

# Detention of Minors in EU Return Procedures: Assessing the Extent to Which Polish Law Is Reflective of the EU Migration Regime and International Human Rights Standards

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*The Return Directive allows for the detention of minors during removal proceedings, but only as a 'last resort', for 'the shortest appropriate period of time' and with the primary consideration of the 'best interests of the child'. While the Directive attempted to provide some safeguards to minors, these are undermined throughout, as the enforcement of such provisions depends significantly on their incorporation into domestic law. I provide an overview of the EU detention policy, map the existing domestic law framework in light of the benchmarks set out by the Directive and human rights instruments, and argue that there is a lack of consistency in the case study of Poland. In doing so, I analyse the limitations to detaining minors in light of the human rights treaties, of the jurisprudence of the Court of Justice of the European Union and the European Court of Human Rights, and of the role of the monitoring body – the Committee on the Rights of the Child. In discussing the different types of jurisprudence, I illustrate how different bodies speak with the same voice on the detention of minors. Based on these findings I attempt to contribute to the policy debate on how to reconcile and balance the implications of two policy objectives affecting irregular migrant children - the protection of minors and immigration enforcement. I identify detention policy aspects, for which the legislation should be further harmonised, and I develop models of good practices based on other Member States' practices, thus providing a set of policy recommendations to the Polish legislator as to what fair and effective irregular migration governance might entail.*

*Keywords: forced migration; irregular migration; Return Directive; vulnerable minors; children's rights*

## Introduction

### *Subject matter*

Over the past ten years, irregular migration has become a priority issue for EU migration policy. A growing number of third-country nationals in irregular situations crossing EU borders was the main reason and a key objective of the EU and its individual Member States for adopting a suitable approach for returning migrants to their home countries.

In December 2008 an impressive body of EU law was produced by the European Parliament and the Council – the Directive 2008/115/EC (Return Directive). The Directive has received a great deal of criticism for its excessive focus on ensuring the effective removal of migrants and its lack of attention to the protection of fundamental human rights. One of the furthest-reaching interferences of these rights is the placing of an immigrant in the pre-departure detention. Cornelisse (2010: 4) describes the mechanism as “deprivation of liberty under administrative law for reasons that are directly linked to the administration of immigration policies”, specifically ‘the administrative detention of individuals on account of the lack of state authorisation for their presence on national territory’. Particular criticism has been addressed towards the possibility of detaining minors. While the Directive attempted to provide some safeguards to minors based on international instruments, these are undermined throughout, as the proper application of EU law depends primarily on the correct and effective transposition of common rules into national legislation (Council Resolution, Council of the European Union 1995).

The detention of irregular migrants has increased significantly in the face of the current crisis. It is important to understand that this increase is not only due to the growing number of arrivals in Europe, but more importantly due to the policy and political decisions that come as a result of an obstructive attitude by Member States towards migrants. Despite the detention being universally accepted under EU and international law as a measure of last resort, many States gradually use the mechanism as a deterrent for migrants. In this paper I aim to show that the legal framework governing the use of detention under EU law and international human rights standards is precise and accessible, and that the practice of immigration detention imposes the obligation to preserve the rights of migrants, which in turn may undermine the territorial basis of sovereignty.

Despite the appropriate legislations that are in place, many Member States consider the entry, stay and return of third-country nationals from their territory as falling under their sovereign power of control. It is therefore the national detention policies that are ambiguous and leave migrants open to abuse of their fundamental rights. Such a lack of transparency can be observed in the current Polish regime, where laws and regulations are insufficient, leaving too much discretion to immigration officials (Parliamentary Assembly of the Council of Europe 2010).

### *Justification for the study*

The facilitation of the return of irregular migrants entails important challenges for the protection of human rights in EU and its Member States. As rightly pointed out by Pétin (2016: 93), States do not have *carte blanche* in this field. Many factors should be considered when assessing the proportionality of detention and it should be done on a case-by-case basis. In (App. No. 28973/11) *Z. H. v. Hungary*, the European Court of Human Rights (ECtHR) recalled that ‘any interference with the rights of persons belonging to particularly vulnerable groups (...) is required to be subject to strict scrutiny, and only very weighty reasons could justify any restriction’ (para. 29). Vulnerability is, therefore, a major factor that must be considered before ordering detention and a key factor in the assessment of the arbitrariness of a detention measure.

The European Commission stated in its Communication (EC 2014: 21) that the Return Directive has positively influenced the laws of the Member States. The contradictory view was presented by the Parliamentary Assembly of the Council of Europe (2014: 3) which in its recently issued report expressed concerns that, despite improvements in legislation, thousands of minors are still being detained annually, which is a clear unequivocal child rights violation. The Commissioner for Human Rights (Council of Europe 2015) called on those States to address current shortcomings in the system with regards to vulnerable minors and emphasised that ‘children should not be subjected to immigration detention, whether with or without their families’.

The Polish legislator nevertheless fails to implement the European and International standards correctly. Of course, in the lack of a preliminary reference made by the Polish Tribunal, or when an individual complains that it would have been taken further by the European Commission, this observation still lacks the background required to be able to make a judgement on the situation. However, shortcomings in the system can be seen, even in the light of recent events. In November 2014, the Association for Legal Intervention (2014) issued a paper warning the Polish government that the Act on foreigners fails to provide remedies against detaining immigrant children in guarded facilities. Also, the coalition of non-governmental organisations (NGOs) has been campaigning for several months to seek alternative measures to supervise the stay of children and parents in Poland (Helsinki Foundation for Human Rights 2012b). While the Court of Justice of the European Union (CJEU) and the European Court of Human Rights (ECtHR) have given considerable attention to detention in the return procedures, both still have not approached the Polish government and its law which clearly is in breach of the Return Directive and human rights standards. The actions taken by the NGOs come as a sign of the unease that detaining minors is causing among human rights activists and also now among international institutions. For these reasons, the detention of minors is perceived as a current and relevant issue and possibly the biggest human rights grey area in Europe.

### *Methods of analysis*

In this paper I will primarily analyse the limitations of detaining minors in light of the human rights treaties, namely the EU Charter of Fundamental Rights (Charter), the European Convention on Human Rights (ECHR) and the UN Convention on the Rights of the Child (UNCRC). In doing so, I will consider the relevant jurisprudence of the CJEU and the ECtHR, and the role of the monitoring body, the Committee on the Rights of the Child (CRC). I will then examine the legal situation of minors in Poland through the prism of children’s fundamental rights. What I have discovered is a huge gap between the Polish legislation and the standards dictated by the Return Directive and human rights instruments. I will explore the widespread failure in Poland to apply universally agreed principles to children who are in detention today. I will then identify detention policy aspects, for which the Polish legislation should be further harmonised. Finally, I will develop models of good practice based on other Member States’ practices, thus providing a set of policy recommendations to the Polish legislator as to what fair and effective irregular migration governance might entail.

The analysis consists of two elements: firstly, desk research was undertaken, concentrating on European, national and international legal documents, as well as case law. Reports and documents by international governmental and non-governmental organisations, as well as articles and books on the subject, have also been used. Secondly, the study visit I participated in at the Ministry of the Interior of the Republic of Poland at the Migration Policy Department (Warsaw, Poland) has contributed to a better understanding of the subject and has helped to provide some practical suggestions and shape my thinking on the problem. Finally, my experience gained through working for the Committee on Civil Liberties, Justice and Home Affairs (LIBE Committee) at the European Parliament (Brussels, Belgium) has allowed me to gain insight into the most recent

developments in the field, including the latest work of the European Commission, the Council and the Parliament, and provided me with extensive up-to-date documentation that has particularly been helpful in writing this paper.

## **Setting the context**

### *Definitions*

Defining who is a migrant in an irregular situation and who is a ‘child’ is not straightforward. If one takes the definition adopted by the International Organisation for Migration (IOM 2004: 34) as a starting point, an irregular migrant is ‘someone who, owing to illegal entry or the expiry of his or her visa, lacks legal status in a transit or host country’. A common framework for identifying irregular migrants has also been established by the Return Directive, as ‘the presence on the territory of a Member State, of a third-country national who does not fulfil, or no longer fulfils the conditions of entry as set out in Article 5 of the Schengen Borders Code or other conditions for entry, stay or residence in that Member State’ (Article 3(2)). Based on these two definitions, irregular migration may constitute an administrative offence; however, irregular migrants are not criminals per se, and therefore should not be treated as such. Irregularity is simply a condition of movement that depends on whether that movement is targeted for control by national, international and/or transnational agencies.

Combining the two above definitions, ‘minors’ in irregular migration will refer to children, individuals under the age of full legal responsibility, whose lives are affected by an irregular migration status. There is, however, at least one key difference between minors and adult migrants. Minors are more vulnerable, and the Return Directive has called on national authorities to create for them special exception to immigration law and procedures.

### *Counting the uncountable*

Measuring irregular migration in practice amounts to counting the uncountable as irregular migration is not only a complex legal term but also one of the most elusive migration populations. Children have always been part of migration flows, yet there is virtually no official data and no reliable EU-wide estimates of the percentage of the number of minors that are being detained in Europe annually. Cornelisse (2010: 7) has emphasised how difficult it is to obtain reliable figures when attempting to present an overview of the use of immigration detention by Member States: ‘if states do keep statistics, they are often rather reticent to make them available to the public’.

The analysis of reports from UN agencies and reputable NGOs indicates that minors continue to be routinely detained. Based on the recent report published by the Global Detention Project (2015: 24–25), the largest number of minors in detention in 2015 have been reported in the Netherlands (402), the United Kingdom (222), Switzerland (177) and Poland (177). The scale of the use of detention of minors in Poland is also shown by the statistical data made available by the Border Guards and published by the Rule of Law Institute (Sieniow 2016: 53). Within the report, minors are slightly understated, with 159 being detained in Polish detention centres in 2015.

## **Legal analysis of the detention mechanism under the Return Directive and the jurisprudence of the Court of Justice of the European Union**

According to Eurostat (2016), in 2015 between 400 000 and 500 000 immigrants were ordered to leave the territory of the EU because of their irregular status. Within these estimates, only in 36 per cent of cases was the return decision effective and migrants were sent back to their country of origin. The Directorate-General of Migration and Home Affairs of the European Commission (2016) argues that these numbers raise the necessity of an effective and humane return policy within a comprehensive migration regime, and that the laws of the Member States do not contradict a more open migration policy. In the view of this Directorate, ‘ensuring the return of irregular migrants is essential in order to enhance the credibility of policies in the field of international protection and legal migration’.

### *Detention under the Return Directive*

Standards and procedures applicable to individuals who are subject to return decision are now regulated by Directive 2008/115/EC. The key elements of harmonisation were to seek a more sustainable approach for returning migrants, particularly through offering them assistance to return voluntarily (Cherti and Szilard 2013: 3). The Directive provides for clear, transparent and fair common rules for the return of migrants, the use of coercive measures and detention, while fully respecting the human rights of irregularly staying individuals (Directorate-General of Migration and Home Affairs 2016). These rights can be derived from the Directive directly, and invoked in proceedings before national courts. The procedures applied in Member States must be, therefore, in accordance with fundamental rights as general principles of Community law as well as international law, including human rights obligations (Article 1).

The Directive establishes that detention should only be used as a measure of last resort. Member States may only detain an immigrant ‘who is a subject of return procedures in order to prepare the return and/or carry out the removal process’ (Article 15(1)). This applies particularly in cases where there is a risk of absconding (Article 15(1)(a)), and where the migrant avoids/hampers the preparation for return or the removal process (Article 15(1)(b)). While Article 15(1) provides that ‘detention shall be for as short a period as possible’, Article 15(5) and (6) allow for detention up to six months, with the possibility of extension for another 12 months if the migrant refuses to cooperate with the national authorities of the host state (Article 15(6)(a)), or where there are delays in obtaining the necessary documentation from third countries (Article 15(6)(b)). When it appears that a reasonable prospect of removal no longer exists, under Article 15(4) detention ceases to be justified and the person concerned should be released immediately. Detention ordered by administrative authorities should be subject to ‘a speedy judicial review’ (Article 15(2), (3)). The Directive also stipulates measures concerning the conditions of detention. These provide that detention should always take place as a rule in specialised detention facilities (Article 16(1)). The exceptions are situations where national authorities are faced with an ‘exceptionally large number of [third-country nationals]’, which places an unforeseen heavy burden on the capacity of the detention facilities of a particular Member State. In such circumstances, the Member State is allowed by Article 18(1) to extend periods for judicial review and derogate from the rules on the condition of detention, provided the Member State informs the Commission (Article 18(2)).

### *Selected jurisprudence of the Court of Justice of the European Union*

In an attempt to make the legal framework clearer, the CJEU has been called upon to interpret the Directive’s provisions. In C-357/09 *Kadzoev*, the Court emphasised that pre-removal detention may not exceed the time

after expiration of the maximum length (paras 37, 54, 61), and that it ceases to be justified when it appears that a reasonable prospect of removal no longer exists (para. 63). According to the Court, the Directive lists exhaustively the reasons which can justify extending the initial six-month limit on detention up to the absolute 18-month limit. Consequently, Member States cannot invoke grounds of public order or public safety for detaining a person under the Directive and for refusing to release that person immediately, once the 18-month period has expired (para. 70).

The judgment in C-61/11 *El Dridi* developed the theme *Kadzoev* only hinted upon, that Member States have to carry out the removal procedures in a way which does not frustrate the Directive's aim of returning irregular immigrants as smoothly as possible. In doing so, the Court clarifies the difference between criminal detention and pre-return detention: 'it is only where, in the light of an assessment of each specific situation, the enforcement of the return decision in the form of removal risks being compromised by the conduct of the person concerned that the [Member State] may deprive that person of his liberty and detain him' (para. 39). The Court emphasised that Member States' national law cannot be of a type that jeopardises the achievement of the aims pursued by EU directives (paras 55–59), and that detention is a measure of last resort which may be taken as a preparatory step to removal (paras 40–43). Thus, the Directive prevents national authorities from punishing migrants with imprisonment for failure to comply with a deportation order (Hatzis 2013: 9–10). Rather, they should 'pursue their efforts to enforce the return decision' (para. 58).

The judgment in C-329/11 *Achughbabian* complements this jurisprudence and specifies that national authorities are required to act with diligence and take a position without delay to verify whether a third-country national is an irregular migrant. Once it has been established that the presence is illegal, the authorities must adopt a return decision (para. 31). As explained by the Court, the objective of that procedure is 'the physical transportation of the person concerned outside the [Member State] concerned' (para. 35), and it should take place 'as soon as possible' (para. 45). According to the Court, detention must substantively comply with the fundamental rights contained in the ECHR and the Charter (para. 49).

Like the three acts of a play, these judgments form a trilogy that are played on the EU law stage and provide a much-needed clarification of the rules of detention of irregular migrants. Later judgments illustrate the Court's further attempts to clarify the imposition of detention under the Return Directive. In C-534/11 *Arslan*, the Court explained that the examination of extension of the initial period of detention by national authorities must rely on a case-by-case assessment of all the relevant circumstances (paras 62–63). In C-146/14 *Mahdi* the Court goes even further and explains that the decision about the extension should be made after precise analysis of the circumstances of the specific case, as it may be possible that the irregularly staying third-country national may instead be subject to a less coercive measure. National authorities should, therefore, rule on all relevant factual and legal matters, which entail an in-depth examination of the facts specific to each individual case. This is required so as not to render the obligation under Article 15(3) meaningless, and hence deprive it of its effectiveness (paras 61–64).

The Court also clarified the concept 'lack of cooperation by the third-country national', meaning that delays and difficulties the third-country demonstrates in issuing the documents necessary for the removal, cannot be blamed upon the individual (para. 58). Thus, the lack of identity documents, in itself, cannot be a ground for extending detention. Otherwise this would encourage automatic detention – practices which the Directive tries to eliminate. As Advocate General Sharpston opined regarding C-554/13 *Zh. and O.* (para. 93), 'seeking to minimise administrative inconvenience is not a valid reason for avoiding assessing cases in accordance with the more nuanced system required under the Directive'. The Court referred to Recital 6 to strengthen this point that any decision taken under the Directive must be based on objective criteria and adopted on a case-by-case basis (para. 70).

Consequently, national courts are obliged to scrutinise carefully the factual matters in line with the clear guidelines provided by the Court of Justice. In consonance with the opinion of Advocate General Maduro in C-281/06 *Jundt*, it is indeed a ‘trite law’ ‘that even where a [Member State] is regulating an area that falls within its exclusive competence it must do so in a way that is consistent with the Treaty and, especially, with the fundamental freedoms’ (para. 28). *Mahdi* was the first occasion when the Court explicitly referred to the dignity of the person when discussing the objective of the Directive with regards to removal and the need for the national courts to consider the case law according to the ECtHR in this regard (Article 52(3) Charter). This ruling is therefore protective of the rights applicable to those in detention. Furthermore, in line with the judgment in C-430/11 *Sagor*, the Directive was not designed to harmonise in their entirety the national rules, but ‘to establish an effective removal and repatriation policy’ (para. 31). Correspondingly, the national legislation can be adopted by a Member State in a way that will discourage irregular migrants from entering and remaining on its territory. It cannot be, however, of a type that jeopardises the achievement of the aims pursued by the Return Directive and fundamental human rights.

### *Minors under the Return Directive*

Minors are defined by Article 3(9) as falling under the category of ‘vulnerable persons’. The Directive provides the possibility to detain unaccompanied minors and families with minors as a ‘measure of last resort’ and for ‘the shortest appropriate period of time’. Families detained pending removal should be provided with separate accommodation guaranteeing adequate privacy (Article 17). The text numerously clarifies that Member States are obliged to take the ‘best interests of the child’ as a primary consideration in the context of detention of minors (Articles 5, 10), and to provide for safeguards pending return (Article 14).

While we are still awaiting the full case on the issue of detention of minors to come before the Court of Justice, Advocate General Bot cursorily noted in his opinion regarding C-473/13 *Bero*, C-514/13 *Bouzalmate* and C-474/13 *Pham* that, with regard to minors, detention is, in principle, always an exceptional measure (para. 48). It is therefore ‘having regard to that information and to the requirements of the Directive and of [human rights] that it is necessary to examine whether the application of such regimes to migrants in detention pending their return observes the rights that are conferred on them in the [EU]’ (para. 49). The Advocate General notes that minors are particularly vulnerable and require particular attention on the part of the authorities because of their condition, age and state dependency, ‘concerning which neither the legislature of the Union, in Article 17(2) [Return Directive], nor the [ECtHR], in its case law, is prepared to compromise’ (para. 111). Advocate General Bot has additionally reasoned in the latter case C-562/13 *Abdida* that Member States must ensure that minors are granted access to the basic education system and that the special needs of vulnerable persons are taken into account (para. 128).

## **Detention mechanism in light of human rights instruments and the jurisprudence of the Court of Justice of the European Union and the European Court of Human Rights**

### *The Charter of Fundamental Rights of the European Union*

The Charter is a legally binding instrument that brings together the fundamental rights protected in the EU (Ferraro and Carmona 2015: 10). The scope of application of the Charter, as defined in Article 51, is that its provisions are addressed to the EU institutions and bodies and, when they act to implement EU law, also to

the Member States. Thus, the Charter does not bind States unless they are acting to implement EU law (C-309/96 *Annibaldi*, paras 21–23).

The Charter guarantees the protection of minors' rights in Article 24. Within the context of EU law and policy, the principle of the best interests of the child underpins all EU activity (House of Lords – European Union Community 2016: 13). As such the provision has general application to any field of EU law where minors may be affected, including migrants' detention (Lamont 2014: 678). In accordance with Article 24 minors 'have the right to such protection and care as is necessary for their well-being'; their best interests must be a primary consideration in 'all actions relating to children, whether taken by public authorities or private institutions'; and every child has 'the right to maintain on a regular basis a personal relationship and direct contact with both his/her parents, unless that is contrary to his/her interests'.

Although the Charter does not allow for cases to be brought directly before the CJEU, research shows that between entry into force of the Charter and the end of April 2016 the CJEU has made reference to or drawn on provisions of the Charter in 395 judgments. Article 24 specifically has been quoted in 20 of these judgments. In fact it was the earliest of the Charter's rights that has been referred to directly by the Court. The initial inclusion of Article 24 suggests a shift to minors as independent rights holders within the EU, rather than objects of EU law. The approach that the Court has taken in its interpretation illustrates the Article's powerful nature and how it should now be considered as an EU law. A proper understanding of this provision therefore requires a proper understanding of the Court's jurisprudence.

*Right to family reunification of minor children of third-country nationals: Directive 2003/86/EC – Family Reunification Directive.* The first opportunity for the Court of Justice to rule on Article 24 was the judgment in C-540/03 *Parliament v. Council*. The case concerned the Family Reunification Directive and formed the basis upon which the later rulings and opinions in different spheres of EU law have relied on. The Court firstly observes that the principal aim of the Charter is to reaffirm 'rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States'. The CJEU held that it would ensure compliance of EU law with these principles (para. 38).

The Court then requires Member States to have due regard to the 'best interests of minors' when examining the application for family reunification under Article 5(5) Directive (paras 10, 63, 73). Also, Member States' authorisation of the entry and residence for the purpose of family reunification under the Article 4 Directive cannot be regarded as running counter to the obligation to have regard to the best interests of minors (paras 76, 87, 90). In doing so, the right to family life recognised by the Article 7 Charter must be read in conjunction with the obligation to have regard to the minor's best interests as recognised by Article 24(2), and taking account of the need, expressed in Article 24(3), for the minor to maintain on a regular basis a personal relationship with both of his or her parents (paras 58, 76).

This reasoning was soon followed in other cases (C-497/10 *Mercredi v. Chaffe*, joined cases C-356/11 and C-357/11 *O., S. v. Maahanmuuttovirasto and Maahanmuuttovirasto v. L*, and C-40/11 *Iida*), illustrating an authoritative power the Article 24 has to empower the family reunification right. The position the Court took ultimately affirmed the ongoing relationship between the minor's substantive rights and the right to family life, namely Articles 7 and 24. Even though the Court pointed out in C-40/11 *Iida* that Article 24 cannot be used to extend the scope of EU law beyond the existing powers of the EU, we can observe how in each case the right of residence is claimed through the minor's best interests. The judgments portray Article 24 as the supreme provision 'against which even primary provisions of the EU law in the Treaties may be measured and assessed'. It is clear therefore that any understanding of the intent and effect of EU law, including in the sphere of minors' rights, has now to be done against a background of an understanding of the terms of the Charter as interpreted by the CJEU (O'Neill, n.d.: 11).



*Brussels II Revised (Council Regulation (EC) 2201/2003 as amended) adopted in the context of public law rules relating to child protection.* The cases in which the role of the provision has been perhaps more prominent are cases concerning Brussels II Revised, expressly child custody, where the Regulation has been applied to the enforcement of a single decision ordering a child to be taken into care. In cases C-491/10 Zarraga and C-403/09 Delicek v. Sgueglia the Court dealt with the reference to Article 24(3) to justify an interpretation of Brussels II Revised, particularly the return of a minor to a State from which he or she was unlawfully removed or retained.

In *Delicek*, the CJEU observes that respect for private and family life recognised in the Article 7 Charter must be read in a way which respects the obligation to take into consideration the minor's best interests, while also taking into account the fundamental right of a minor to maintain on a regular basis personal relationships and direct contact with both of his or her parents (Article 24(3)) (paras 60–62). In *Aguirre*, the Court additionally acknowledged 'the urgency of ruling in cases of minor removal in particular where the separation of a minor from the parent to whom (...) custody had previously been awarded (...) would be likely to bring about a deterioration of their relationship, and to cause psychological damage'. Moreover, Member States must provide an opportunity to the minor to be heard during the proceedings. Such an opportunity must be interpreted in light of Article 24 (para. 60); otherwise it would be a violation of fundamental principles. Yet, 'hearing the child cannot constitute an absolute obligation, but must be assessed having regard to what is required in the best interests of the child in each individual case, in accordance with Article 24(2)'. Nevertheless, in C-400/10 *J. McB. v. L. E.* and C-211/10 *Povse v. Alpaço*, the CJEU ruled that an unlawful removal of the minor is likely to deprive him or her of the possibility of maintaining on a regular basis a personal relationship and direct contact with the parent (para. 64).

The judgments emphasise the sensitive nature of cases involving the return of minors, and how this vulnerable category is supposed to be treated with special carefulness. By their very nature, the practices affirmed in the judgments should be followed in cases involving the voluntary return, with the 'best interests of the minor' being taken into account in the following three particular scenarios.

Firstly, all matters concerning minors in an irregular situation should be determined with respect of preserving a direct contact with the minor's family. Minors cannot be deprived of close family relations only by having regard to their temporary illegal status. For that reason, minors' families need always to be taken into consideration when deciding upon detention, and minors should never be separated and placed in detention without the guardian. When dealing with unaccompanied minors, foster guardians should be considered, or where possible alternatives to detention in the form of an orphanage where minors would be placed under specialist care.

Secondly, all procedures regarding minors should be processed with urgency. National authorities need to do everything in their power to avoid prolonged procedures, including detention, which should be limited to the shortest period of time, to comply with the minors' best interests.

Thirdly, having regard to the particular facts of the case, the courts must give an opportunity to a minor to be heard during detention proceedings, if that would be required to preserve his or her best interest. Age should not determine the possibility for individuals to be heard during their own proceedings, though it can be a decisive determinant. This can be of particular importance where a minor has been falsely classified as 'unaccompanied', yet may have knowledge of his or her family residence.

*Dublin II Regulation (Council Regulation (EC) No 343/2003) and the best interests of the child.* The clearest impact of minors' interests on EU law has occurred in a more recent preliminary ruling C-648/11 *M. A. and Others v. the UK* concerning the permissibility of transfer of an unaccompanied minor asylum seeker to another Member State under the Dublin Regulation. The CJEU clarified that, in the absence of a family legally present

in a Member State, the state in which the minor is physically present is responsible for examining his or her claim. The CJEU referred here specifically to Article 24(2) and held that the minor's best interests must be a primary consideration in all decisions under the Dublin II Regulation. The reason given was the particular vulnerability of minors. Prompt access to an asylum procedure and the prevention of unnecessary delays in the Dublin procedure, in the view of the Court, are central to their best interests (para. 61).

The judgment sends a straightforward message that the national rules must be designed in a way that protects minors' well-being, and that the Dublin Regulation can only be applied in a manner which safeguards the rights of minors under primary EU law. In the normative sense, this ruling is a perfect model judgment for further cases that come before the CJEU on the detention of minors in return procedures. The main concern of the Return Directive was to ensure that the provisions are fully compatible with fundamental rights. As a result, the Directive pays special attention to minors and requires the 'best interests of the child' to be a primary consideration for Member States when implementing the provisions involving minors. It is crucial that every State implements it in a way which takes into account the needs of minors and safeguards their welfare on its territory, which is ultimately required by their vulnerable nature.

*Best interest of the child within the internal market.* The powerful nature of Article 24 may be used for the purpose of the interpretation and application of different EU legal instruments, though not necessarily those in the family context. *C-244/06 Dynamic Medien* concerned German laws prohibiting the sale of DVDs via mail order that were not labelled as suitable for young persons. It was on the Article 24 basis that the CJEU held that the restrictions imposed by the German Government were justified by the overarching aim to protect minors. This judgment is highly significant. By using Article 24 to challenge 'the fundamental single market ethos of the EU', the judgment illustrates how the protection of minors' rights could also act as a legitimate brake on the application of EU law. The Court exhibited therefore a rare derogation from the free movement of goods provisions, thus confidently deploying and safeguarding minors' rights (Invernizzi and Williams 2011: 212–213).

*Commentary.* The research shows that, while Article 24 is formally acknowledged at the legal stage, the room for interpretation that is left by the legislator allows Member States not to implement the principle into their domestic laws. One could argue that Article 24 is merely a 'mantra' that has little value in decision-making, and that there is too little standardisation of what the Article actually means in practice (House of Lords – European Union Community 2016: 32–33). Although in neither of the cases did the Court closely analyse the meaning or content of the rights that the provision contains, given that the Charter is now primary law (Article 6(1) Treaty on the European Union), it did establish a clear pattern for interpreting national law that falls within the scope of EU law in light of the Charter. In all cases involving minors, the Court established a rule of prioritising minors' rights by referring to Article 24. In this way, the Court indicates that decisions about the families' future, asylum application or the internal market will ultimately depend on the well-being of the minor. Just like an umbrella, the Court indicates that in all actions relating to minors, regardless of whether they are taken by public authorities, private institutions, courts, legislative or administrative authorities, 'the best interests of the child' must be given primary consideration.

The judgments illustrate how along these lines the CJEU tested the EU Directive's provisions that clashed with fundamental rights in the Charter and consequently how these rights were to prevail. This leads us to the assumption that the CJEU acknowledges that the minor's best interests should be taken into account in determining how the directives are interpreted. The omission of the Article during the interpretation of EU law at the national level amounts to a disproportionate interference with substantive rights. Moreover, the Article subordinates not only the EU secondary law, but also other provisions contained in the Charter, namely Article

7, which gives rights to all members of the family to be balanced against one another, according to the obligations in Article 24 (Lamont 2014: 686–687).

With such an extensive power, Article 24 has the potential to influence the development and interpretation of the Return Directive. It may be a difficult task, since the principle encourages the determination of best interests on a case-by-case basis. However, such a minor-centred approach, affirming among other things that childhood has a value in itself, is according to the EU Network of Independent Experts of Fundamental Rights (2006: 211–212) in line with recent developments of EU institutions. The importance of the prioritisation of the fundamental rights of minors was expressed by the European Commission in its Communication 2011 (EC 2011). This aimed to put in practice the rights of minors enshrined in the Charter through a comprehensive programme of actions during 2011–2014. Subsequently, the importance of compliance with Article 24 was highlighted in the expert group set up to monitor the transposition of the Return Directive. It has been argued that the Charter directs Member States to implement the Directive, taking into account the principle of ‘the best interests of the minor’, in particular the need to protect minors by adopting alternative measures. While the Commission is currently working on further developing more consistent return practices which will fully comply with fundamental rights, it stresses in its Communication (EC 2014: 18) that, whenever States impose detention, this must be done under conditions that comply with the Charter, and that minors’ needs must be observed in particular.

The detention of minors should therefore be limited only to exceptional situations where the deprivation of liberty would be in the best interest of that minor. Such a scenario can occur in cases where the state is not in a position to secure a place in alternative locations, and where consequently detention is the only solution that will prevent a minor from being left without a venue and appropriate care. This however does not prevent the Member State from future improvements of its legal and administrative system. Perhaps, in the view of O’Neill (n.d.: 2–3), given the CJEU’s continuing history of ‘discovering’ substantive rights as an unwritten general principle of EU law, the Court could soon discover Article 24’s ‘dynamic’ approach and begin to perceive it ‘as the starting point of any consideration of [the Return Directive], rather than an end-point of discussions as to the nature, extent and effect of EU law’.

### *The European Convention on Human Rights*

The ECHR is so far the most developed human rights treaty, not only through its case law but also because it is applied in the national laws of Member States and by their national courts. An instrument is of general application, meaning that the rights and freedoms included in the Convention apply to everyone within the contracting parties’ jurisdictions (Article 1). This is supported by Article 14, which says that all the rights in the Convention apply to all people without discrimination.

The Convention provides a framework of protection which is also applicable to irregular migrants, including minors. As explained by the Commissioner for Human Rights (2007), it articulates rights defined in other treaties, such as the UNCRC, taking into account the particular situation of a migrant, and provides a framework for national authorities to prevent and eliminate irregular movements. Among the set of rights, the special protection of migrant minors in detention derive from Articles 3 and 5.

Article 3, which prohibits torture and cruel, inhuman or degrading treatments, is relevant to minors in detention for two reasons. Firstly, it provides safeguards in detention conditions. Secondly, it protects basic social and economic rights such as food or medical treatment. Each Member State must have a particular regard to this Article, ‘which enshrines one of the most fundamental values of democratic societies and prohibits in absolute terms torture and inhuman or degrading treatment or punishment irrespective of the circumstances

and of the victim's conduct' (App. No. 30696/09 *M. S. S. v. Belgium & Greece*). Without the safeguards provided, detained migrants would be exposed to conditions of destitution which in turn could amount to inhuman and/or degrading treatment.

Article 5 further strengthens this right by listing exhaustively the legitimate grounds for detention and ensures that those established at the national level do not extend beyond it. For irregular minors, the exception must be justified on the grounds that 'the lawful arrest or detention of a person [is] to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition'. The Article, therefore, must be strictly delineated and permitted and no one may be detained arbitrarily for reasons not contained in domestic law and as set out in this provision. In any case, detention on the basis of this Article will only be justified for the period of expulsion proceedings (COE and ECtHR 2014: 19). If such proceedings are not conducted with due diligence, the detention will cease to be permissible under Article 5 (App. No. 3455/05 *A. and Others v. the UK*, para. 164).

The ECHR, which is charged with monitoring the application of the Convention, has been central in extending the scope of the Articles with the view to protecting the fundamental rights of detained minors. Unlike the Charter, the principle of 'the best interest of the minor' is not explicitly stated in the Convention, but it is regularly expressed in its case law, which is clear that illegality of status does not automatically preclude minors from the genuine enjoyment of the Convention's rights (Carrera and Merlino 2010: 5).

In App. No. 13178/03 *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, the Court found it was inappropriate to place a five-year-old for two months 'in a closed centre intended for illegal immigrants'. Such a prolonged detention jointly with adults caused the minor considerable distress and demonstrated 'a lack of humanity to such a degree that it amounted to inhuman treatment'. According to the Court, it was impossible for the national authorities not to have had knowledge of the considerable distress and serious psychological effects that the minor must have been exposed to during the detention (para. 58). Consequently, the Court held that the measures taken were disproportionate, and that detention of a minor was a deliberate violation of Article 3.

The Court additionally emphasised that the minor was detained 'in the same conditions as adults; these conditions were consequently not adapted to the position of extreme vulnerability in which she found herself as a result of her position as an unaccompanied minor' (para. 103). On that basis the Court found that the authorities did not sufficiently protect the minor's right to liberty, which in effect was a violation of Article 5(1) (para. 104). To strengthen this point, the Court pointed out that 'States' interests in foiling attempts to circumvent immigration rules must not deprive [minors] of the protection their status warrants' (para. 81). Instead, the authorities should have explored other measures, including placement in a specialised centre or with foster parents, that would have been more conducive to the best interests of the minor, as guaranteed by Article 3 UNCRC (para. 83).

What is particularly striking from this judgment is that, in order to highlight the vulnerability of minors, the Court referred to their very young age. The fact that they are in an extremely vulnerable situation takes precedence over consideration of their irregular status. An irregular status is considered by the Court merely as 'an additional element that adds up to a serious situation of compounded vulnerability in which factor related to age or health play the primary role' (Ippolito and Iglesias Sánchez 2015: 438). The detention of minors should therefore be perceived as inhuman and contrary not only to the Return Directive but also to a range of international standards, as discussed in this paper. Instead, the authorities should do everything in their power to enforce the alternatives, conditions closest to those required for minors, and to provide them with opportunities to find some normality in their uprooted lives.

In the latter case of App. No. 41442/07 *Muskhadzhiyeva and Others v. Belgium* the Court held that the detention of a mother with four minors aged between seven months and seven years constituted a violation of

both Articles 3 and 5(1). To reach this conclusion the Court emphasised the fact that the detention had lasted for over a month, that doctors had expressed concern about the impact of the detention on the minors' health, and that the detention centre was not designed for accommodating minors (Nykanen 2012: 57). Even though the minors were accompanied by their mother, the authorities were still under an obligation to protect the minors who they had deprived of their liberty. Consequently, there is no need for the authorities to distinguish between whether a minor is accompanied by an older guardian or whether he or she classifies as unaccompanied. Eventually they all deserve an equal protection in light of human rights. Their vulnerability does not depend on whether they are accompanied; in fact the circumstances in this case suggest that detaining a minor together with the family may not always be in the minor's best interest, especially when the detention centre in which they are placed is designed for adult detainees.

Interestingly, the Court noted how distressing it must have been also for a mother to see her children held in such conditions. Yet, her detention had been considered not to be in breach of Article 5, and her adult irregular status ultimately was taken to justify a rather considerable degree of suffering. Thus, the judgment presents a clear distinction between the adults' and the minors' rights. The Court made it clear that detention of minors, as opposed to adults, raises special challenges from the human rights perspective. Particular attention has to be paid to their vulnerability in this context, which again takes precedence over their status as irregular migrants.

In this regard, the ECtHR has further insisted in App. No. 39472/07 and App. No. 39474/07 *Popov v. France* on the importance of reducing to the minimum the situations where families with minors are detained. For national authorities to deal with such cases, provided there are no reasons to suspect that the family would try to abscond, the Court's guidance is to apply the alternative measures. Such a procedure is crucial in order to preserve the family unit (Article 6 ECHR) while avoiding depriving minors of their liberty (paras 147–148). The judgment insists on applying the alternative means to all unaccompanied and accompanied minors, though it still only suggests it as an option to be considered by national courts and not as an obligation under European and international law.

These judgments were later confirmed in the case App. No. 8687/08 *Rahimi v. Greece*, which concerned the two-day detention of a 15-year old. The conditions of detention that the minor was exposed to, particularly with regard to hygiene and infrastructure, undermined the definition of human dignity. Appropriately, even though it had lasted for two days, the conditions of detention amounted to degrading treatment, which is in breach of Article 3. The Court also considered that the detention of the minors had exposed them to a level of suffering that equated to ill-treatment, as set out by Article 3 (paras 67–69). Thus, the time spent by the minor in detention is not of such relevance as the conditions in which he or she is kept; and even the shortest time will at the most basic level constitute a gross violation of the right included in the Convention.

In this regard, according to Cornelisse (2010: 6), 'the line between the deprivation of liberty (...) and a restriction upon personal liberty (...) is not always that easy to draw'. A judgment in App. No. 7367/76 *Guzzardi v. Italy* indicates that 'in order to determine whether someone has been deprived of his liberty (...) the starting point must be his concrete situation and account must be taken of a whole range of criteria' (para. 93). Detention cannot satisfy the absence of arbitrariness criteria simply because it is comparatively brief. Even a brief detention is not per se fair or reasonable (App. No. 22414/93 *Chahal v. UK*: 5). In the words of Pétin (2016: 107), 'the assessment of whether a measure constitutes deprivation of liberty is (...) relative and the particular vulnerability of an individual must be included in this assessment'. Therefore, when a deprivation of liberty occurs, the rule of law and the standard of human rights demand that there be adequate justification (O'Nions 2008: 41).

The argument of vulnerability has also been based on the need to justify the detention of any minor in the light of the principle of best interests (Article 3 UNCRC), which hence requires analysis on a case-by-case

basis. The detention of a minor in this case appeared to have resulted from the automatic application of national law, with no consideration of best interests or his individual story. The authorities failed to take account of the individual's age, on account of which he was extremely vulnerable. The authorities have neither examined whether his detention was a measure of last resort or whether alternative less coercive measures would have sufficed. The Member State therefore failed to take adequate measures to provide care and protection as part of its positive obligations under Article 3 UNCRC. On that basis, the Court found that, in general, detention has severe negative short and long-term effects on minors' physical and mental health and is always contrary to their best interest. Minors are particularly vulnerable to the negative effects of detention. As reported by the Parliamentary Assembly of the Council of Europe (2014: 7), even short periods of detention negatively impact on minor's cognitive and emotional development. In consequence, detention can cause long-lasting severe trauma as well as developmental challenges. These factors have undermined the very basic rules dictated by the European Convention and the UN Convention, and accordingly, according to the Court, were in violation of Articles 3 UNCRC and 5(1) ECHR.

Perhaps what the Court could have also done was to refer to the CRC's *General Comment No. 6* (CRC 2005) on the treatment of unaccompanied children outside their country of origin, which came in the aftermath of App. No. 13178/03 *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*. In the Comment, the Committee provides highly significant substantive guidance as to the application of the principle of 'the best interests of the child': 'unaccompanied or separated children should not, as a general rule, be detained. 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' (Ouald Chaib and Brems 2011).

A particularly worrying trend in many Member States is not allowing minors in an irregular situation to defend themselves against detention. Such an issue was considered in App. No. 41533/08 *Bubullima v. Greece* where a minor successfully used Article 5 in the absence of domestic provision conferring on courts the power to examine the lawfulness of minors' detention. The minor in question relied on Article 5(4) alleging that he had no remedy by which to challenge the lawfulness of his detention. The Court held that the lack of such provisions undermined the minor's ability to defend himself against detention, and consequently was in breach of Article 5(4) (para. 33). The judgment expresses the view that a lack of provision allowing for such protection, or a denial of the right to make a claim before the national court for a decision on the legality of the detention, is discriminatory on the basis of age. Minors should not be automatically perceived by the authorities as applicants who are unequal to adults, but whose rights should in fact be prioritised. Consequently, they should be allowed the same rights in relation to detention, in light of the implemented EU law, as adult migrants.

*Commentary.* By looking at the above judgments it is right to conclude that they stand for the principle that the detention of minors will almost never be lawful. The Court emphasised the absolute nature of Articles 3 and 5 ECHR, and stressed the positive obligation that Member States have to protect and also provide care for minors, regardless of their immigration status. By interpreting the cases in light of the UN Convention, the ECtHR established additional safeguards to protect particularly vulnerable minors, ensuring them the specific attention they need. The compliance still requires Member States to take the necessary measures to adopt reasonable and suitable measures that will safeguard the rights of minors. The Court recalls here that 'the best interests of minors' implies that Member States ensure as far as they can the use of detention only as a measure of last resort.

The principle of effective protection can indeed constitute a significant limitation upon state discretion, including any of the rights entrenched in domestic legal frameworks. The words 'in accordance with a procedure prescribed by law' in Article 5(1) essentially refer back to national law and the obligation to conform to

the substantive and procedural rules of the Member State. The interpretation and application of national law is, in the first place, an obligation of the national authorities, notably the courts. However, in cases of non-compliance with the national law which results in a violation of the Convention's rights, the situation is different. In cases involving violation of Article 5(1), the Court must exercise a certain power to review whether a breach of national law has occurred (COE and ECtHR 2014: 7; App. No. 29226/03 *Creangă v. Romania*, para. 101; App. No. 28358/95 *Baranowski v. Poland*, para. 50). In such instances, the Court would have regard to the legal situation as it stood at the material time (App. No. 27785/95 *Wloch v. Poland*, para. 114).

Ultimately the ECtHR can be viewed as setting tight limits on the rights of states to impose legislative terms on such undertakings (e.g., C-200/02 *Zhu and Chen*). However, considering that the imperative aim and function of the Convention is the effective protection of human rights, the rights in the Convention cannot be interpreted restrictively in adherence to and preservation of national sovereignty (Greer 2000: 15). The obligation to implement the fundamental rights of the Convention into the national legal framework does not mean that the power of states in adopting diverse procedural and technical systems will be limited. They are free to adopt different judicial and administrative systems in relation to the detention of minors, provided the principle of proportionality is observed (Ost 1992: 283–317). In this regard, the concept of 'lawfulness' of detention under the Convention requires that any deprivation of liberty should be in keeping with the purpose of protecting the individual from arbitrariness. This notion of 'arbitrariness' will extend beyond the lack of conformity with national law. In other words, detention may be lawful in terms of domestic law but still arbitrary and thus contrary to the rights included in the Convention (App. No. 13229/03 *Saadi v. the UK*, para. 67). In the absence of an individual assessment of the appropriateness of detention, these requirements will not be satisfied (O'Nions 2008: 42).

What the ECtHR could, in my opinion, consider in future cases of the detention of minors is to refer back to the judgment in the case App. No. 3455/05 *A. and Others v. the UK*, where in para. 171 the Court clearly stated that it:

*does not accept the Government's argument that Article 5(1) permits a balance to be struck between the individual's right to liberty and the State's interest in protecting its population. (...) This argument is inconsistent not only with the Court's jurisprudence under sub-paragraph (f) but also with the principle that sub-paragraphs (a) to (f) amount to an exhaustive list of exceptions and that only a narrow interpretation of these exceptions is compatible with the aims of Article 5. If detention does not fit within the confines of the sub-paragraphs as interpreted by the Court, it cannot be made to fit by an appeal to the need to balance the interests of the State against those of the detainee.*

### *The United Nations Convention on the Rights of the Child*

The UNCRC is an instrument that ultimately confirms minors as human beings with a distinct set of rights rather than as passive objects of care. It is a legally binding international agreement, which acknowledges in its Preamble that every minor regardless of their immigration status has basic fundamental rights, and so any decision of national authorities concerning minors must be based on respect for those rights as set out in the Convention.

Article 17 of the Return Directive corresponds closely to the Convention on the Rights of the Child with one major difference. The Convention not only suggests but also demands that migrant minors be seen and protected first and foremost as children. CRC's *General Comment No. 6* (CRC 2005) stresses this point by stating that 'the enjoyment of rights stipulated in the Convention is not limited to children who are citizens of a State party and must therefore (...) also be available to all children (...) irrespective of their immigration

status'. The Special Rapporteur on the Human Rights of Migrants adds to this by noting that although 'the Convention neither focuses on child migration nor defines the migrant child, its provisions are of the highest relevance to ensure the adequate protection of all children in all circumstances, including therefore all stages of the migration process' (EC 2010: 2).

The provisions that are meant to guide the interpretation of the Convention with reference to minors in detention are: the principle of the best interests of the child (Article 3); the right to life (Article 6); the right to be heard (Article 12); protection from all forms of violence (Article 19); special protection and assistance (Article 20); the right to health care (Article 24); the right to education (Article 28); the right to leisure and play (Article 31); the right to personal liberty (Article 37); and the right to legal safeguards (Article 40). The principle of 'the best interests of the child' is of fundamental importance, and in the words of Alston and Gilmour-Walsh (1996: 1): 'there is no article in the Convention, and no right recognised therein, with respect to which this principle is not relevant'. Thus, the public authorities must make this a primary consideration when taking actions related to minors, and their every decision that will give primary consideration to the best interest of the minor will be one that will ensure that all of the other rights included in the Convention are respected.

The CJEU has expressly recognised the need to respect minors' rights and requires the taking into due account of the UN Convention in C-540/03 *European Parliament v. Council of the European Union*. It recognised the Convention as an international instrument that binds each of the Member States, and one of which it takes account by applying the general principles of Community Law (para. 37). Such a remark is significant in the sense that it is the first time that the Court has ruled that the UNCRC provides a source of the general principles of EU law. The same conclusion was later reached in C-244/06 *Dynamic Medien*. However, as pointed out by Van Bueren (2007: 30), the use which the CJEU made of the UN Convention in these cases still lacks explanation as to where the balance should lie between the state's security concerns and the best interests of the child. In her view, the best interests may require that 'the ambit of a state's margin of appreciation be limited in order to incorporate the child's best interests' – a rule to which not many States may readily agree (Garde 2012: 173).

Despite the Court's official acknowledgement of the use of the UN Convention rights, the power of UNCRC is not as far-reaching. This is particularly evidenced through the Court's jurisprudence where, by considering the fundamental rights held by minors in migrant families, their rights were derived from the EU Treaty, regulations and directives, and not from the UN Convention itself (UNICEF and OHCHR 2012: 18). For example, in C-200/02 *Zhu and Chen* and C-413/99 *Baumbast*, the non-EU primary care givers of the minors had derived a right to reside from the rights conferred by EU law directly on the minors. In doing so, the Court applied the rights arising from the EU Treaty and Regulation C-1612/68 in *Baumbast*, and Directive 90/364/EEC in *Chen*. It was not until the more recent case C-34/09 *Zambrano* that the Court made an indirect link to Article 3 and held that refusing to recognise that the non-EU national parents had acquired a derived right to reside in the EU would be a breach of not only the European Treaty, but also the principle of 'the best interests of the minor'. The Court has additionally reasoned that refusal to grant a parent a residence permit 'constitutes a breach of his or her children's (...) protection of rights as children, as recognised in the Convention' (UNICEF and OHCHR 2012: 18). This illustrates the point that the Court may be more willing to use human rights and apply Strasbourg case law to Member States directly. Thus, even Poland, where the status of precedent from the ECtHR is still unclear, can be forced to apply it, giving the UN Convention added strength through EU law (Vries, Bernitz and Weatherill 2013: 163–164).

The implementation of the UN Convention is monitored by the CRC. In relation to minors in detention, the Committee stresses the special responsibility of Member States to the Convention in the search for the most protective solutions, guided by 'the best interests of the child'. In the Report of General Discussion (CRC



2012), the Committee stresses that, to the greatest extent possible, and always using the least restrictive means necessary, States should adopt alternative measures that fulfil the best interests of minors, along with their rights to liberty and family life, through legislation, policy and practices that allow them to remain with family members (para. 79). Family unity therefore is never a justification for detaining minors and alternative measures should be found for the whole family (para. 39). The non-consideration of the alternatives prior to the detention order is a violation of minors' rights under Article 37 and is never in their best interests. In consonance with the statement given by the Working Group on Arbitrary Detention (2010) in its report of January 2010, 'given the availability of alternatives to detention, it is difficult to conceive of a situation in which the detention of a (...) minor would comply with the [international requirements], according to which detention can be used only as a measure of last resort' (para. 60). The list of possible alternatives can be found in the CRC's Background Paper (CRC 2012: 34), according to which alternatives must be designed and developed in keeping with the UN Guidelines for the Alternative Care of Children (UN 2010).

Recalling here the words of the Advocate General Bot in the case of *Abdida* discussed in the previous section, it should not be considered 'fair and equitable that a third-country national whose stay on national territory is de facto tolerated pending an examination of his appeal should be treated less favourably than a third-country national held in detention (...) in a specialised detention facility which, in principle, caters for all of his basic needs, including legal assistance and health and social care, for a period of up to 18 months' (para. 150). In other words, placing minors in alternative locations should not be to the detriment of their rights, and should not, at any stage, deprive them of the appropriate support that their position as a vulnerable individual requires (Pétin 2016:107–108).

Where detention is nevertheless exceptionally justified, the Committee urges in its Report of General Discussion (CRC 2012) case-by-case assessments (para. 34). Before the detention is ordered, minors should be granted the right to be heard (Article 12). All minors must be treated as individual right-holders, meaning that their child-specific needs are considered equally and individually, and that their views are appropriately heard. For that reason, they must have access to basic procedural guarantees (Article 40) (*General Comment No. 14*, para. 3, CRC 2014); that being the administrative and judicial remedies against decisions on their own situation', to guarantee that all decisions are taken in their best interests (para. 75).

Detention itself should be conducted in accordance with Article 37(b), which requires it to be used only as a measure of last resort and for the shortest appropriate period of time. The Committee stresses here the specific nature of unaccompanied minors and presents them as beneficiaries of the State's obligations (Article 20), who, as a rule, should never be detained (*General Comment No. 6*, para. 39, CRC 2005). These minors are particularly entitled to special protection and assistance provided by the State, including placement in suitable institutions for the care of minors. Detention cannot be justified solely on the basis of the minor being unaccompanied, or on their migratory or residential status, or lack thereof, which otherwise would be contrary to Article 37.

Highlighting *General Comment No. 10* (CRC 2007), when detained, Member States have the legal obligation to enforce at least the minimum standards on detention conditions, as listed in the Rules for the Protection of Juveniles Deprived of their Liberty (1990) which apply to all forms of detention, including that of irregular migrants, as well as being in line with the UN Guidelines for the Alternative Care of Children (UN 2010) and the Convention respectively (paras 79–80). Such safeguards include the prevention of any violence and child-mistreatment (Article 19) (*General Comment No. 13*, CRC 2011), ensuring that detained minors have access to services for their well-being and development, including health care (Article 24), leisure (Article 31) and education (Article 28) (Report of General Discussion, CRC 2012, para. 41).

The biggest emphasis has been placed on the right to health (Article 24). The Committee recognises in its Report (CRC 2012) the need for the provision of adequate mental health support, including, as a part of determining the best interests of the child, any post-trauma and mental health needs. Thus, Member States must conduct interviews in a non-intimidating environment and ensure minors are accompanied by a person whom they trust (para. 44).

The right to leisure (Article 31) is stressed by the Committee in the *General Comment No. 17* (CRC 2013) according to which Member States should adopt measures to ensure that all detention centres guarantee both space and opportunity for minors to associate with their peers in the community, to play and to participate in physical exercise. Such measures should not be restricted to compulsory activities. Minors staying in detention for significant periods of time also require appropriate literature, periodicals and access to the Internet (para. 51). Finally, the *General Comment No. 6* (CRC 2005) stipulates that it is in the best interests of the child to have access to quality education (paras 41–42). Such an obligation derives from Article 28 and requires ensuring that minors' access to education is maintained during the detention period in the country that they have entered illegally.

### **Polish law in light of the Return Directive and human rights standards**

Transposition of the Return Directive into Polish law has been mainly done through the 2013 Act on foreigners. The deadline laid down in the Directive was Christmas Eve 2010. The Polish main transposing legislation was passed on 12 December 2013 but entered into force on 1 May 2014, jeopardising the efficiency and fairness of the common return procedure and undermining the EU's migration policy, technically speaking for four years. The Act repeals the existing law of 13 June 2003. Through the implementation of the Return Directive, the new Act adjusts Polish law to the Directive and determines the terms and conditions of entry, stay and departure of irregular migrants from Polish territory. By ratifying the UNCRC, the ECHR and the Charter, the documents have become an integral part of the domestic legal system (Articles 241, 89(1)(2), 91(1)(2) Constitution of Poland). As a result, the documents should be directly applied in the law created by the Polish legislator and in the case of any legal collision with other acts: human rights documents must be given primacy.

So far as domestic law is concerned, despite the extensive length of the regulation, a major drawback is the residual reference of the Polish legislator directly to the legal situation of minors. The provisions on detention contained in the Act are limited to the use of 'minors' only in the case of unaccompanied children (Article 397). Children of migrants are not distinguished separately and come under the category of 'foreigners' within the meaning of Article 3(2). This is a major defect since the problem of families with children irregularly migrating to the EU is statistically more visible (MI 2014: 27).

#### *The detention of minors under the 2013 Act on foreigners*

The Act on foreigners allows for the possibility of placing minors in guarded centres for foreigners. Article 397 discusses the possibility of detaining unaccompanied minors without legal status, although those who have not yet turned 15 years old are generally excluded from the rule (Article 397(3)). In such instances 'the Police shall immediately put a minor foreigner at the disposal of a [Border Guard] authority that is competent for the place of his/her detention' (Article 397(1)), followed by the Border Guard requesting a court with jurisdiction over the place of detention of a minor foreigner to place him or her in detention (Article 397(2)). In the case of minors residing in the territory of Poland, together with their care givers, under Article 398(1) a foreigner (also minors with care givers) should be placed in a guarded facility if there is a probability that a return decision will be issued or has already been issued without a specified period for voluntary return, or when

a foreigner has not voluntarily left the territory within the period specified in the decision and when immediate forced execution of the decision is not possible, or when a foreigner fails to meet the obligations set out in the ruling on the use of the alternative measures to detention.

By differentiating the legal situation of unaccompanied and accompanied minors, Poland is in breach of Article 2 UNCRC and Article 32 of the Constitution of Poland (the right to equal treatment before the law). Further, the Polish Act does not fulfil the Return Directive (Article 17(1)) and the UNCRC (Article 37(b)), which clearly provides that detention of minors should be used only ‘as a measure of last resort’. Detention may be implemented only as a preparatory step to removal. Instead, in accordance with current Polish legislation, families with minors are detained as soon as they are found to be in an irregular situation. This is against Article 2(2) UNCRC, under which Poland agreed not to impose any form of punishment on children for the actions of their parents/guardians.

Furthermore, the legislature failed to include the reference to Article 17(5) of the Directive, Article 3(1) UNCRC and Article 24(2) Charter that ‘the best interests of the child shall be a primary consideration’ for the purpose of deciding on the detention of minors. The Court is obliged to take into account numerous factors when deciding on applications to place an unaccompanied minor in detention, such as (Article 397(2)) the degree of physical and mental development of a minor, his or her personality traits, and his or her circumstances of detention. However, the stipulated conditions are applicable only in matters of unaccompanied minors. Minors remaining under guardianship are subjected to general rules when deciding on whether to place them in the detention stipulated in the Act and when ‘the best interests of the child’ are not taken into consideration.

This is a significant drawback, since minors with families remain in the majority. This leads us to the assumption that the legal status of third-country national migrants in Poland is not regulated according to their age, and that their immigration cases are not considered independently of their families. The rationale behind such a rule could be that it is in the best interest of minors not to separate them from their families. Nonetheless, this may not always be the case, such as when the family situation is abusive and/or the return of the minor to his or her country of origin would not be in the best interests of that child (IPECL and ILO 2010: 3).

#### *The length of detention of minors under the 2013 Act on foreigners*

A similar uncertainty with international provisions can be observed in Article 403 which covers the length of detention. No specific implication can be observed as to the allowed length of time for detaining minors. As a result, they are covered by the same conditions as adult migrants. The period of stay in the detention centre must not exceed 12 months (Article 403(3)), but may be extended to 18 months in the case where a migrant appeals against a return decision (Article 403(5)).

An analysis published by the Association for Legal Intervention (2014: 4) argues that in cases where the return proceeding was preceded by a refugee status determination proceeding, as a result of which the foreigner was refused international protection, and where the foreigner during the course of this proceeding remained detained for the maximum period of six months, then that foreigner, as a result of the course of the two proceedings, could remain in the detention facility for up to 24 months. In the absence of any time limit applied to minors, this NGO argues that this two-year term could also apply to children.

Although this reasoning appears legitimate in the absence of any time limit, the argument presents a fallacy in interpreting Article 403. In relation to this provision, the Judge of the Supreme Administrative Court in Poland, Jacek Chlebny (2015), distinguishes between three separate scenarios. In the first scenario, when a migrant has been detained and further extension of the length of detention has a basis in Article 403(2), the total period of stay may not exceed 12 months (para. 3). In the second scenario, when a migrant has applied

for refugee status, Article 89(5) (Act of 13 June 2003 on granting protection to foreigners within the territory of the Republic of Poland) reads that the period of stay in detention cannot exceed six months. Reading this provision, together with Article 403(4) (2013 Act on foreigners), Judge Chlebny notes that the real period of detention cannot in any case exceed the maximum period of 18 months, being 12 months for the return decision (on the basis of the 2013 Act on foreigners) and six months for the asylum status consideration (on the basis of the Act of 13 June 2003 on granting protection to foreigners within the territory of the Republic of Poland). In the third scenario, when a migrant has filed a complaint to the administrative court with a motion to suspend the enforceability of the obligation to return, the maximum period of detention will again not extend beyond the limit of 18 months.

Judge Chlebny's reasoning is in line with the European Commission (EC 2015: 86), which directs that 'when calculating the period of detention for the purpose of removal, periods of detention as asylum seeker need not be taken into account, since detention for removal purposes and detention of asylum seekers fall under different legal rules and regimes'. The exception applies, however, when 'due to administrative shortcomings or procedural mistakes no proper decision on imposing asylum related detention was taken and the person remained in detention based on the national rules on detention for the purpose of removal'. In such a scenario, this period must be taken into account, which is also confirmed by the previously discussed judgment of the Court of Justice in the case of *Kadzoev* (paras 45, 48). In any case, the Return Directive explicitly states that asylum seekers cannot be considered 'illegally staying' as long as their claim is pending (Recital 9). States cannot justify their detention in view of the enforcement of a return decision. If this was the case, States would be dependent on the European Convention to violate their EU law obligations (De Bruycker and Tsourdi 2016: 27–28).

The Association for Legal Intervention (2014) further argued that under the current Polish regime there is nothing specified in law that restricts the number of times a minor can be detained. This would be in breach of Articles 3 and 5 of the European Convention, because in cases where the families with minors reach the maximum permitted length of detention but still remain non-deportable after their release, they would remain susceptible to possible re-detention. Judge Chlebny proves that this reasoning is also incorrect. In the course of the return decision, when a migrant is detained more than once, his or her periods of detention are simply added up, as was held by the Supreme Court of Poland in its decision of 27 September 2007 on the duration of stay of a foreigner in a guarded centre or a pre-expulsion facility (I KZP 36/07) (retaining full relevance under the current legal regime). Assuming that the release of a migrant were to result in the interrupting of the period of maximum detention is unacceptable, because as noted by the Supreme Court such practices would tolerate obvious abuse, as they would allow a break in the detention period of the person subjected to return. When released, the person could be yet re-detained, and the detention clock would resume again. This would apply also in cases when the person has been released only for a few hours.

What Judge Chlebny has omitted to mention is the fact that, in the above scenarios, the 18-month period introduced by the Polish legislator may nevertheless apply to the detention of minors. Certainly, a provision that allows the detaining of minors for a period that may extend to 18 months is incompatible with Directive Article 17(1) and Article 37(b) UNCRC, which call for minors to be detained 'for the shortest appropriate period of time'. In effect, this would mean that minors could under the Directive be detained for an unlimited period of time. However, these seemingly open-ended powers of the immigration authorities to detain minors with a view to their removal are subject to restrictions. While Articles 17 or 37(b) have not yet been interpreted by the Court, in *El Dridi* the Court did make it clear that national law cannot be of a type that jeopardises the achievement of the aims pursued by EU directives (paras 55–59). In addition, the ECtHR held in case App. No. 13229/03 *Saadi v. the UK* that the length of the detention should not exceed that reasonably required for the purpose pursued (para. 74). The purpose of the Return Directive is to pursue Member States' efforts to

enforce the return decision, and Article 17(1) clearly allows the detention of minors only for the shortest appropriate period of time.

It is in this context that the Working Group on Arbitrary Detention (UNHRC 2009: 81) observes that ‘national laws appear to take insufficient account of the fact that in some cases it is clear from the outset that removal is not possible and that detention can therefore not be justified’ (Cornellise 2010: 18). In particularly problematic cases, where the enforcement of the obligation to return encounters significant difficulties, Judge Chlebny (2015) advises that, in order to extend the length of the detention, the authorities must demonstrate that there is still a real prospect of removal, and that they must do so on a case-by-case basis. The reasoning here is in line with (App. No. 46390/10) *Auad v. Bulgaria*, where the ECtHR ruled that the period of detention may not exceed the length of time that is reasonably necessary to achieve the objective (para. 128).

#### *The alternatives to detention available under the 2013 Act on foreigners*

Poland has introduced into its legal framework the possibility of using alternative procedures to detain adults with minors, such as regular reporting to the authorities (Article 398(3)(1)), residence requirements (Article 398(3)(4)), the obligation to surrender a travel document (Article 398(3)(3)) or release on bail (Article 398(3)(2)). In accordance with the current Polish regime alternative measures may be applied, though there is yet no requirement stipulated by the legislator that would oblige the national courts to order them (Association for Legal Intervention 2014: 4). Additionally, the courts are not obliged to determine before ordering detention whether alternatives would be feasible in a particular case in light of individual circumstances (Global Detention Project 2015). There are also no separate criteria to be considered by the authorities when choosing alternatives to detention, which means that consideration of vulnerability – the assessment as to whether the person has special needs or whether minors are present – is not taken into account.

Thus, the current Polish regulation does not fulfil the Directive, which in Recital 16 and Article 15 stipulates that detention is justified only if the application of less coercive measures would not be sufficient or cannot be applied effectively. This is also in line with Article 20(2) and Article 40(3)(b) UN Convention which insist that States ensure alternative care for such minors. Instead, the practices of Poland illustrate a worrying trend towards using detention as a measure of first resort, rather than last resort, as would be required by international provisions (EC 2014: 22–33).

#### *The accommodation of detained minors under the 2013 Act on foreigners*

Detention is allowed for unaccompanied minors only in a separate part of the guarded centre (Article 414(4)), and minors under custody should be provided with a common room for foreigners located in the closed guarded centre (Article 414(3)). Such provisions may suggest an empathetic appreciation on the part of the Polish authorities to the minor’s vulnerability and conformity to the Article 17 Directive, which in para. 2 calls for families to be detained in separate accommodation guaranteeing adequate privacy and for unaccompanied minors to ‘as far as possible be provided with accommodation in institutions provided with personnel and facilities which take into account the needs of persons of their age’. However, such provision would fail when dealing with harder questions that would require a constructive approach rather than a mere replication of the provisions of the Directive, such as the detention of minors with special needs.

### *The rights available to detained minors under the 2013 Act on foreigners*

The laws designed by the Act on foreigners to safeguard children in detention are very far from being adequate. A major drawback of the Act is a significantly small reference to the legal position of detained minors. The rights of migrants in detention are listed in Articles 415 and 416. Nonetheless, the Act uses only the term ‘foreigner’, not treating the legal status of minors as a separate category. It could be argued that the failure to distinguish between the rights of minors and adults, as is the case of the previous Articles, means that minors are entitled to the same rights as adult foreigners. Yet, this is not the case here, because the Act on foreigners clearly states that the only right that ‘minors’ have access to is the right to participate in educational and recreational activities.

According to Article 416(2), minors ‘shall have the right to participate (...) in teaching and educational activities and in recreational and sports activities’. This is a correct implementation of Article 14(1)(c), the 17(3) Return Directive, and Article 28 and 31 UNCRC. Although education is an important addition to national legislation, there is yet a visible lack of reference to the ‘special needs’ that minors as a vulnerable group require (Directive Article 14(1)(d)). In this regard, Member States are obliged to indicate the nature of such needs. The needs (UNCRC) applicable to all minors would include appropriate health standards (Article 24), the right to be heard (Article 12) and the right to legal safeguards (Article 40). Moreover, the most vulnerable minors might be in need of specialist treatment. In this respect, national authorities have failed to have due regard for the individual history of minors, who tend to be victims of trafficking and who, by way of detention and deportation, are punished for offences committed as the inevitable consequence of the violations they themselves have suffered.

### **Poland and the protection of national security**

An issue of incompatibility of Polish law with EU and international law was raised during Poland’s Universal Periodic Review (UPR) 2012. This was a year when the old 2003 Act was soon to be amended and replaced with a ‘better’ one which ‘fully respected EU and international law’, namely the 2013 Act on foreigners, discussed in this paper. Stakeholders and NGOs raised their concerns about the current situation and made recommendations to the Polish authorities as to what the new Act should include, with regard to detention of minors.

Poland has been criticised for:

1. The automatic procedures of detaining minors in closed detention facilities on the simple basis of being undocumented or classified as asylum seekers.
2. The facilities in detention centres have been accused of being very similar to prisons, with most of them not providing educational programmes.
3. Stakeholders reporting the problem of the availability of health care to detained minors, together with the Istituto Internazionale Maria Ausiliatrice Human Rights Office which pointed to the exclusion of minors from health care services, except for life threatening situations.
4. Insufficient legal guarantees, such as free legal assistance to minors (Child Rights International Network 2012).

Stakeholders as well as the Commissioner for Human Rights, and the European Commission Against Racism and Intolerance recommended Poland to introduce legislation which would ultimately prohibit the detention of minors who cannot be expelled, and not to detain minors seeking asylum (Child Rights International Network 2012). In response, Poland noted that an amendment to the 2003 Act on foreigners was being prepared

in order to introduce such a ban on detaining minors in closed facilities. However, it would be applied only to minors seeking refugee status: ‘a complete ban (...) could lead to negative trend of using children by adults for migratory purposes as a safeguard against being placed in closed facilities’ (Human Rights Council 2012: para. 90.118).

Although it appears that Poland has taken a proactive approach, the end result does not reflect these intentions. The regrettable lack of action has been followed even though Amnesty International and two Polish NGOs warned the Polish Government that the draft Act on foreigners failed to provide remedies against detaining immigrant minors in ‘prison-like guarded facilities’. In particular, they pointed to the provision in the Act which allows minors aged 13 or older to be detained as contrary to the UNCRC. According to them, the Act should introduce alternatives in order to supervise the minors’ and parents’ stay in Poland. In the view of Amnesty International, ‘detention never serves the best interests of a child. Guarded centres are not places for minors’ (Helsinki Foundation for Human Rights 2012a).

The transition from the old law of 2003 to the new law of 2013 governing irregular migration was an opportunity for the Polish authorities to make a positive change in their fracturing legal system. The legislator attempted to introduce some standards of the Directive before the Act of 2013 through the amendment of the 2003 Act. The amendment was a very close copy and did not differ from the premises of the Directive. However, some scholars argue that, by passing the amendment, the Polish legislator only ‘purchased’ extra time for concerning the future image of its law on foreigners (Dąbrowski and Stefańska 2014: 12). Unsurprisingly, despite the promises made in the aftermath of the UPR, the 2013 Act on foreigners did not introduce a ban on the detention of minors. Under the new law, minors involved in the return procedures can be legally detained in the same way as those seeking asylum.

The concerns and recommendations made during the UPR and by the NGOs have also highlighted for Poland the loopholes that must be addressed in the new law. Yet, the modification proposed in the 2013 Act of foreigners did not introduce any significant changes to improve the situation of minors in Poland, and consequently the Act is in breach of the country’s EU obligations in the area of voluntary return, as well as its international obligations in the area of the protection of minors’ fundamental rights, notably the protection of the widely interpreted ‘best interests of the child’.

Such an omission suggests a deliberate defiance of the obligations that European and international law imposes on Poland in favour of its national sovereignty and its own national interest. Concerning the term ‘national security’, the United Nations High Commissioner for Refugees Guidelines (UNHCR 2012, para. 30) note that ‘determining what constitutes a national security threat lies primarily within the domain of the government’. At the same time, it stresses that detention must be proportionate to the threat, for example a terrorism threat (De Bruycker and Tsourdi 2016: 22–24). One could argue that detention in Poland serves a political purpose, not necessarily terrorism, but one that goes far beyond that explicitly stated in law. The formal objective of facilitating expulsion may not be met. Instead, it could serve an informal function, namely deterring illegal residence or managing popular anxiety by symbolically asserting state control in light of the current crisis. Although the security argument can be seen as a valid argument for detention, it is not legally justifiable under Community and international law (Bloomfield 2016: 34). Having said that, Community law precludes the adoption of restrictive measures on general preventive grounds (*C-67/74 Carmelo Angelo Bonsignore v. Oberstadtdirektor der Stadt Köln*, paras 5–7). ‘Restrictive measures must be based on an actual threat and cannot be justified merely by a general risk. (...) Individuals can have their rights restricted only if their personal conduct represents a threat, i.e. indicates the likelihood of a serious prejudice to the requirements of public policy or public security. A threat that is only presumed is not genuine. The threat must be present’ (EC 2009, para. 3.2).

This might be about to change with the CRC's review, which Poland was subject to in September 2016. The CRC Committee considered the investigations carried out regarding torture and ill-treatment of minors in detention centres (CRC 2015), and concluded that minors are being detained as a first resort measure without the decision being reviewed on a regular basis with a view to withdrawing it. Minors placed in detention are also deprived of special protection measures. Perhaps the outcome of the review will elevate minors' interests to the level of a primary consideration in the final decisions. This may be strengthened by the investigation that has already been conducted by the Committee Against Torture (OHCHR 2013) which revealed that the detention of minors in Polish guarded centres, whether on their own or with their parents, is absolutely unacceptable.

The UN Convention therefore has a feasible opportunity to influence the way in which minors' rights are interpreted by Polish domestic courts, as was the case with the UK. Here, in *R. v. SSHD* [2002], a senior judge asserted that the Committee imposes enforceable obligations on national authorities to have regard to the principles included in the Convention (paras 67–68). Pursuant to the judgment, the Convention should be consulted by the domestic courts, 'in so far as it proclaims, reaffirms or elucidates the contents of human rights (...) in particular the nature and scope of [Convention] rights' under national regulations (para. 51). Compliance with international standards on detention conditions and legal safeguards, according to *General Comment No. 13* (CRC 2011), is a necessity to ensure the protection of minors' rights while detained. Thus, the underlying approach to such a programme should be 'care' and not 'detention' (para. 63), and the rights guaranteed in the Convention should be explicit in the national legislation of every Member State (para. 86).

### **Conclusions and recommendations**

The current crisis raises serious questions about the effectiveness of Europe's migration framework, its relative position towards its international obligations, and the gap between migration and security concerns of the States (Save the Children 2016). It also raises questions in terms of how different States are fulfilling their international obligations relating to child protection. It is clear from the above overview that, although the Directive provides for age-neutral Articles, these provisions are child-specific and that the importance of protecting the rights of children are further emphasised by the CJEU and the ECtHR in their jurisprudence. Human rights instruments play a critical normative role in establishing agreed benchmarks for the treatment of minors, providing for a child-centred approach.

The current crisis has brought to the spotlight the importance of a full and correct implementation of these standards at the national level. In the example of Poland, we can observe how the migration *acquis* and the States' attempts to retain their sovereignty bite each other in the tail. With the available legislative documents, the detention of migrants is not exclusively a populist political stance. However, the rise of extreme right-wing parties in Member States, including Poland, has certainly contributed to its expansion (Bloomfield 2016: 35). The correct implementation of the Return Directive and international obligations must be the crux of this argument. When it comes to minors, we expect the highest standards of care, the treating of their fundamental rights as a primary consideration in legislation and policy development, and delivery at all levels of governmental decisions (Home Office 2016: 67–69).

At present, Polish law is in my opinion accompanied by many legal doubts, which have been discussed above. It is difficult to challenge the detention mechanism set out by the Directive. However, European and international law provides a clear framework of fundamental rights that need to be taken into account when implementing the Directive. In particular, it is essential that national law defines clearly the conditions for detention and that the law is foreseeable in its application (App. No. 73947/01 *Zervudacki v. France*, para. 43). Therefore, the proper regulation of the detention of minors in Poland requires further improvement.



It is recommended that the legislator considers the amendment of the Act on foreigners to include the wording ‘minor’ in all detention provisions. This would ultimately define their status, in line with the UN Convention, as one which should be treated first and foremost as ‘children’. Such a correction is of particular importance in listing the grounds under which minors can be detained. Not differentiating their status makes the grounds so broad that they result in the arbitrary and widespread use of detention. In this regard, UNHCR (2012: 36) requires the use of appropriate age assessment methods that respect human rights standards, otherwise the result is the arbitrary detention of children. Further, the legislator should note that not differentiating the status between unaccompanied and accompanied minors is in breach of Article 2 UNCRC.

The legislator should introduce an obligation for the court which receives a request of placing a minor in detention to review it on a case-by-case basis. In that regard, the legislator should state the circumstances under which the minors could not be detained, to conform to Articles 20(2) and 40(3)(b) UNCRC. For example, in Austria, detention of all minors below 14 is prohibited and for minors aged 14–16 alternatives are provided (EC 2014: 20). In the UK, there is a specific mechanism ‘Rule 35’ which aims to ‘ensure that particularly vulnerable detainees are brought to the attention of those with direct responsibility for authorising, maintaining and reviewing detention’ (Home Office 2016: 30–33).

The legislator is in need of introducing an obligation to detain minors only in very exceptional cases, where alternatives are not considered appropriate. An obligation must be introduced that considers cases of all minors, taking into account whether such a solution would correspond properly to the welfare of the child. Examples include residence restrictions, open houses for families, case worker support, regular reporting, the surrender of ID / travel documents, bail and electronic monitoring (EC 2015: 79). This is not an exhaustive list and Member States remain free to select other types of schemes. The UN *Special Rapporteur on the Human Rights of Migrants* (Crépeau 2012, para. 53) called on States to improve their legislation on this point. Recent evidence suggests that the fundamental rights of persons placed in alternative arrangements are more efficiently protected. This can be seen through the example of Slovakia, where in 2013 the rate of absconding persons detained amounted to 1.5 per cent, while for persons in the alternative arrangements it was 0 per cent (EC 2014: 39). The UNHCR (2012: 23) advises that, in designing alternatives to detention, it is important to observe the principle of ‘minimum intervention’ and to pay close attention to the specific situation of minors (UNHCR 2012, Guideline 9).

According to the European Commission (EC 2015: 79) using alternative methods to detention often means higher return rates, generally improved cooperation with returnees in obtaining the necessary documentation, as well as financial benefits (less cost for the State) and reduced human cost (avoidance of hardship related to detention). Model practices can be observed in Bulgaria, where the issue of alternative methods is assessed by whether it allows for appropriate living conditions. Belgian legislation provides that families with minors are to be detained in alternative ‘family units’ (EC 2014: 20), and that families require special needs so as to reside in their own accommodation until they can return (EC 2014: 35). Cyprus goes a step further and advises families with minors to apply for Public Benefits Allowance so that the family is guaranteed to receive the minimum living standards while in alternative arrangements (EC 2014: 28).

At all times of detention consideration, the court must be guided by the legislation to pay attention to the vulnerability issue (UNHCR 2012, Guideline 4): whether a minor is present (Austria), health status (Denmark), and special needs (UK). The Commission recommended in its *Return Handbook* (Directorate-General of Migration and Home Affairs of the European Commission 2015: 13) that Member States should pay attention to the needs of vulnerable persons at all stages of the return procedure: ‘even if a Member State decides to detain a minor during the initial stage of the return procedure, the particular vulnerability of the person concerned may impede a continued detention at the time of the judicial review of the measure’. Consequently, vulnerability has to be duly considered at every stage of the decision-making process (Pétin 2016: 102). For instance,

in Finland social workers are present during the initial assessment, and in Greece vulnerability is assessed through interviewing a minor (EC 2014: 22–24). Lithuania, on the other hand, introduced an obligation for the judicial authority to approve the detention decision in each case. In all three countries listed as an example, vulnerability is a major factor that guides the judge in imposing an alternative (Pétin 2016: 102), as in the administrative case A-540-617/2013 where the Švenčionys district court (Lithuania) ruled on 18 April 2013 that the detention of the applicant with his four minor children and his pregnant wife was not reasonable.

To correspond fully to the Article 17(1) Directive and Article 37(b) UNCRC, the legislator should follow the Inter-American Court of Human Rights (ICHR). When the ICHR was consulted on the interpretation of the ‘last resort’ principle, it stated in its Advisory Opinion (ICHR 2014: 7) that states may not resort to the deprivation of the liberty of minors as a precautionary measure to protect the objectives of immigration proceedings. The Court indicated that states may not detain minors on the basis that they do not comply with entry and residence requirements, are unaccompanied, or to ensure family unity. Instead, the Court urged states to adopt less harmful alternatives which would more effectively protect the rights of the child integrally and as a priority (PICUM 2014: 3).

The legislator should stress the importance for procedures to be brought before the court without delay and on the following day at the latest. In Finland, all cases of detention that continue for more than four days are automatically brought up to the district court to be assessed with regard to the lawfulness of detention. Procedures in Norway allow individuals to challenge the lawfulness of their detention through judicial review. In Bulgaria, the competent authorities are obliged to conduct a monthly assessment for persons detained, with the purpose of ascertaining the existence of grounds for the placement in detention (EC 2014: 25–26).

The legislator should introduce a clause that all minors, irrespective of whether accompanied or unaccompanied, should be detained only for the shortest appropriate period of time (Article 17(1) Directive and Article 37(b) UNCRC) and prevent the courts from detaining them for an unlimited period. Simultaneously, the legislator must include that, in cases where it appears that a reasonable prospect of removal no longer exists, minors should be released immediately and not be subject to re-detention (which is prohibited in absolute terms in Portugal) (EC 2014: 28) (Article 15(4) Directive, Articles 3 and 5 ECHR). In Luxembourg, migrants found to be illegally present are never, according to the legislation, detained without a return decision (EC 2014: 19). A particular provision worth imitating is the law in the Czech Republic, where the police are obliged to request a binding opinion from the Ministry before any migrant is placed in detention. Such procedures are carried out to evaluate whether it is possible to issue or execute a return decision. If the Ministry decrees that it is not, detention will not proceed (EC 2014: 27).

The legislator should consider an amendment, to include a clause on child welfare, with particular reference to the legal position of ‘minors’. In that regard, the legislator needs to introduce a clause with legal guarantees and protection to preserve a degree of proper care offered to minors before and whilst detained (Article 14(1)(d) Directive, Article 23 UNCRC). In particular, the European Commission (EC 2015: 102–104) directs the Member States that, as soon as possible after the presence of a child becomes known to the authorities, a professionally qualified person be appointed to conduct an assessment of the child’s particular vulnerabilities, including from the standpoints of age, health, psychological factors and other protection needs, such as those deriving from violence, trafficking or trauma. Review mechanisms should also be introduced to monitor the ongoing quality of guardianship. Additionally, steps should be taken to ensure a regular presence of, and individual contact with, a social worker and a psychologist. The Committee for the Prevention of Torture also refers to the importance of regular visits for minors by an independent body, such as a visiting committee, a judge, the children’s ombudsman or the National Preventive Mechanism – established under the Optional Protocol to the UN Convention against Torture. Such bodies should have the authority to receive and/or take action on minors’ complaints and/or to inspect and assess whether the institutions are operating in accordance

with the requirements of national law and relevant international standards. The court should be obliged to take into account individual stories to safeguard the special needs of those most vulnerable. After suffering physical abuse, they are in need of health services and psychological consultations. In addition to sports activities, minors should also be provided with children's supplies such as toys and books (Estonia) (EC 2014: 33), which are essential to a child's mental development and alleviate stress and trauma (UNHCR 2012: 36, Guideline 8).

Finally, the legislator should emphasise that any decision about the minor's future should be made with regard to 'the best interests of the child' as prioritised in Articles 17(5) Directive, Article 3(1) UNCRC and Article 24(2) Charter. Judge Chlebny (2013: 2), in the speech delivered in Strasbourg on the standards of the provisional protection against expulsion, stressed that 'one must always remember that according to the principle of subsidiarity it is always the duty of a national judge to make sure that the level of protection in the national court is not lower than that set by international human rights instruments'. This obligation underlines the responsibility of Poland to add substance to its provisions in a manner that honours this principle. Even though the Directive aims at harmonising return procedures across the legal systems within Member States, it leaves unaffected the right of each State 'to adopt or maintain provisions that are more favourable to persons to whom it applies provided that such provisions are compatible with this Directive'. (Article 4(3) Return Directive). EU and international law measures represent a floor of entitlement which Member States have the discretion to build upon with more favourable entitlement for minors (Stalford 2012: 80–81). Notably, 'more favourable' must always be interpreted as 'more favourable for the returnee' and not more favourable for the expelling/removing State (EC 2014: 16–17).

Poland must bear in mind that its obligation to return an irregular migrant is subject to the principle of proportionality (Recital 24, Return Directive). The legitimate aim of fighting irregular migration may be balanced against other legitimate state interests, such as the interest of the state to fight crime, or respect for the best interests of the child. However, in any case, deprivation of liberty must be carried out in good faith and must be strictly related to the purpose of the return. The conditions of detention should be appropriate, bearing in mind that 'the measure is applicable not to those who have committed criminal offences but to foreigners who, often fearing for their lives, have fled from their own country' (App. No. 13229/03 *Saadi v. the UK*, para. 74), App. No. 19776/92 *Amuur v. France*, para. 43). Member States' practices which respect fundamental rights will not be considered by the European Commission (EC 2015: 22) as an infringement of the obligation to issue return decisions to any irregularly staying third-country national. Good examples have been discussed in this section and are in place to ensure and foster peer-to-peer learning.

Until the changes are introduced, firstly, at least in the case of the detention of minors, the domestic court should recognise a conflict between the EU and its national law, and consequently EU law should take effect, as would be required by the doctrine of supremacy (C-6/64 *Costa v. ENEL*). The Polish courts must not 'without strong reasons dilute or weaken the effect of the Strasbourg case law' (*R. v. Special Adjudicator* (2004), para. 20). Also, in line with the *Return Handbook* (Directorate-General of Migration and Home Affairs of the European Commission 2015: 17), if a Member State opts not to apply the Directive, it must nevertheless ensure, in accordance with Article 4(4) Return Directive, that the level of protection for individuals is not less favourable than that set out in the Articles of the Directive. This principle applies to: cases where there is a postponement of removal, the detention conditions in which individuals are held, cases where there are limitations on the use of coercive measures, and vulnerable persons' needs. Secondly, the provisory regulation should be added in accordance with the Return Directive and human rights standards. In this way, the Act on foreigners could at least partially fulfil the obligations on the detention of minors as a 'last resort' measure.

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