authorities in January 2020 and a revised action plan or report is awaited. The CoE Committee of Ministers requested additional information on the number of existing border police detention facilities in Bulgaria, their location, conditions of detention and any planned or completed repair works, as well as measures adopted or foreseen to secure timely supply of food and drinks and equipment and supplies for very young children.

This case effectively challenged migration-related detention of accompanied children, which has been a reality for hundreds of them in Bulgaria. Detention during the status determination procedure in closed reception facilities is possible under Article 45(f)(1) of the Law on Asylum Seekers and Refugees. Its provisions provide for the possibility to detain asylum seeking children together with their families as a measure of last resort, to maintain family unity and ensure protection and safety, but the UNHCR deemed these provisions as not adequate because they do not specifically refer to the primacy of the

principle of the best interests of the child when ordering detention (AIDA 2019: 66). *S.F. and Others v. Bulgaria* goes beyond the rights of the individual children acting as applicants, and its successful implementation in terms of general measures can benefit children who are in a similar position.

## 6. Poland

Key stakeholders in the country include, *inter alia*, the Association for Legal Intervention (SIP, *Stowarzyszenie Interwencji Prawnej*) and the Helsinki Foundation for Human Rights (HFHR). They have repetitively challenged migrant children's detention in Poland, which has been systemic for many years despite strong advocacy and litigation. At the national level, a relevant case concerns a 17 years old unaccompanied migrant child whose release from a detention centre after almost 8 months of confinement was ordered by decision no. VII Kz 420/20 of October 30, 2020, by the District Court in Olsztyn (SIP 2020). SIP also litigated several cases for compensation and redress for children's wrongful detention from the state treasury.

A noteworthy CRSL effort by attorney-at-law Małgorzata Jaźwińska from SIP is case II KK 148/22 of cassation appeal before the Polish Supreme Court, against the judgement of the Court of Appeal in Warsaw of September 27, 2021 (II AKa 310/20), regarding the compensation for wrongful placement in a guarded centre for foreigners of a single mother with her six-month-old child for approximately 16.5 months. Initially, their detention was based on the need to confirm the child's identity and collect information for the asylum procedure. However, the family was detained over 4 months after the mother's interview, without collecting other evidence for which their presence was necessary. Moreover, no procedures were undertaken to establish the child's identity, which in fact was based on the mother's declaration and the birth certificate (both available from the first day of detention). Due to the negative asylum decision, their detention was extended during the return procedure, but beyond the 6 months legal limit. Nonetheless, the deportation could not be executed (for legal obstacles) even if the documents were obtained and Russia provided all documentation within the timeframe of the readmission agreement. Additionally, the child's best interests were basically not included and analysed in any detention decisions. In such context, the District Court and the Court of Appeal dismissed the application and did not grant the requested compensation, questioning the possibility to seek it for unjust placement in a guarded centre during the asylum procedure. They also claimed that, since at the time of the detention court's ruling Polish authorities did not have the aforementioned documents from third countries, there was a delay in the period of detention during the return procedure. Furthermore, they did not take into account the child's rights and ruled that these were not violated and the child's best interests were secured as the family was not separated.

In lodging the cassation appeal in December 2021, the litigator invoked *inter alia* Articles 3, 5(1)(f) and 8 ECHR and Article 3(1) CRC. The Court was also requested to make preliminary reference concerning Article 17(1) of Return Directive 2008/115/EC and Articles 8(3) and 23(1) of Directive 2013/33/EU in view of Articles 6, 7 and 24(2) of the Charter of Fundamental Rights of the EU (CFR), in the context of immigration detention of children. In particular, multiple legal issues have been addressed. One is the proper interpretation of Article 15(6)(b) of the Return Directive (and the litigator prepared a request for a preliminary reference): what do "delays" mean; do they need to be the sole reason why deportation cannot be carried out. A second issue (with another request prepared for a preliminary reference) is what do the best interests of the child in immigration detention cases mean, especially in the context of prolonged detention; what factors and how should be analysed. A third issue (with related request for a preliminary reference) concerns the rule of law issue in Poland and the consequences of the ruling by the 2nd instance court that was incorrectly composed as one of the judges was not properly appointed. A fourth issue regards the possibility to seek compensation for wrongful immigration detention in asylum procedures under Article 5(5) ECHR. A fifth issue is the unlawful character of the detention made to collect information on which the asylum application is made if no such evidence is being collected. A sixth issue is the unlawful character of the detention made to identify if no proceedings of the sort are being carried out. Another issue is the unlawful character of the detention in return procedure beyond the 6 months limit under Article 15(5) of the Return Directive.

Notably, an *amicus curiae* brief in support of the appellant was prepared *pro bono* by Dzidek Kedzia, Agata Hauser and Lukasz Szoszkiewicz from the Global Campus of Human Rights network and was submitted to the Court in May 2022. They analysed relevant sources of international law in relation to the deprivation of liberty of migrant children, in particular the ECHR and the CRC, emphasising that Poland is a state-party to both Conventions and it is the duty of public authorities to apply such an interpretation of national law that will allow the implementation of the treaty provisions to the highest degree. Both ECtHR and UN treaty bodies point to the international consensus on the prohibition of depriving children of liberty on the basis of their or their parents' irregular migration status. Taking into account that Poland is bound by these treaties, as well as constitutional provisions (primarily Article 72 establishing the obligation to protect children's rights), the third-party interveners argued the unlawfulness of the decision to place the child in a guarded centre for foreigners, which was contrary to the child's best interests, well-being, health and development. This also in view of Article 88 of the Act of June 13, 2003, which allowed the use of alternative measures for a proportionate balance between the restriction of the right to personal

freedom and movement and the state interest to ensure efficient migration procedures. Moreover, the district and appellate courts did not carefully consider the effect of detention on the child being nervous and restless and having trouble sleeping at night. It is not enough for those courts to merely note that the child applicant and her mother were medically examined, as it does not meet the requirement of the best interests of the child as the primary consideration on which the decision should be based. Such a situation may constitute a violation of the obligations arising from the CRC, according to the CRC-Committee's position that "in order to demonstrate that the right of the child to have his or her best interests assessed and taken into account first, every decision affecting the child or children must be reasoned, reasoned and explained" (CRC-Committee 2021, para 12.4). Overall, the appellate court failed to act with due diligence, by neglecting the obligation to carry out an effective assessment of the applicants' deprivation of liberty in a situation where one of them was a child in favour of any alternative measures (see ECtHR judgement of July 22, 2021 in *M.D. and A.D. v. France* 57035/18, para 103) as well as by not sufficiently taking into account the child's best interests and addressing the allegations raised by the applicants. Finally, given the limited nature of medical consultations, it is difficult to assume that public authorities have proved that long-term detention will not have a negative impact on the child's well-being and psychophysical development, and so the state should take into account liability for damages.

The parties are awaiting the Polish Supreme Court's decision. Significantly, this case aims to increase legal protection of children's rights through interpretation of statutory provisions, and through finding the practice of migration-related detention of children to be unlawful and in violation of their rights under international and regional law. It also aims to advance children's rights beyond the individual child's rights, to correct such a systemic problem that negatively affects children, and to hold duty bearers accountable for violations of children's rights.

However, CRSL efforts have mostly been done at the regional or international level. A leading case before the ECtHR is *Bistieva and Others v. Poland* 75157/14 concerning the disproportionate detention of a Chechen woman and her three children at the ***Kętrzyn*** guarded centre for foreigners in violation of the right to respect for family life under Article 8. In their complaints against the decisions ordering and extending their administrative detention, the applicants referred, *inter alia,* to the fact that Polish authorities failed to evaluate how detention affects the children. Since they issued a decision refusing to expel the youngest child, the applicants also claimed that there was no justification for the child's detention, which was ordered for the purpose of securing the expulsion. Referring to the CRC (ECtHR 2018, para 78) and its previous case law, the Court held that "the child's best interests cannot be confined to keeping

the family together and that the authorities have to take all necessary steps to limit, as far as possible, the detention of families accompanied by children and effectively preserve the right to family life" (para 85). The Court was not assured that the authorities ordered the family's detention as a measure of last resort after exploring possible alternative measures (para 86). It also had serious doubts as to whether they had given sufficient consideration to the best interests of the three children in compliance with obligations stemming from international law legal obligations imposed on the authorities (e.g., CRC or CFR) and from section 401(4) of the 2013 Act. In the Court's view, "the detention of minors called for greater speed and diligence on the part of the authorities" (para 87). Even in the light of the risk that the family might abscond, the authorities had failed to provide sufficient reasons to justify detention for 5 months and 20 days (para 88). Subjecting accompanied children to living conditions typical of a custodial institution was, therefore, disproportionate and in contravention with Article 8. Polish authorities were ordered to pay the applicants jointly EUR 12.000 in respect of non-pecuniary damage, plus any tax chargeable on that amount. This was the first decision by an international court concerning the placing of foreign families with children in guarded centres in Poland, and triggered a thread of decisions in "repetitive" cases (*A.B. and Others v. Poland* 15845/15 and 56300/15, *Bilalova and Others v. Poland* 23685/14, *Nikoghosyan v. Poland* 14743/17, and *R.M. and Others v. Poland* 11247/18). Significantly, in reporting on the execution of this judgement, HFHR recommended Polish authorities to: "educate judges and Border Guard officers on the application of the principle of the best interests of the child and on the ECtHR case law in this area; provide practical guidance on the specific activities that the Border Guard and the courts should carry out as part of an examination of the best interests of the child; make sure that the decisions ordering detention of families in guarded centres contain detailed and case-specific justification relating to the situation of the children concerned; provide ex officio legal aid in all cases concerning detention of families with children in guarded centres" (HFHR 2018: 41). Reportedly "the percentage of decisions imposing an alternative to detention increased from 11% in 2014 to over 23% in 2017" in Poland (FRA 2018, 184).

The subsequent case *Bilalova and Others v. Poland* 23685/14 concerns the detention of a Russian national of Chechen origin and her five children (aged three to nine) in a closed centre for aliens and the national authorities' failure to limit to absolute minimum the time of children's detention pending the outcome of their application for refugee status. In finding a violation of Article 5(1)(f), the Court observed that the place and conditions of detention must be appropriate and that the duration must not exceed a period that is reasonably necessary to achieve the aim pursued (ECtHR 2020, para 75). It noted that the place of detention was contrary to the well-established case law indicating that the confinement

of young children in such facilities should be *in principium* avoided (para 78); only a short placement under suitable conditions could be compatible with the ECHR, provided, however, that the authorities have resorted to this ultimate measure only after having concretely verified that no other measure less infringing on liberty could be taken (para 78). It concluded that there was insufficient evidence to show that domestic authorities had carried out such an assessment, especially as the applicants' father, previously in a similar situation, was placed in an open structure for foreigners (para 77). Moreover, steps had not been taken to limit the duration of their detention. The Court therefore found that children's detention was unlawful. It ordered Poland to remedy child applicants with a sum of EUR 10.700 for non-pecuniary damage. This case tackles a widespread and well-documented issue of Polish courts not taking into consideration the child's best interests in cases concerning migrant children whereas alternatives to detention were rarely sought prior to decisions imposing or extending detention. The case significance for tackling the long-term practice of Polish authorities to detain children for migration-related reasons was reiterated in the TPI by ECRE, AIRE Centre and ICJ, drawing the attention of the Court to Articles 3 and 37 CRC (ECRE 2015).

The aforementioned case *Nikoghosyan v. Poland* 14743/17 concerns the "automatic placement" of an Armenian family with three children in the *Biała Podlaska* guarded centre for aliens for six months without individualised assessment of particular situation and needs, pending their asylum application. The applicants' detention was prescribed by section 89 of the Aliens Act, and the domestic courts ordered and extended the measure. However, the ECtHR reiterated that "the detention of young children in unsuitable conditions may on its own lead to a finding of a violation of Article 5(1), regardless of whether the children were accompanied by an adult or not (ECtHR 2022, para 64). It also highlighted that "various international bodies … are increasingly calling on states to expeditiously and completely cease or eradicate the immigration detention of children" (para 65). Critically, the fact that the father was accompanied by his three minor children was not given any consideration when the courts first decided to place them in detention (para 80). Only at a later stage the Regional Court looked into the material conditions at the closed centre and concluded that the family's well-being was not threatened by their detention because the premises were suited to the children's needs (para 81). For the Court, the examination of this aspect of the applicants' case was not "thorough or individualised" (para 82). Firstly, the domestic courts did not refer to the new fact that, while in detention, the mother had given birth to her fourth child. Secondly, the domestic courts, and later the government, relied on the argument that the children's well-being had necessarily been protected by the fact that the family had been detained together and they had not been separated from their parents. On this point the ECtHR reiterated the principle stated (albeit under Article

8) in the aforementioned paragraph 85 of *Bistieva and Others*. The centre constituted a place of confinement and, from its well-established case-law, it ruled that "as a matter of principle, the confinement of young children in detention establishments should be avoided and that only placement in suitable conditions may be compatible with the Convention, on condition, however, that the authorities establish that they took this measure of last resort only after actually verifying that no other measure less restrictive of liberty could be put in place and that the authorities act with the required expedition" (para 86). In this case the domestic courts, after having verified that the applicants had only EUR 50 and had no address in Poland, simply concluded that the applicants did not qualify for any alternative measure under the law. The ECtHR ruled that, in the circumstances of this case, the detention of both adult and children for almost six months was not a measure of last resort for which no alternative was available, and "the fact that minors were being detained called for greater speed and diligence on the part of the authorities" (para 88). Accordingly, Article 5(1)(f) was violated.

The already cited case *R.M. and Others v. Poland* 11247/18 concerns the placement and maintenance of a mother with her three minor children for a period of about seven months in the ***Kętrzyn*** closed centre for foreigners pending their deportation to Russia. In September 2017, they were handed over to the Polish authorities by their German counterparts under the Dublin III Regulation. They complain that the child applicants' detention had been contrary to Article 3 ECHR, having regard to its duration, their young age, the presence of certain factors that caused anxiety (such as surveillance by uniformed staff, restrictions on freedom of movement and exposure to noise caused by renovation work then in progress in the detention centre) and the psychosomatic symptoms from which one of the children suffered. Citing Article 5(1)(f) and (4), they claim that: (a) their detention was arbitrary and unnecessary; (b) the successive requests by the border police to place and keep them in a detention centre were not communicated to them. Moreover, they claim that their placement and continued detention were contrary to Article 8. Notably, HHC submitted a TPI to assist the Court in the following areas: contracting states' obligations under international law regarding safeguards and best interests of the child in all actions concerning her or him; contracting states' obligations under Articles 3, 5 and 8 ECHR for the reception of asylum-seeking families with children and related breaches when detained, especially children; contracting states' obligations to justify the support of asylum-seekers' detention with objectively justified reasoning that proves the necessity of detention while less coercive measures are not applicable (HHC 2020). The parties are awaiting the Court's decision.

At the international level, in September 2021, Manfred Nowak and Dzidek Kedzia filed a third-party submission to the UN Human Rights Committee in relation to the individual communication no. 3870/2021. The latter is the first to be brought against Poland concerning the wrongful placement of foreigners in a guarded centre, under the Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR). It was submitted in November 2019 by a family from Chechnya, represented by HFHR, and concerns a single father and two underage children who applied for international protection in Poland and were immediately placed in the *Biała Podlaska* centre, where they spent over 10 months. The applicants allege violations of Articles 7, 9 and 24 ICCPR. According to the communication the psychologists had stated that the detention had caused the deterioration of the father's health and had a negative impact on the condition of his children, which required specialistic treatment that was not available in the detention facility. In this case, the Polish courts did not properly assess the children's situation and their best interests; deciding on the prolongation of the detention for the family, the District Court considered only the opinion of the Border Guard authority stating that there were no contradictions for furthering the children's stay in detention despite the fact that their mental condition was deteriorating. The *amicus curiae* brief was prepared *pro bono* and offers an opportunity to enrich the Committee's analysis of the issues raised in the communication in terms of violations of the children's rights under Article 24 ICCPR as interpreted in accordance with the CRC (particularly Articles 3 and 37) and the International Covenant on Economic, Social and Cultural Rights (particularly Article 12). In October 2021, the Committee forwarded the brief to the parties, who submitted written observations in reply and related comments in 2022. The parties are awaiting the Committee's decision.

## 7. Greece

Key stakeholders in the country include, ***inter alia***, Arsis Association, the Greek Council for Refugees, Equal Rights Beyond Borders, the Hellenic Action for Human Rights, and Refugee Support Aegean. At the national level, the Global Campus of Human Rights supported the initiation of CRSL litigation by lawyers from Arsis,[3] precisely five cases against Greece before national administrative courts: *S.Z. v. Greek Administration* AKY187/2022 and AND189/2022; *A.R.Z. v. Greek Administration* AKY75/2021 and AND81/2021; *H.M. v. Greek Administration* AKY528/2020 and AND268/2020; *M.T. v. Greek Administration* AKY609/2020 and AND13/2021; *M.A. v. Greek Administration* AKY434 and AND177/2022.

3 In the context of the ACRiSL project, a cooperation contract (in force between February and July 2022) was signed between the Global Campus of Human Rights and three Greek lawyers from Arsis Association (Nikolas Psathas, Chrysovalantis – Konstantinos Papathanasiou, and Eutychia Chalkeidou) in order to support and monitor progress in five CRSL cases.

In terms of impact, the CRSL activities undertaken in the first four cases have prevented so far concrete risks of detention of the migrant children concerned; in the first, third and fourth cases the children were previously placed under "protective custody" and then in shelters for unaccompanied children. The fifth case was initiated to protect a child who experienced unlawful migration-related detention with adults for 4 months. The parties in all these cases are awaiting the courts' decisions.

At the regional level, some relevant cases decided by the ECtHR include: *Bubullima v. Greece* 41533/08 (Judgement of 28 October 2010); *Mahmundi and Others v. Greece* 14902/10 (Judgement of 31 July 2012); *Rahimi v. Greece* 8687/08 (Judgement of 5 April 2011); *Mohamad v. Greece* 70586/11 (Judgement of 11 December 2014); *H.A. and Others v. Greece* 19951/16 (Judgement of 28 February 2019). Only some of these qualify, to a certain degree, as CRSL, and their effectiveness is highlighted hereafter.

In *Rahimi*, the Court considered the application of Article 3 ECHR to the reception and detention conditions of an unaccompanied minor seeking asylum, finding a violation based on the dreadful detention circumstances (despite short duration, 2 days) and the applicant's extremely vulnerable situation (his homelessness, 7 days), but also concluding that the Greek authorities' negligence to take appropriate care of a child in migration also amounted to a violation of Article 3 ECHR. Furthermore, it was a landmark decision to apply a procedural approach regarding the CRC in relation to vulnerable unaccompanied minors, attaching decisive importance to the fact that the Greek authorities had not examined whether the detention was in the applicant's best interests (Article 3 CRC) and whether the detention was used as a measure of last resort (Article 37(b) CRC). This approach has paved the way for laying the primary responsibility to protect children's rights on the domestic authorities, thereby confirming the subsidiary nature of the ECHR system. However, it must be noticed that the case was not filed through a conscious decision-making regarding strategic litigation; actually, the ECtHR raised itself that changed the legal basis into Article 3 and turned into a strategic judgement. At the practical level, the impact of Rahimi was that it gave the lawyers the confidence and experience to continue bringing cases. The case started a thread of litigation against the absence of an effective remedy (Article 13) enabling the child applicants to complain about their detention conditions (*Mahmundi and Others v. Greece* 2012), as well as against the lack of judicial review of the lawfulness of their detention pending expulsion (Article 5(4)) (*Bulbullima v. Greece* 2010; *Mahmundi and Others v. Greece* 2012).

In *Mohamad*, the Court's decision dealt with one child's situation but targeted the systemic issue of inhumane treatment at Greek border posts (especially in Feres and Soufli) which has affected migrant unaccompanied minors and has led to violate Article 3 ECHR, even in conjunction to Article

13 ECHR. It also targeted the recurring issue of their status as minors being not taken into account when held at such border posts instead of at an alternative accommodation suited to their needs, which has led to violation of Article 5(1)(f) ECHR.

In *H.A.*, the Court recognised the unlawfulness of the "protective custody" in Greek police stations of nine unaccompanied minors within the meaning of Article 5(1) ECHR as it could only fall under subparagraph (f), also highlighting that Article 118 of Decree 141/1991 had not been intended for unaccompanied minors and potentially led to lengthy periods of detention, and thus stressing the need to ensure them the protection linked to their condition, including their possibility to be identified by lawyers working for NGOs in order to bring, within a reasonable time, an appeal against what they regarded as a detention measure and to speed up their transfer to appropriate facilities, even recognising the practical obstacles in any attempt to challenge their detention before the administrative court due to the lack of official detainee status. Significantly, the case targeted widespread issues faced by unaccompanied minors in the context of asylum procedures in Greece, where their reception and protection has been challenged by the long-standing practice of "protective custody" in police stations and pre-departure detention centres, along with their inability to bring a complaint against the (not-child appropriate) detention conditions, the impossibility to establish contact with lawyers and the practical obstacles to challenge their detention. Following several calls (by different stakeholders in different fora) to Greek authorities, Law 4760/2020 exempts unaccompanied minors from the "protective custody" regime under Article 43 whereby the Public Prosecutor (acting as a temporary guardian) along with the Special Secretary for the Protection of Unaccompanied Minors take necessary measures to refer them in appropriate accommodation facilities.

Other cases, although not CRSL, show the importance of litigation efforts to stop violations of children's rights. In particular, Equal Rights Beyond Borders submitted to the ECtHR requests for interim measures. In *N.A. v. Greece* 55988/19, the Court decided (October 28, 2019) to grant them and obliged Greece to immediately release a 16-year-old Afghan unaccompanied minor kept in "protective custody" under "devastating conditions" in a police station in Athens, in order to accommodate him in suitable conditions until his transfer to be reunified with his sister in the UK. In *A.M. v. Greece* 61303/19, the Court decided (November 27, 2019) to grant interim measures to an Afghan unaccompanied minor imprisoned in the Greek camp Fylakio under "unimaginable conditions" and ordered Greece to treat him as unaccompanied minor until the performance of an age assessment (if deemed necessary and doubts exist as regards his actual age), to transfer him to an accommodation with reception conditions compatible with Article 3 ECHR and his particular status, and to clarify and facilitate

the lodging of his asylum request and family reunification request with his uncle in Germany. Even in *H.M. and R.M. v. Greece* 6184/20, the Court decided (May 14, 2020) to grant interim measures to two unaccompanied minors kept in the camp Fylakio, and ordered Greece to transfer them to an accommodation with reception conditions compatible with Article 3 ECHR and their particular status as unaccompanied minors, as well as to clarify and facilitate the lodging of their asylum requests and family reunification requests with an older brother legally residing in Germany.

The Greek Council for Refugees (GCR) also submitted requests for interim measures, claiming breaches of Articles 3 and/or 5 ECHR to stop violations of unaccompanied children's rights. For instance, in *D.F. and Others v. Greece*, 65267/19, the Court granted (December 24, 2019) interim measures in one day to transfer to age-appropriate facilities five unaccompanied and asylum-seeking children living for many months in substandard conditions in the RIC of Samos and in the surrounding area known as the "jungle". The case illustrated the enormous gaps in protection for unaccompanied children, resulting in their exposure to serious risks. It highlighted that all necessary measures must be taken for juvenile refugees' effective protection, including the immediate implementation of a guardianship system, the increasing number of suitable accommodations, the prohibition of the legalisation of juvenile detention under the national asylum and immigration law, and the immediate termination of such a practice. Also in *T.S. and M.S. v. Greece* 15008/19, the Court granted (March 21, 2019) interim measures to transfer to age-appropriate accommodation facilities some underage unaccompanied girls seeking international protection and placed in "protective custody", under unsuitable and dangerous conditions, within the detention facility for adult women of Attika's General Police Directorate of Foreigners.

A noteworthy case, litigated with the support of GCR that represented some of the affected children before national authorities, is *ICJ and ECRE v. Greece* 173/2018, which was decided by the European Committee of Social Rights (ECSR) on January 26, 2021. Significantly, systematic detention and lack of adequate facilities for children's enjoyment of special care and protection were deemed to be among the most blatant infringements of the rights of migrant children under the European Social Charter, which included their rights to shelter (Article 31.2), to social and economic protection (Article 17.1), to protection against social and moral danger (Article 7.10), to adequate housing (Article 31.1), to protection of health (Article 11.1 and 11.3), and to education (Article 17.2) (ECSR 2021). The ECSR's immediate measures against Greece (to provide age-appropriate shelter, water, food, health care and education, to remove unaccompanied children from detention and from RICs at the borders, to place them in suitable accommodation for their age, and to appoint effective guardians) were not fully implemented. Nonetheless, this decision brought to light that even under the most precarious circumstances (inadequate reception system), children's rights cannot be suspended and immediate access to basic social entitlements must be ensured.

## 8. Malta

Key stakeholders in the country include, *inter alia*, aditus foundation and Jesuit Refugee Service Malta (JRS). The Global Campus of Human Rights supported the initiation of CRSL litigation by lawyers from aditus in cooperation with JRS respectively before national courts and the ECtHR.[4]

In particular, *A.F. v. Ministry for Home Affairs, Security, Reforms and Equality, the Permanent Secretary, Ministry for Home Affairs, Security, Reforms and Equality, Director of the Detention Services, The Director of the Agency for the Welfare of Asylum Seekers, the Superintendent for Public Health and the State's Advocate* was filed before the First Hall Civil Court (Constitutional Jurisdiction) on July 12, 2022. It originates from the situation of six migrants (from Sierra Leone, Liberia, Ivory Coast) who, after being rescued and taken to Malta in November 2021, were confirmed to be minors during the course of a protracted age assessment procedure. They were subsequently released after the *habeas corpus* application filed by aditus in January 2022, although such application was rejected by the national Court[5] (that confirmed the applicants' detention) and it is not clear which entity ordered their release (Falzon 2022). In May 2022, aditus filed an application before the Civil Court (Voluntary Jurisdiction) requesting authorisation to proceed with the children's human rights application in the absence of the legal guardian's consent. This court issued a positive decision in June 2022. In the meantime, some of the children left the country. Nonetheless, a human rights application was filed for the remaining child (an asylum-seeking child from Liberia) before the aforementioned First Hall Civil Court in July 2022. This was based on violations of Articles 3 and 5 ECHR, Articles 1, 4, 6 and 24 CFR, and Articles 32, 34 and 36 of the Constitution of Malta. Relevant CRC provisions are Articles 3, 8, 16, 20, 22, 24, 27, 30, 31, and 37. The applicant was confirmed a child by the national authorities and was provided with a legal guardian. In November 2022, aditus prepared and filed an application to the Court, requesting proceedings to be conducted in the English language. The litigation is still pending. Depending on the outcome of the judgement, an appeal before Malta's Constitutional Court will be possible for both the applicant and Malta.-

Notably, the children are the applicants before these national procedures. They have been actively involved at all stages of the lawyers' work through participating in all decisions taken on the basis of regular

4 In the context of the ACRiSL project, a cooperation contract (in force between February 2022 and March 2023) was signed between the Global Campus of Human Rights and a lawyer from aditus foundation (Neil Falzon) in order to support and monitor progress in two CRSL cases.

5 The *habeas corpus* application was rejected by the national court since it had been filed against the Commissioner of Police, whilst the Commissioner was not the entity detaining the children.

information provision and updates. With these clients the lawyers needed to undertake a more in-depth and sensitive empowerment process due to their placement under a legal guardianship regime that was (and remains) opposed to their engagement in legal actions against the state.

From a CRSL perspective, three considerations emphasised by the litigators are noteworthy. First, this case aims to advance children's rights beyond the individual child concerned. The process is intended to bring judicial and political attention to Malta's excessive and irregular reliance on administrative detention of children as a tool of migration management. It also underlines the institutional abuse presented by the cumulative effect of various inadequate procedures (vulnerability identification, age assessment, detention decision-making) and the terrible living conditions in which children have been kept in the state detention centres. This is the first case where the Maltese courts are called upon to look at Malta's detention regime and its treatment of unaccompanied children. The lawyers are ensuring that the First Hall Civil Court is given information on the reception system from the moment of disembarkation until eventual release of the child and appointment of a guardian, in order for the Court to appreciate the systemic deficiencies, the administrative negligence and the sheer disregard for legal norms. Second, the case aims to increase legal protection of children's rights. The application highlights the early stages of Malta's detention regime whereby asylum-seekers, including children, are detained on grounds not in conformity with international and regional standards. It seeks to reinforce the principle that detention of minors is never in the best interests of the child, including where medical considerations are being assessed. Third, the application also emphasises the lawyers' concerns in relation to Malta's regime of legal guardianship, where the guardian has clearly acted against the best interests of the minor under their charge.

At the regional level, aditus filed an application A.D. v. Malta 12427/22, to the ECtHR in March 2022. The applicant is a young Ivorian national who attempted to reach Europe through Libya by boat with other asylum seekers in early November 2021. They were rescued by the Armed Forces of Malta after spending 10 days stranded at sea and disembarked in Malta on November 24, 2021, while some people reportedly died (Arena 2021). Despite suffering from ill-health and exhaustion, all the male survivors were directly detained. Upon arrival, the applicant declared that he was a minor. He was detained in inhumane living conditions and under different legal regimes Malta relies on to detain asylum-seekers (COVID-19 quarantine, public health, and reception regulations). He was released in July 2022. On May 24, 2022, the ECtHR communicated the case to the government, with questions for Malta to comment on regarding detention conditions and review mechanisms. The facts at issue span from November 24, 2021, until July 7, 2022, and the ECHR provisions allegedly violated includes

Articles 3, 5(1), 5(4), 13 and 14. Relevant CRC provisions are Articles 3, 8, 16, 20, 22, 24, 27, 30, 31, and 37. In August 2022, aditus received the government's observations on the application, and in October 2022 submitted to the ECtHR their own final observations and request for just satisfaction. The submissions also included *affidavits* made by the applicant and by two other persons detained at the same time. Notably, the applicant child has been actively involved at all stages of the lawyers' work through participating in all decisions taken on the basis of regular information provision and updates. With his consent, his story also featured in a blogpost on the lawyers' work in relation to his detention (Falzon 2022).

In this context, on October 17, 2022, AIRE Centre, Manfred Nowak and the author from the Global Campus of Human Rights, ICJ and ECRE jointly submitted a TPI to the ECtHR (EDAL 2022). They underlined the need for detention under Article 5(1) to comply with the requirements of legality, not be arbitrary and be in accordance with a provision prescribed by law, with consideration of less invasive alternatives to detention as part of an individualised assessment, which takes into account all circumstances of the case and applicant concerned. Moreover, they stressed the need for the child's best interests to be an overriding consideration and thus be assessed in all cases relating to children, including when deprivation of liberty is at stake. Additionally, the presumption of minority should be applied where there is doubt as to the age of the person concerned and corresponding rights. They emphasised the Court's previous findings that children's vulnerability can mean that their deprivation of liberty has been violated in situations where it may not have been for adults. In this context, they highlighted that the CRC-Committee's General Comments (particularly n. 6 paras 61-63; n. 10 para 79; n. 14 paras 75-76; n. 23 para 10) are authoritative and interpretative tools which should also be considered under Article 53 ECHR. Furthermore, they highlighted the need for an effective judicial review of detention under Article 5(4), clearly prescribed by law and accessible in practice, as an essential safeguard against arbitrary detention, including in the context of immigration control. Access to legal aid and advice is important in ensuring the accessibility and effectiveness of judicial review, and the absence of provision for legal assistance in law or in practice should be taken into account in assessing both the arbitrariness of detention and the adequacy of judicial review.

On November 25, 2022, aditus received Malta's final submissions which provided useful information in relation to its asylum regime. All parties are awaiting the ECtHR's decision. In the meantime, advocacy efforts by the lawyers, including public dissemination and bilateral meetings with government stakeholders, have been engaged in so as to raise the profile of detained children. From a CRSL perspective, three considerations emphasised by the litigators are noteworthy. First, similarly to the previous case, *A.D. v. Malta* aims to advance children's rights

beyond the rights of the individual child concerned, bringing judicial and political attention to Malta's reliance on administrative detention as a tool of migration management. It also underlines the aforementioned institutional abuse presented by the cumulative effect of inadequate procedures and the terrible living conditions in the state detention centres. Second, the application aims to strengthen legal protection of children's rights, highlighting Malta's detention regime whereby asylum-seekers, including children, are confined on grounds not in line with international and regional standards. It seeks to reinforce the principle that detention of minors is never in the best interests of the child, including where medical considerations are being assessed. Additionally, the case has the potential of radically changing the remedies that Malta provides for detained persons, including children. The formulation of the ECtHR's questions to Malta shows an interest by the Court in the nature of the Immigration Appeals Board, and whether it conforms to the Convention's requirements for an effective remedy. The lawyers' submissions had underlined the lack of impartiality of this body, highlighting the politicisation of appointments of its members. Third, the application seeks redress through a regional body for a violation of children's rights at the domestic level.

Importantly, the two cases are highlighted in all advocacy meetings aditus and JRS attend on the issues of detention, protection of children, and general migration issues. On May 31, 2022, they also publicly launched a report that presents the voices of children talking about their experiences of Malta's asylum regime; the qualitative study explores various stages of a child's life in Malta and identifies key concerns (Carabott 2022; Agius 2022). With this report they intend to focus on a key advocacy message echoing Malta's own national policy on children: migrant children are firstly children. These lawyers' advocacy attempts to shift narratives from a migration-centric one –inevitably leading to discussions on age assessment, detention, status, procedures, etc.– to a child-centre one, with a more obvious focus on care, security, attention, guidance and support.

## 9. Concluding remarks for a children's rights preparedness

The litigation efforts explored in previous sections seem to indicate that there can be valuable opportunities to strategically litigate children's rights in relation to migration-related detention before national and regional/international bodies. Nonetheless, it is important to emphasise the need for a children's rights preparedness in addressing the challenges of such a damaging practice. This entails to focus on litigation strategies that are consistent with children's rights and aim to advance children's enjoyment of their rights, in order to contribute effectively to tackle such practice and bring changes against it.

In the above selected cases, the actors driving and supporting CRSL work in this area are law firms, child rights organisations and other civil society organisations working with lawyers on a regular basis. The applicants include the children concerned. The respondents are state actors. The litigation undertaken by these organisations has proved to contribute to challenging such rights-violating practice and opening up to further opportunities, especially when leading to landmark decisions that provide important considerations to be used in further strategic litigation and advocacy. Importantly, as these CRSL activities have been undertaken before national and regional courts and international monitoring bodies, the related long-term impact is likely to be wide-ranging. In the European context, the considered litigators do not generally expect the cases to be solved domestically and rather seem to rely on possible positive outcomes in the EU, CoE or UN fora. All the countries involved in the selected cases, however, are not yet parties to the Optional Protocol to the CRC on a communications procedure.

It must be emphasised that the author's qualitative research conducted for ACRiSL and from which the above selected cases are drawn show a certain diversity linked to the existence of regional human rights monitoring mechanisms, favouring the number of Global North CRSL experiences (in comparison to Global South CRSL experiences) in relation to child migration-related detention. The fact that CRSL is under-practiced in this thematic area in most of the Asian countries concerned does not help the lawyers concerned to work on new cases. Such difficulty seems partly due to practitioners' impossibility to access immigration detention centres in their countries and the consequent unfeasibility to initiate new cases, or to the large xenophobic sentiment existing in their countries, or to the conservative approach of national courts who are not very fond of the possibility of TPI from abroad on how to take up and implement certain policies. Some progressive results have been obtained through strategic advocacy and inter-ministerial agreements. Nonetheless, the same research also shows that all of the European and Asian states on the radar have experienced similar structural challenges impeding the rights of children in migration-related detention (especially in terms of risk of arbitrary detention, lack of protection, and barriers to access basic services)[6].

These considerations make clear the value of creating opportunities for discussion and exchange for legal and advocacy practitioners from different countries and even regions in terms of inspiring positive change in litigators' approaches to CRSL and learning from each other about how

6 For an overview of the challenges that diverse types of cross-border migration pose for children and the support systems provided to them in countries of origin and destination in East, South, and Southeast Asia, see Maruja M.B. Asis and Alan Feranil. 2020. "Not for Adults Only: Toward a Child Lens in Migration Policies in Asia" in 8(1) *Journal on Migration and Human Security*, 68-82. Link

to use innovative ways to tackle similar issues in their respective countries. Thus, besides mapping and highlighting existing pertinent cases, it remains important to build-up and consolidate a non-formal network of practitioners who are either experienced in or willing to engage in CRSL on migration-related detention, by facilitating the sharing of expertise about it with manifold interactions focusing on specific challenges to be solved and/or skills to be acquired for new CRSL efforts that could effectively change the lives of children on the ground.

In this regard, a successful example about positive influence on lawyers' approaches towards CRSL is represented by the workshop organised in May 2021 by the Global Campus of Human Rights for the ACRiSL project, which explored the most appropriate forms of CRSL dealing with migration-related detention. Several participants emphasised how the participation therein had already enriched their knowledge and inspired them to use innovative tactics in their work. By creating a space for lawyers from different continents experiencing similar issues and by inviting international experts to the discussion, the workshop was appreciated by the participants who reacted positively to learning from each other and from experts about original ways to face similar issues in their respective countries. Subsequent interactions with these lawyers have offered further opportunities to reflect on CRSL specific objectives in order to develop their attitudes towards ongoing challenges in the area of migration-related detention and to identify new cases.

The author's activities carried out to support specific CRSL cases in cooperation with selected lawyers have provided opportunities to understand some concrete challenges that practitioners can face in preparing and developing the cases concerned, especially given the often rapidly changing litigation context. Some can stem from factors independent from the efforts undertaken, such as in the case of the ECtHR's refusal of the request to submit a TPI in *M.H. v. Hungary*. Another example regards the pending Greek cases 1 and 5 which have been delayed due to the preliminary cases before other courts which would need to be resolved before there can be further progress. Other challenges can stem from dynamics that are largely outside the control of lawyers, such as in cases of unaccompanied minors who left Malta after having been considered as clients for the purposes of CRSL efforts. Further challenges can end up being additional aspects to tackle in the litigation process, as in one case litigated by Maltese lawyers who unsuccessfully engaged with the minors' legal guardian for legal authorisation to file their human rights application before the national civil court.

Strong arguments have been recently articulated in favour of child rights-consistent practice based on the CRC and the work of the CRC-Committee (Nolan and Skelton 2022, 9-13), also emphasising the real risk

of raising issues of legitimacy, internal coherence and overall contribution to children's rights achievements. They have well identified the most appropriate child rights standards that CRSL practitioners should have in mind to assess such consistency at all stages of litigation. Key attention is given to Articles 12, 13, 17 and 5 CRC, but also Articles 2, 3(1), 6, 16, 19, 36 and 39 (Nolan, Skelton and Ozah 2022, 36-39; Nolan and Skelton 2022a, 13-19). In this regard, they have also articulated key principles that should be borne in mind by CRSL actors when carrying out work around the scoping, planning and design of CRSL (Nolan, Skelton and Ozah 2022b). In this context, the selected litigation efforts addressed in the present article clearly go in the desirable direction but even show a space for more preparedness in terms of making multiple considerations of children's rights that can inform and develop further strategic litigation practice against migration-related detention. In this vein, increasing children's rights literacy across relevant stakeholders in turn can contribute to being prepared and bring much greater results.

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