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The common European asylum system and the rights of the child: an exploration of meaning and compliance

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7 | The right of the child to liberty

7.1 INTRODUCTION

This chapter explores the compliance of the CEAS with the right of the child to liberty. Unfortunately, a great many children seeking international protection in the EU – both accompanied and unaccompanied – are detained.¹ Sometimes the detention is said to be justified on the grounds that it is protective detention.² But generally, detention of children is regarded as being inimical to the protection and care of children. For this reason, the CRC has developed stringent standards for the detention of minors to ensure that they are protected *from* detention and, if detained, that they are protected *in* detention. This short chapter follows the structure of previous chapters, albeit in simplified form, since just one right is involved. Thus, section 7.2 sets out the right of the child to liberty in its various dimensions; section 7.3 scrutinizes whether the relevant Phase One instruments are compliant with the right of the child to liberty; finally, section 7.4 assesses the prospects for enhanced compliance in Phase Two. The relevant CEAS instruments are the RCD and the APD.

7.2 THE RIGHT OF THE CHILD TO LIBERTY

The administrative detention of asylum seekers is situated at the juncture of international human rights and international refugee law. On the one hand,

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- 1 In its evaluation of the RCD, the Commission found that ‘most of [the Member States] authorize the detention of minors and many of them even authorize the detention of unaccompanied minors.’ ‘Report from the Commission to the Council and to the European Parliament on the application of Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers, COM (2007) 745 final’, § 3.5.2, p. 9. Hereinafter, ‘Commission evaluation of RCD’.
 - 2 For example, in the Explanatory Memorandum to the proposed recast RCD it is stated that ‘[d]iscussions in the Council revealed that in certain circumstances it is in the best interests of unaccompanied minors to be kept in detention facilities, in particular to prevent abductions which reportedly do occur in open centers.’ Amended proposal for a Directive of the European Parliament and of the Council laying down standards for the reception of asylum seekers (recast), COM (2011) 320 final, § 3.1.2, p. 6.

refugee law establishes a presumption against the detention of asylum seekers,³ while on the other, human rights law, while not prohibiting such detention outright, subjects it to a series of criteria and safeguards in view of the importance of liberty. Thus, at the international level, Articles 9 and 10 ICCPR relate respectively to safeguards against arbitrary or unlawful detention and minimum standards regarding conditions of detention.⁴ At the regional level, Article 5 ECHR, while it permits in paragraph 1(f) administrative detention to prevent unauthorized entry and to effect deportation, requires that such detention must be lawful and amenable to judicial review.⁵ In cases where the conditions of detention are very poor, Article 3 ECHR may also be engaged.⁶ Finally, Article 6 of the EU Charter of Fundamental Rights establishes a right to liberty and security.⁷

The detention of minor asylum seekers is more problematic than that of adults because the impact of detention on a child's rights are more profound – the right of the child to development, family unity and education being cases in point – and the child is more susceptible to abuse, victimization and violation of his/her protection rights while in detention than adults generally. For

3 See Article 31 1951 Convention relating to the Status of Refugees, UNHCR Excom. Conclusion No. 44 (XXXVII) 1986, *Detention of Refugees and Asylum Seekers*, and UNHCR, *Guidelines on Applicable Standards and Criteria relating to the Detention of Asylum Seekers* (1999).

4 Art 9 ICCPR provides, *inter alia*: '1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law. 2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him. [...] 4. Anyone who is deprived of liberty by arrest or detention shall be entitled to take proceedings before a court, in order that the court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.' Article 10(1) ICCPR provides: 'All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.'

5 Article 5 ECHR provides in relevant part: '1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure proscribed by law: [...] (f) the lawful arrest or detention of a person to prevent his effecting the unauthorized entry into the country or of a person against whom action is being taken with a view to deportation or extradition. 2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him. [...] 4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful. [...].'

66 See ECtHR, *Mayeka Mitunga v Belgium*, Appl. No. 13178/03, Judgment of 12 October 2006; ECtHR, *Muskhadzhiyeva v Belgium*, Appl. No. 41442/07, Judgment of 19 January 2010; ECtHR, *Rahimi v Greece*, Appl. No. 8687/08, Judgment of 5 April 2011; ECtHR, *Kanagaratnam and Others v Belgium*, Appl. No. 15297/09, Judgment of 13 December 2011; and ECtHR, *Popov v France*, Appl. No. 39472/07 and 39474/07, Judgment of 19 January 2012. These cases are all discussed at § 5.2.2 *infra*.

7 Article 6 reads: 'Everyone has the right to liberty and security of person.'

this reason, a number of specific criteria and guarantees apply to the detention of minors under Article 37(b)-(d) CRC, which provides:

(b) No child shall be deprived of his/her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law, used only as a measure of last resort and for the shortest appropriate period of time.

(c) Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person and in a manner which takes into account the needs of persons of his/her age. In particular, every child deprived of liberty shall be separated from adults, unless it is considered in the child's best interests not to do so and shall have the right to maintain contact with his/her family through correspondence and visits, save in exceptional circumstances.

(d) Every child deprived of his/her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his/her liberty before a court or other competent independent and impartial authority and to a prompt decision on any such action.

In short, Article 37(b) relates to permissible detention, Article 37(c) to conditions of detention and Article 37(d) to procedural protection. The subsequent analysis proceeds under these headings.

7.2.1 Permissible detention

Let us consider first Article 37(b), which deals with the situations in which a child may legitimately be deprived of his or her liberty. The first sentence encapsulates the dual requirements of lawfulness and non-arbitrariness that are common to most prohibitions of deprivation of liberty in international human rights law.

The requirement of lawfulness is the most straightforward, pertaining to the need for detention to be prescribed by law, in the sense of having a legal basis that is accessible, precise and foreseeable. The case-law of the ECtHR on the question of lawfulness is instructive. In *Amuur v France*, the Court rejected the contention that a number of disparate administrative decrees and circulars provided a legal basis for the detention of a group of Somali asylum seekers in the international transit zone of the airport for 20 days.⁸ Among the problems with the various documents was that they failed to contain any due process guarantees, permit judicial review, place time-limits on detention or make provision for legal, humanitarian or social assistance. In *Abdolkhani and Karimnia v Turkey*, the Court held that a law that required non-nationals without valid travel documents to reside at designated places did not provide

8 ECtHR, *Amuur v France*, Appl. No. 19776/92, Judgment of 25 June 1996.

a sufficiently clear legal basis for the detention of non-nationals pending deportation.⁹ The Court noted that:

These provisions do not refer to a deprivation of liberty in the context of deportation proceedings. They concern the residence of certain groups of foreigners in Turkey, but not their detention. Nor do they provide any details as to the conditions for ordering and extending detention with a view to deportation, or set time-limits for such detention. The Court therefore finds that the applicants' detention [...] did not have a sufficient legal basis.¹⁰

Hence, in order to be lawful, the administrative detention must be explicitly provided for by law, as must the permitted length of detention and the rights of detainees associated with judicial review.

The requirement of arbitrariness is more complicated, and in this regard two different approaches to the question of arbitrariness can be discerned in international human rights law. On the one hand, there is the approach of the Human Rights Committee under Article 9 ICCPR. In considering whether a detention is arbitrary, the Committee will inquire into whether the individual detention is justified, in the sense of being reasonable, necessary and proportionate in the circumstances of the particular case.¹¹ Detention will be considered to be arbitrary if an alternative to detention could have been used in the case.¹² Consequently, mandatory immigration detention will always be found to be arbitrary as it does not allow for an individualized assessment of arbitrariness. As regards the detention of minors, the Committee will consider the best interests of the child in its individualized assessment of arbitrariness.¹³ In this regard, the Committee is facilitated by Article 24(1) ICCPR which provides that 'Every child shall have, without any discrimination

9 ECtHR, *Abdolkhani and Karimnia v Turkey*, Appl. No. 30471/08, Judgment of 22 September 2009.

10 *Ibid* at para. 133.

11 Human Rights Committee, *A v Australia*, Communication No. 560/1993, U.N. Doc CCPR/C/59/D/560/1993 (1997), Views of 3 April 1997. The Committee stated that 'remand in custody could be considered arbitrary if it is not necessary in all the circumstances of the case, for example to prevent flight or interference with evidence: the element of proportionality becomes relevant in this context.' At para. 9.2.

12 Human Rights Committee, *C v Australia*, Communication No 900/1999, U.N. Doc CCPR/C/76/D/900/1999, Views of 28 October 2002. The Committee held that 'the State party has not demonstrated that, in the light of the author's particular circumstances, there were not less invasive means of achieving the same ends, that is to say, compliance with State Party's immigration policies, by, for example, the imposition of reporting obligation, sureties or other conditions [...]'. At para. 8.2. According to UNHCR, alternatives to detention include monitoring requirements, provision of a guarantor/surety, release on bail and the use of open centers. UNHCR, *supra* n. 3, Guideline 4.

13 See Human Rights Committee, *Bahktiyari v Australia*, CCPR, Communication No. 1069/2002, Views of 6 November 2003, para. 9.6 and Human Rights Committee, *Samba Jollah v The Netherlands*, CCPR, Communication No. 794/1998, Views of 15 April 2002.

[...] the right to such measures of protection as are required by his status as a minor ...', a provision the Committee has interpreted as encompassing the best interests principle.¹⁴

By contrast, Article 5 ECHR does not contain any express prohibition of arbitrariness, but rather contains an exhaustive list of permissible grounds of detention, including ground (f) – the lawful arrest or detention of a person to prevent his effecting an unauthorized entry into the country or of a person against whom action is being taken with a view to deportation or extradition. If the detention does not fall under one of the permissible grounds, it is *prima facie* considered to be arbitrary. Conversely, if the detention does fall under one of the permissible grounds, it will be presumed not to be arbitrary. Although the Court has 'read down' a proportionality requirement in respect of some of the grounds of detention foreseen by Article 5(1), it has traditionally declined to do so in respect of Article 5(1)(f).¹⁵ Thus, states are not required to show that the detention was necessary, reasonable or proportionate in the individual circumstances of the case.¹⁶ Detention must be reasonably justified *in general terms*, detention with a view to deportation must proceed with 'due diligence'¹⁷ and detention to prevent unauthorized entry must be closely connected to the purpose of preventing unauthorized entry and should not be unreasonably prolonged.¹⁸ But no individualized assessment is required. When followed to its logical conclusion, this approach does not permit a best interests assessment to be factored into the question of the permissibility of detaining a child *per se*, although it may feature, as we shall see, in the assessment of the conditions of detention – but this is a separate issue.

The question is, which approach to the question of arbitrariness is taken in Article 37(b) CRC? Here the second sentence of Article 37(b) is instructive. The fact that detention can be used only as a measure of last resort and for the shortest appropriate period of time clearly indicates that an individual assessment of arbitrariness is required, *per* the ICCPR and *pace* the ECHR. Put differently, it would be impossible to show that detention was a measure of last resort if alternatives to detention for the particular individual had not be

14 *Ibid* (*Bakhtiyari v Australia*).

15 In a number of recent cases, the Court did, expressly or impliedly 'read down' a proportionality test into Article 5(1)(f). See ECtHR, *Jusic v Switzerland*, Appl. No. 4691/06, Judgment of 2 December 2010, paras. 71-73 and ECtHR, *Raza v Bulgaria*, Appl. No. 31465/08, Judgment of 11 February 2010, para. 74. However, subsequent cases reaffirmed the Court's traditional stance that Article 5(1)(f) does not demand that detention be reasonably considered necessary. See, for example, ECtHR, *M and others v Bulgaria*, Appl. No. 41416/08, Judgment of 26 July 2011, para. 61 and ECtHR, *Rahimi v Greece*, Appl. No. 8687/08, Judgment of 5 April 2011, para. 107. Consequently, it is premature to infer a general change of attitude by the Court to Article 5(1)(f).

16 ECtHR, *Chahal v The United Kingdom*, Appl. No. 22414/93, Judgment (GC) of 15 November 1996.

17 ECtHR, *Conka v Belgium*, Appl. No. 51564/99, Judgment of 5 February 2002.

18 ECtHR, *Saadi v UK*, Appl. No. 13229/03, Judgment (GC) of 29 January 2008.

explored; and it would be impossible to show that detention was for the shortest appropriate period of time, if appropriateness was not assessed in relation to the individual. Consequently, Article 37(b) implicitly prohibits the mandatory detention of children and requires an individualized assessment of the need for detention in each case. Since the best interests of the child is a general principle of relevance to the interpretation and application of all the rights in the Convention, including Article 37(b), the individualized assessment must encompass a best interests assessment.

When applied to the asylum context, Article 37(b) establishes a strong presumption against the administrative detention of asylum seeking children. Accordingly, UNHCR considers that minors should not, as a general rule, be detained. In the case of accompanied minors, '[c]hildren and their primary caregivers should not be detained unless this is the only means of maintaining family unity',¹⁹ and in the case of unaccompanied minors '[w]here possible they should be released into the care of family members who already have residency within the asylum country. Where this is not possible, alternative care arrangements should be made by the competent child care authorities for unaccompanied minors to receive adequate accommodation and appropriate supervision.'²⁰

Similarly, the Committee RC has stipulated that:

[U]naccompanied 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.' [Where detention is exceptionally justified under Article 37(b)] all efforts, including acceleration of relevant processes, should be made to allow for the immediate release of unaccompanied or separated children from detention and their placement in other forms of appropriate accommodation.²¹

The combined influence of Article 37(b) and 3 CRC has begun to make itself felt in the approach of the ECtHR to Article 5(1)(f) ECHR. In the recent ground-

19 UNHCR, *supra* n. 3, p. 10.

20 *Ibid.*

21 Committee RC, General Comment No. 6, 'Treatment of unaccompanied and separated children outside their country of origin', U.N. Doc. CRC/GC/2005/6 (2005), p. 18. The immigration detention of minors has been a consistent theme of the Committee RC in its concluding observations to States Parties which are EU Member States. See Committee RC, Concluding Observations to Greece in 2002, UN Doc. CRC/C/15/Add.170, paras. 68 & 69; to The United Kingdom in 2002, U.N. Doc. CRC/C/15/Add.188, para. 50; to the Czech Republic in 2003, U.N. Doc. CRC/C/15/Add.201, para. 56; to Italy in 2003, U.N. Doc. CRC/C/15/Add.198, para. 45; to Romania in 2003, U.N. Doc. CRC/C/15/Add.199, para. 55; to The Netherlands in 2004, U.N. Doc. CRC/C/15/Add.227, para. 54; to Latvia in 2006, U.N. Doc. CRC/C/LVA/CO/2, para. 53; to Lithuania in 2006, U.N. Doc. CRC/C/LTU/CO/2, § 8; to The United Kingdom in 2008, U.N. Doc. CRC/C/GBR/CO/4, para. 71; to Spain in 2010, U.N. Doc. CRC/C/ESP/CO/3-4, para. 59; and to Belgium in 2010, U.N. Doc. CRC/C/BEL/CO/3-4, paras. 76 & 77.

breaking case of *Rahimi v Greece*, which involved the detention prior to expulsion of a 15 year old unaccompanied Afghan boy, the Court reiterated its established position that detention does not have to be reasonably considered necessary in the circumstances of the case, but then went on to reprimand the Greek authorities for automatically applying the law on detention to the boy without taking into consideration his particular situation as an unaccompanied minor.²² The Court noted the requirements of Article 3 and 37 CRC and the fact that the best interests principle is reiterated in the RCD, which the impugned domestic law transposed. The Court further noted that it had already recognized in its Article 8 jurisprudence that there is a wide consensus that in all decisions concerning children the best interests of the child must be a primary consideration. Consequently, it held:

Or, en l'occurrence, en ordonnant la mise en détention du requérant les autorités nationales ne se sont aucunement penchées sur la question de son intérêt supérieur en tant que mineur. De plus, elles n'ont pas recherché si le placement du requérant dans le centre de rétention [...] était une mesure de dernier ressort et si elles pouvaient lui substituer une autre mesure moins radicale afin de garantir son expulsion. Ces éléments suscitent des doutes aux yeux de la Cour, quant à la bonne foi des autorités lors de la mise en oeuvre de la mesure de détention.²³

In finding a violation of Article 5(1)(f), the Court effectively established an exception for unaccompanied minors to its established position that no proportionality test is required by sub-paragraph (f).²⁴ In the subsequent case of *Popov v France*, the Court extended the exception for unaccompanied minors to minors who are accompanied by their parents.²⁵ These developments bring

22 ECtHR, *Rahimi v Greece*, Appl. No. 8687/08, Judgment of 5 April 2011.

23 *Ibid*, para. 109.

24 This new position of the Court was already signalled in *Mayeka Mitunga*, a case which involved the detention of a 5 year old unaccompanied minor. The Court stated that 'in the absence of any risk of the second applicant's seeking to evade the supervision of the Belgian authorities, her detention in a closed centre for adults was unnecessary. Other measures could have been taken that would have been more conducive to the higher interest of the child guaranteed by Article 3 of the Convention on the Rights of the Child. These included her placement in a specialized center or with foster parents.' Appl. No. 13178/03, Judgment of 12 October 2006 at para. 83. It is too early to say whether the new approach to the detention of minors presages a general re-think by the Court of its refusal to 'read down' a proportionality test in Article 5(1)(f), but there are some tentative indications of a change of attitude. For example, in *Raza v Bulgaria*, a case involving an adult, the Court noted that following the applicant's release from detention, he was required to report to his local police station at regular intervals, a fact that 'shows that the authorities had at their disposal measures other than the applicant's protracted detention to secure the enforcement of the order for his expulsion'. Appl. No. 31465/08, Judgment of 11 February 2010, para. 74.

25 ECtHR, *Popov v France*, Appl. Nos. 39472/07 and 39474/07, Judgment of 19 January 2012. See in particular paras. 119 and 120.

the approach of the ECtHR on the permissibility of detaining minors into line with the approach of the CRC.

In sum, the international legal position is now that mandatory immigration detention of children is not permitted. Detention of minors can only follow an individualized assessment, including a best interests assessment, and must comply with the principle of last resort. Hence liberty is the rule, with detention as the (exceptional) exception.

7.2.2 Conditions of detention

International human rights law establishes strict requirements regarding conditions of detention, which have been expanded on in various soft-law documents.²⁶ Thus, explicit criteria relating to conditions of detention are established in Article 10 ICCPR,²⁷ and while no equivalent criteria are specified in Article 5 ECHR, the ECtHR deals with the issue as part of the requirement of lawfulness in Article 5(1)(f).²⁸ Very poor conditions of detention may also constitute inhuman or degrading treatment contrary to Article 3 ECHR.²⁹ These basic criteria establish that persons deprived of their liberty should be treated with humanity and with respect for their dignity. This is also the point of departure of Article 37(c) CRC, but with the additional requirements that treatment in detention must a) take into account the needs of persons of his/her age; b) that every child deprived of liberty must be separated from adults unless this is contrary to the child's best interests; and c) that the child has the right to maintain contact with his/her family through correspondence and visits 'save in exceptional circumstances'.

Taking first the requirement that every child deprived of liberty must be treated in accordance with the needs of persons of his/her age, Helmut Sax, in his commentary on Article 37 CRC considers that this 'conveys the message

26 See, for example, 'UN Standard Minimum Rules on the Treatment of Prisoners', adopted in 1955, approved by the Economic and Social Council by its resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977; 'Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment', GA Res. 43/173, 9 December 1988; 'United Nations Rules for the Protection of Juveniles Deprived of their Liberty', GA Res. 45/113 of 14 December 1990.

27 Article 10 ICCPR comprises three paragraphs of which only the first relates to detention generally, as opposed to detention in the criminal justice context. Article 10(1) provides: 'All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.'

28 For example, the Court stated in *Mayeka Mitunga v Belgium* that 'the fact that the second applicant's detention came within paragraph (f) of Article 5§1 does not necessarily mean that it was lawful within the meaning of this provision, as the Court's case-law requires that there must be some relationship between the ground of permitted deprivation of liberty relied on and the place and conditions of detention.' Appl. No. 13178/03, Judgment of 12 October 2006 at para 102.

29 *Ibid.*

that children should not be regarded as one homogenous group but instead that the conditions and the treatment of the young persons have to be constantly monitored and flexibly adapted due to their personal developments.³⁰ Thus, for example, conditions of detention that are adequate for older teenagers, may not be suitable for younger children. Moreover, age cannot be the only determining criterion in this regard, since the general principle of the best interests of the child must a primary consideration. The individualized assessment of best interests allows factors such as degree of maturity, stage of development and personal circumstances to be taken into account in determining whether the conditions of detention are appropriate. It follows that, at a minimum, the conditions of detention of young children cannot be the same as conditions of detention of adults.

A trilogy of recent ECHR cases involving Belgium speak clearly to this last requirement. In *Mayeka Mitunga v Belgium*, the Court held that the detention of a 5 year old unaccompanied minor for nearly two months in a closed centre for adults constituted inhuman or degrading treatment contrary to Article 3 ECHR and a violation of the requirement under Article 5(1)(f) that the detention be lawful.³¹ In arriving at its decision the Court took note of the applicant's extreme vulnerability and in particular of the fact that she was detained in a centre that had initially been designed for adults, that no one was assigned to look after her even though she was unaccompanied by her parents, and that no measures were taken to ensure that she received proper counselling and educational assistance from qualified personnel specially mandated for that purpose.

The Court applied the same reasoning and reached the same conclusions in *Muskhadzhiyeva v Belgium*, a case concerning the detention for one month of four children all under the age of six, at least two of whom were shown to be suffering from post-traumatic stress disorder, in the same detention centre as in the *Mitunga* case but accompanied by their mother.³² The Court declined to attach any significance to the fact that they were accompanied holding, 'cet élément ne suffit pas à exempter les autorités de leur obligation de protéger les enfants et d'adopter des mesures adéquates au titre des obligations positives découlant [de la Convention].'³³

The Court confirmed its decision in *Miskhadzhiyeva* and extended its scope in *Kanagaratnam and Others v Belgium*, where three children were detained with their mother in the same detention centre as in the previous two cases.³⁴ The

30 William Schabas and Helmut Sax, *A Commentary on the United Nations Convention on the Rights of the Child, Article 37, Prohibition of Torture, Death Penalty, Life Imprisonment and Deprivation of Liberty* (Leiden/Boston: Martinus Nijhoff Publishers, 2006), 89.

31 ECtHR, *Mayeka Mitunga v Belgium*, Appl. No. 13178/03, Judgment of 12 October 2006.

32 ECtHR, *Muskhadzhiyeva v Belgium*, Appl. No. 41442/07, Judgment of 19 January 2010.

33 *Ibid*, para. 58.

34 ECtHR, *Kanagaratnam and Others v Belgium*, Appl. No. 15297/09, Judgment of 13 December 2011.

Court was not persuaded by the government's argument that the children were older than in *Miskhadzhiyeva* and that no evidence has been submitted regarding their psychological state. In view of the principle of the best interests of the child in Article 3 CRC, the Court held that the state should have operated on the assumption that the children were vulnerable *qua* children and because of their personal history as asylum seekers. The Court also noted the comparatively long period of detention – four months. By contrast, in *Rahimi*, the Court held that the detention of a 15 year old unaccompanied minor in an overcrowded detention centre for adults, with 'deplorable' hygiene standards, no contact with the outside world and no possibility of fresh air or leisure, even though it was only for two days, constituted a violation of Article 5(1)(f) and Article 3 ECHR.³⁵

Another way of stating the requirement in Article 37(c) that every child deprived of liberty must be treated in accordance with the *needs* of persons of his/her age, is that every child detainee must be treated in accordance with his/her *rights* as established in the CRC, since a reliable indication of the needs of the child are his/her rights. Thus, notwithstanding detention, the child is entitled to all the Convention rights with the exception of those few which are incompatible with detention itself, such as the right to liberty, freedom of movement or freedom of association and assembly. Indeed, the majority of rights in the CRC apply regardless of whether the child is in detention or at liberty. Consider, for example, the right of the child deprived of his/her family environment to special protection and assistance including alternative care, the right of the child seeking or enjoying refugee status to *appropriate* protection and humanitarian assistance, the right of the child to family unity, the right of the child to education, the right of the child to health-care, the right of the child to rest, leisure, play and recreation and the right of the child who has been victim of any sort of violence or abuse to recovery and reintegration. Such rights are not placed in abeyance because the child is in detention.

Indeed, many of the 'protection' rights in the Convention are of particularly urgent application in the context of detention, for example, the right of the child in Article 19 CRC to protection from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse. Various soft law instruments establish how, precisely, these rights should be given effect to in detention.³⁶ But the most important point to establish here is that detained children are entitled to these rights on an equal basis to non-detained children. Any denial of these rights to a child who is in detention is likely to offend against the non-discrim-

35 ECtHR, *Rahimi v Greece*, Appl. No. 8687/08, Judgment of 5 April 2011. See further, ECtHR, *Popov v France*, Appl. No. 39472/07 and 39474/07, Judgment of 19 January 2012.

36 The most comprehensive soft law instrument in this regard is the 1990 'UN Rules for the Protection of Juveniles Deprived of their Liberty', GA Res. 45/113 (14 December 1990).

ination provision in Article 2(1) CRC, a general principle of the Convention which provides, 'States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's [...] status.' The status of relevance here is the child's detention status.

Next, there is the requirement that every child deprived of liberty be separated from adults, 'unless it is considered in the child's best interests not to do so'. Sax, referring to the 1957 UN Standard Minimum Rules for the Treatment of Prisoners, notes that the norm that children should be kept separately from adults ranks among the oldest of UN standards in the field of criminal justice.³⁷ Indeed, two similar provisions relating to accused and convicted juvenile offenders are contained in Article 10(2) and (3) ICCPR respectively.³⁸ The purpose in the criminal justice context is two-fold: to prevent criminal contagion and to protect the minor from exploitation and abuse by adults. While the latter consideration applies equally to immigration detention, the former is an additional argument for not detaining asylum-seeking children in prison accommodation. Notably, the only exception to the rule requiring segregation of children and adults in detention is where such segregation is not in the best interests of the child. Accordingly, any failure to separate child detainees from adults due to other considerations, such as a lack of space or resources, will offend against Article 37(c). Moreover, any decision contemplating detaining a child with adults must be based on an individualized assessment of best interests, which requires that due weight be given to the views of the child in accordance with the child's age and maturity.

A related point, but one which does not receive specific mention in the context of Article 37, is the question of detention of accompanied children and their right not to be separated from their parents against their will, as established in Article 9(1) CRC.³⁹ As was discussed in Chapter 5, Article 9(1) establishes the best interests principle as the paramount – indeed, the only – consideration. Moreover, in determining the best interests of the child, only considerations personal to the child and his or her relationship with the parents are determinative. Consequently, children who are accompanied by their

37 William Schabas and Helmut Sax, *supra* n. 30.

38 Article 10(2)(b) ICCPR reads: 'Accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication.' Article 10(3) ICCPR provides, *inter alia*, 'Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status.'

39 Article 9(1) CRC reads: 'States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence.'

parents and who are placed in detention, must be detained together with their parents, unless it is contrary to their best interests. However, this is not to suggest that detention of children for the purposes of family unity with their parents dispenses with the need for a rigorous assessment of the justification of the detention of the minor under Article 37(b). In fact, if the detention of the child cannot be justified under Article 37(b), then Article 9(1) poses a compelling argument for the release of the whole family.⁴⁰

This contention is supported by a recent judgment of the ECtHR. In *Popov v France*, a six month old baby and three year old infant were detained with their parents in the 'family zone' of a detention centre for 15 days prior to expulsion.⁴¹ The family zone amounted to a wing reserved for families and single women which nevertheless had barred and barbed-wire windows, no facilities for leisure or education, no children's furniture and few toys, and no access to the open-air. Furthermore, announcements were made over a tannoy, the general atmosphere was described as anguished and stressed, and the behaviour of the inmates was characterized by promiscuity and tension. Unsurprisingly, the court found that the conditions of detention were contrary to Article 3 and 5(1)(f) ECHR in the case of the children. However, in an unprecedented move, the Court went on to find a violation of Article 8 ECHR in the case of the whole family, holding that 'elle est d'avis que l'intérêt supérieur de l'enfant ne peut se limiter à maintenir l'unité familiale mais que les autorités doivent mettre en oeuvre tous les moyens nécessaires afin de limiter autant que faire se peut la détention de familles accompagnées d'enfants et préserver effectivement le droit à une vie familiale.'⁴² In particular, the state failed to thoroughly explore whether alternatives to detention for the family, who were not a flight risk, were possible.

As to the final provision of Article 37(c), namely, the right of the child to maintain contact with his/her family through correspondence and visits, save in exceptional circumstances, the Committee RC has elaborated on this obliga-

40 Thus, in its Concluding Observations to Belgium in 2010, the Committee RC expressed 'concern that in spite of a decision by the Minister of Migration Policy and Asylum that families with children would no longer be detained in closed centers as of 1 October 2008, some children and their parents are still being detained in precarious conditions in facilities unsuitable for children.' The Committee RC urged 'the State party to put an end to the detention of children in closed centers [and] to create alternatives to detention for asylum seeking families'. U.N. Doc. CRC/C/BEL/CO/3-4, paras. 76 & 77.

41 ECtHR, *Popov v France*, Appl. No. 39472/07 and 39474/07, Judgment of 19 January 2012.

42 *Ibid.*, para. 147. *Popov* signals a development on *Muskhadzhiyeva*, previously discussed, in which the Court found no violation of Article 8 ECHR on the basis that the mother and the children had been detained together. However, the Court did find a violation of Article 3 and 5(1)(f) in respect of the conditions in which the children were detained. Therefore, *Muskhadzhiyeva* already hints that release of the entire family is the only way to avoid both a violation of Article 8 and Articles 3 and 5(1)(f) ECHR. For commentary, see (2010) 'Case Comment, *Muskhadzhiyeva v Belgium* (Application No. 41442/07): detention of asylum seekers – accompanied minors', *European Human Rights Law Review*, 3, 338-342.

tion in the context of unaccompanied minors, providing that detention 'facilities should not be located in isolated areas where culturally appropriate community resources and access to legal aid are unavailable. Children should have the opportunity to make regular contact and receive visits from friends, relatives, religious, social and legal counsel and their guardian.'⁴³

To sum up, Article 37(b) CRC relating to conditions of detention requires that the child detainee must be treated in accordance with the needs and rights of persons of his/her age, must be separated from adults unless this is contrary to the child's best interests, must be kept together with his/her family if the family is detained and must be allowed to communicate with relatives if the child is separated or unaccompanied.

7.2.3 Procedural protection

Article 37(d) establishes the right of the child who is detained to prompt access to legal and other appropriate assistance and the right to challenge the legality of the detention and to a prompt decision on any such action. The right to mount a legal challenge of detention is also established under Article 9(4) ICCPR⁴⁴ and Article 5(4) ECHR⁴⁵ and both the Human Rights Committee and the ECtHR have developed a sophisticated jurisprudence on safeguards relating to judicial review of detention. These include the requirement that the review be: clearly prescribed by law, by an independent and impartial judicial body, of sufficient scope and possessed of sufficient powers to be effective, consistent with standards of due process and prompt.⁴⁶ These requirements also follow from Article 37(d) CRC. However, what is unique about Article 37(d) is the explicit reference to the right to legal and other appropriate assistance. While the ECtHR has found that access to legal advice may, depending on the facts of the case, be necessary in order that the detention meet the requirement of legality,⁴⁷ Article 37(d) establishes that access to legal and other appropriate assistance is a requirement in each case. In the context of unaccompanied minors, the Committee RC has interpreted the reference to legal *and* other

43 Committee RC, General Comment No. 6, *supra* n. 21, p.19.

44 'Anyone who is deprived of liberty by arrest or detention shall be entitled to take proceedings before a court, in order that the court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.'

45 'Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.'

46 For a general discussion of the case-law of the ECtHR and Human Rights Committee establishing these requirements, see International Commission of Jurists Practitioners' Guide No. 6, *Migration and International Human Rights Law* (2011), Chapter 4, Migrants in Detention, Section IV, Procedural Protection.

47 For example, ECtHR, *Öcalan v Turkey*, Appl. No. 46221/99, Judgment (GC) of 12 May 2005, para. 70.

appropriate assistance in Article 37(d) as mandating the assignment of a legal representative as well as a guardian or adviser tasked with ensuring the child's best interests.⁴⁸

Finally, one omission from Article 37(d) should be noted. Whereas Article 9 ICCPR and Article 5(2) ECHR provide that anyone who is arrested must be informed promptly of the reasons for the arrest, Article 37 is silent on the issue. However, such an obligation is implicit in the right to challenge the legality of the detention in Article 37(d) and in Article 12(1) CRC, a general principle of the Convention which provides that the child has the right to express views freely in all matters affecting the child. Notably, the right of the child to express views presupposes that the child has access to information about his/her situation. Interestingly, the ECtHR has held that the right to be informed must not only be in a language that the person understands – an explicit requirement of Article 5(2) ECHR – but must also be in a form that takes account of his/her level of education.⁴⁹ Implicitly, this establishes a requirement that information be provided to detained minors in an age-appropriate manner.

In brief, in addition to the usual procedural guarantees to which a detained person is entitled under general human rights law, detained children are entitled to legal assistance and the assistance of a guardian or adviser. Furthermore, the child detainee must be informed of the reasons for his/her detention in a manner appropriate to his/her age.

7.3 PHASE ONE CEAS: COMPLIANCE WITH THE RIGHT OF THE CHILD TO LIBERTY

Just two of the phase one CEAS instruments contain provisions relating to detention: the RCD and the APD. While both directives were subject to a Commission impact evaluation, only the provisions of the RCD relating to detention were reported on;⁵⁰ unhelpfully, the provisions of the APD relating to detention did not feature in the evaluation of that directive.⁵¹

48 Committee RC, General Comment No. 6, *supra* n. 21, para. 36.

49 ECtHR, *Nasrullojev v Russia*, Appl. No. 656/06, Judgment of 11 October 2007, para. 77. Strangely, in *Rahimi v Greece*, while the Court reprimanded the Greek authorities for providing written information in Arabic to a 15 year old Afghan unaccompanied minor who spoke only Farsi, the Court omitted to address the fact that the boy was illiterate and consequently would not have understood the written information even if it were in Farsi. Appl. No. 8687/08, Judgment of 5 April 2011, see paras. 8 and 120.

50 Commission evaluation of the RCD, *supra* n. 1.

51 'Report from the Commission to the European Parliament and the Council on the Application of Directive 2005/85/EC of 1 December 2005 on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status, COM (2010) 465 final'. Hereinafter, 'Commission evaluation of the APD'.

7.3.1 Permissible detention

In terms of when detention of asylum seekers is permissible, Article 7 of the RCD (Residence and freedom of movement) provides in paragraph 3 that, '[w]hen it proves necessary, for example for legal reasons or reasons of public order, Member States may confine an applicant to a particular place in accordance with their national law.' Although the title of the article and the wording of paragraph 3 give the impression that (mere) restrictions on freedom of movement are envisaged, later provisions, which are dealt with below, relate more explicitly to detention. This suggests that Article 7 is actually an oblique reference to detention. Article 18 of the APD (Detention) provides in paragraph 1 that 'Member States shall not hold a person in detention for the sole reason that he/she is an applicant for asylum'. *A contrario*, Article 18 implicitly establishes that detention is permissible if there is any other reason for it.

Neither directive contains a provision exempting minors or unaccompanied minors from detention, with the resulting inference that both minors and unaccompanied minors are fully susceptible to detention. This interpretation is reinforced by Article 35 of the APD which relates to border procedures. Article 35(3), which relates to a border-entry procedure which Member States may maintain on the basis of a stand-still clause, provides in sub-paragraph (f) for the right of an unaccompanied minor who is being dealt with in such a procedure to a representative. This provision implicitly establishes that unaccompanied minors are subject to such a procedure. At a minimum, border-entry procedures involve restrictions on freedom of movement. However, the case-law of the ECtHR indicates that the dividing line between restrictions on freedom of movement and detention is a question of fact, depending on such issues as the length of the deprivation of liberty and the conditions in which the person is confined.⁵² In this regard, Article 35(4) envisages a time-limit of 4 weeks. Such a length clearly corresponds to detention.⁵³ The applicability of border-entry procedures to unaccompanied minors confirms that the latter are indeed susceptible to detention.

Are these provisions compatible with the requirements of Article 37(b) CRC? Recall that Article 37(b) encompasses a requirement of lawfulness and non-arbitrariness.

On the requirement of lawfulness, it is doubtful that the provisions of Article 7(3) of the RCD or Article 18(1) of the APD, taken alone or together, meet the requirement of lawfulness. Article 7(3) of the RCD which permits detention if it 'proves necessary [...] for legal reasons or reasons of public order' is

52 ECtHR, *Abdolkhani and Karimnia v Turkey*, Appl. No. 30471/08, Judgment of 22 September 2009.

53 In the *Saadi* case, it was not disputed that the applicant, who had been held in a closed 'reception centre' for 7 days to facilitate a fast-track asylum process, has been deprived of his liberty. ECtHR, *Saadi v UK*, Appl. No. 13229/03, Judgment (GC) of 29 January 2008.

entirely circular: detention is legal if there is a legal reason for it. It tells us nothing about the type of legal reasons or reasons of public order which might give rise to a need for detention in the asylum context. Moreover, the euphemistic clause permitting Member States to 'confine an applicant to a particular place' falls foul of the judgment of the ECtHR in *Abdolkhani and Karimnia v Turkey*.⁵⁴ As for Article 18(1) APD, which prohibits detention on the sole ground of being an asylum seeker, it can be observed that this article tacitly sanctions the detention of asylum seekers for any other immigration-related or, indeed, non-immigration-related reason. A typical example of an immigration-related reason for detention is: entering or attempting to enter the state irregularly or without the proper documentation. Therefore, the minimum standards established in the directives do not appear to conform to the requirement that the law on detention be 'accessible, precise and foreseeable'.

On the requirement of non-arbitrariness, the key issue is whether the provisions mandate an individualized assessment of the need for detention. In this regard, it is interesting to note that, in its evaluation of the RCD, the Commission states that, '[g]iven that according to the Directive detention is an exception to the general rule of free movement, which might be used only when 'it proves necessary', automatic detention without any evaluation of the situation of the person in question is contrary to the Directive'.⁵⁵ It is submitted that this is a rather reaching interpretation by the Commission of the wording of Article 7(3) RCD since it is open to Member States to define the legal reasons or reasons of public order for detention at a broad level of generality. Unsurprisingly, the Commission evaluation reports that:

Detention is foreseen by all Member States on numerous grounds (from exceptional circumstances – Germany – to the general practice of detention of all asylum seekers illegally entering the Member State except for those with special needs – Malta). Similarly, the length of detention varies from 7 days (PT) to 12 months (MT, HU) or even an undefined period (UK, FI).⁵⁶

As for the APD, the Art 18(1) prohibition of detention on the sole ground of being an applicant for asylum does not infer an individualized assessment since detention could conceivably apply, for example, to all asylum applicants who enter or attempt to enter the state irregularly or without the proper documentation, as indicated above.

Finally, neither Article 7(3) RCD nor Article 18(1) APD states that detention of minors is a measure of last resort and for the shortest appropriate period of time. However, in its evaluation of the RCD, the Commission seems to

54 ECtHR, *Abdolkhani and Karimnia v Turkey*, Appl. No. 30471/08, Judgment of 22 September 2009.

55 Commission evaluation of the RCD, *supra* n. 1, § 3.4.1, p. 7.

56 *Ibid.*

consider that various *other* provisions of the directive establish this requirement, such as the best interests requirement, the classification of minors as vulnerable persons or the right of the unaccompanied minor to alternative care.⁵⁷ Again, however, it is submitted that it is expecting rather too much of Member States to join the dots in this way, in the absence of an explicit statement of the principle of last resort. In this regard, it comes as no surprise that the Commission found in its evaluation of the RCD that ‘most of [the Member States] authorize the detention of minors and many of them even authorize the detention of unaccompanied minors.’⁵⁸

In conclusion, the provisions of the RCD and APD relating to detention do not conform to standards established in Article 37(b) CRC regarding when the detention of minors is permissible.

7.3.2 Conditions of detention

The APD is silent on conditions of detention. However, Article 13(2) RCD is relevant to the issue of conditions of detention, providing:

Member States shall make provision on material reception conditions to ensure a standard of living adequate for the health of applicants and capable of ensuring their subsistence. Member States shall ensure that that standard of living is met in the specific situation of persons who have special needs [...] as well as in relation to the situation of persons who are in detention.

Furthermore, Article 14 RCD, which relates to modalities for material reception conditions (i.e. accommodation and associated rights), contains a number of potentially useful provisions. Paragraph 2 provides that where applicants are provided with housing in kind, they must be assured protection of their family life and the possibility of communicating with relatives, legal advisers, representatives of UNHCR and recognized NGOs. Paragraph 2 further establishes that ‘Member States shall pay particular attention to the prevention of assault within the premises and accommodation centres [...]’. Paragraph 3 provides that ‘Member States shall ensure, if appropriate, that minor children of applicants or applicants who are minors are lodged with their parents or with the adult family member responsible for them whether by law or custom.’ However, Member States are permitted to derogate from their obligations under Article 14. Thus Article 14(8) establishes that Member States ‘may exceptionally set modalities for material reception conditions different from those provided for in this article, for a reasonable period which shall be as

⁵⁷ *Ibid*, § 3.5.2, p. 10.

⁵⁸ *Ibid*, § 3.5.2, p. 9.

short as possible, when [...] the asylum seeker is in detention or confined to border posts. These different conditions shall cover in any case basic needs.'

Are these provisions consistent with Article 37(c) CRC, which mandates that 1) detained minors be treated in a manner that takes account of the needs (and implicitly) rights of persons of their age; 2) that they be separated from adults unless contrary to their best interests; 3) that accompanied children should not be separated from their parents while in detention; and 4) that unaccompanied children should have contact with their relatives?

The absence of any specific guarantees relating to the detention of minors, coupled with the express permission to derogate from the obligation to prevent assault and from such rights as family unity and the right to communicate with relatives etc., strongly indicates that the requirements of Article 37(c) are not met. In this context, the broad *proviso* in Article 13(2) of the RCD – that Member States must ensure that the minimum standard of living established in the directive is met in detention – is of limited benefit, since it relates only to health and subsistence and fails to encompass the myriad other rights of the child that are implicated by detention, such as the right to education or the right of the child to protection from all forms of ill-treatment or violence. In any event, the minimum standard of living alluded to in Article 13(2) falls well short of the minimum standard of living to which the child is entitled – regardless of whether he is at liberty or in detention: as outlined in Chapter 6, Article 27 CRC entitles the child to a standard of living adequate for his/her *physical, mental, spiritual, moral and social development*.

In this regard, it is hardly surprising that 'serious problems' were reported by the Commission in its evaluation of the RCD in terms of the applicability of the directive in all premises hosting asylum seekers. It found that as many as seven Member States (UK, BE, IT, NL, PL, LU, CY) do not apply the directive in detention centres, while other Member States (e.g. AT) do not apply it in transit zones. Since, as the Commission noted, the level of reception conditions in detention inevitably drops, 'it is hard to imagine how the special needs of vulnerable persons (especially minors) might be met' in detention.⁵⁹ More specifically, the Commission found that, '[c]ontrary to the provisions of the Directive, many Member States deny detained minors access to education or make it impossible or very limited in practice (AT, BE, FI, FR, HU, IT, PL, SK, SI, UK, NL). Only in a few Member States is this right recognized or special classes organized in detention centres (LV, CZ, LT, SE).'⁶⁰

In sum, therefore, the few provisions of the RCD that relate to conditions of detention do not conform to the requirements of Article 37(c) CRC.

59 Commission evaluation of the RCD, *supra* n. 1, § 3.5.2, p. 9.

60 *Ibid.*, § 3.4.4, p. 8.

7.3.3 Procedural protection

Article 7(3) of the RCD which tacitly sanctions detention contains no provision for procedural protection. However, Article 21 on appeals is of utmost relevance in this regard, providing:

1. Member States shall ensure that [...] decisions taken under Article 7 which individually affect asylum seekers may be the subject of an appeal within the procedures laid down in the national law. At least in the last instance the possibility of an appeal or review before a judicial body shall be granted.
2. Procedures for access to legal assistance in such cases shall be laid down in national law.

Paragraph 1 establishes that detention decisions must be amenable to some sort of appeal but does not establish any requirements regarding the appeal body (except at last instance), the scope of the appeal, due process guarantees or time-frame. While paragraph 2 appears to mandate the provision of some sort of legal assistance to detainees, this is tempered by the fact that restrictions may be placed on access to places of detention by legal representatives. Thus, as previously noted, the right in Article 14(2) of applicants who are provided with housing in kind to communicate with legal advisers and the obligation in Article 14(7) to grant legal advisers access to accommodation centres and housing facilities can be derogated from under Article 14(8) when the asylum seeker is in detention or confined to border posts.

As for the APD, Article 18(2) provides that '[w]here an applicant for asylum is held in detention, Member States shall ensure that there is a possibility of speedy judicial review.' Thus the appeal body (a court) and time-frame (speedy) are specified. However, no standards are established regarding the scope of the judicial review or due process guarantees. Although Article 18 is silent on the right to legal assistance for the purpose of challenging the legality of detention, other articles of the directive may be of relevance. Notably, Article 10(1) establishes a right to information, to the services of an interpreter and to communicate with UNHCR, while Articles 15 and 16 establish a right to legal assistance and representation. Moreover, Article 16(2) guarantees that 'the legal adviser or other counsellor who assists or represents an applicant for asylum has access to closed areas, such as detention facilities and transit zones, for the purpose of consulting the applicant.' However, when interpreted in their context, these rights appear to be guaranteed only with respect to the asylum application.

It can be observed that the inter-play of the provisions of the RCD and the APD on detention leads to rather a bizarre outcome. Under the RCD, a detainee has some sort of right to legal assistance in order to challenge the detention but no guarantee that the legal adviser will be granted access to the place of detention, while under the APD, the legal adviser must be granted access to the place of detention but the detainee has no express right to legal assistance

for the purposes of challenging the detention. This inconsistency does not sit well with the right of the child under Article 37(d) to legal assistance. Moreover, while both directives provide for the appointment of a representative to the unaccompanied minor, neither directive has anything to say about the role of the representative when the unaccompanied minor is in detention.⁶¹

Therefore, it can be concluded that both directives only partially conform to the requirements of Article 37(d) CRC. Regrettably, the issue of procedural protection while in detention is not addressed in the Commission's evaluation of either directive.

7.4 PHASE TWO CEAS: PROSPECTS FOR ENHANCED COMPLIANCE

The proposed recast RCD contains four entirely new and detailed articles relation to the detention of applicants for international protection, covering grounds of detention (Article 8), guarantees for detained persons (Article 9), conditions of detention (Article 10) and detention of vulnerable persons and persons with special needs (Article 11). These provisions are cross-referenced in the proposed recast APD⁶² and are either substantially mirrored or cross-referenced in the proposed recast DR which provides for the first time for the detention of applicants who are subject to a Dublin transfer and who are considered to be at risk of absconding.⁶³ Consequently, the analysis below is of the provisions of the proposed recast RCD.

7.4.1 Permissible detention

Article 8 of the proposed recast RCD is undoubtedly a vast improvement on the existing directive. Article 8 provides that detention of applicants for international protection must be provided for by law and outlines four exhaustive grounds on which such detention may be permitted under national law.⁶⁴

61 Article 19(1) RCD and Article 17(1) APD. Article 19(1) RCD is silent on the role of the representative but Article 17(1) APD provides that the role of the representative is to 'represent and/or assist the unaccompanied minor with respect to the examination of the application' which suggests that the representative has no role regarding the detention of the minor.

62 Article 26.

63 Article 27.

64 The grounds in Article 8 are: '(a) in order to determine or verify [the applicant's] identity or nationality; (b) in order to determine, within the context of a preliminary interview, the elements on which the application for international protection is based which could not be obtained in the absence of detention; (c) in the context of a procedure to decide on the right to enter the territory; (d) when protection of national security or public order so requires.' According to the Commission, these grounds are based on the Recommendation of the Committee of Ministers of the Council of Europe, 'On Measures of Detention of

It states that detention must only be resorted to when it proves necessary on an individual basis and if alternatives to detention – which must be laid down in national law – cannot be applied. Article 9 establishes that detention must be for as short a period as possible. Article 11(2) states *inter alia*:

Minors shall not be detained unless it is established in an individual case that it is in the minor's best interests, as prescribed in Article 23(2).

Detention of minors shall be a measure of last resort, after having established that other less coercive alternative measures cannot be applied effectively. It shall be for as short a period as possible and all efforts shall be made to release the detained minors and place them in accommodation suitable for minors.

Detention of unaccompanied minors shall be resorted to only in particularly exceptional cases.

While the provision in Article 11(2) relating to the detention of unaccompanied minors is something of a retrograde step from the equivalent provision in the 2008 proposed recast (which exempted unaccompanied minors from detention altogether), nevertheless, it is submitted that Articles 8, 9 and 11 of the 2011 proposed recast are broadly consistent with Article 37(b) CRC.

7.4.2 Conditions of detention

Article 10 of the proposed recast RCD lays down minimum standards relating to conditions of detention. It establishes in paragraph 1 that applicants for international protection can only be detained in specialized detention facilities, as opposed to prison. However, this is subject to a derogation in paragraph 6(a) where accommodation in specialized detention facilities is temporarily not available. In such circumstances, detention in prison accommodation is permitted provided that applicants are accommodated separately from prisoners. An exemption is made from this derogation for unaccompanied, though not accompanied, minors. The failure to exempt minors in general from the derogation must be regarded as falling foul of the injunction in Article 37(c) CRC to treat the minor detainee in a manner that takes account of his/her age. It is highly questionable whether administrative detention in a *prison* is appropriate for anyone under the age of 18.

As regards the rights of the minor detainee, including the right not to be discriminated against in the enjoyment of his/her rights *viz.* a *viz.* non-detained children, there is no express statement of equality of treatment or full applicability of the rights established in the directive generally to situations

Asylum Seekers' and on UNHCR's 1999 Guidelines. See, Proposal for a Directive of the European Parliament and of the Council laying down minimum standards for the reception of asylum seekers, Explanatory Memorandum, COM (2008) 815 final, p. 6.

of detention. However, Article 11(2) does introduce an obligation that detained minors be given possibility to engage in leisure activities, including play and recreational activities appropriate to their age. This provision, which reflects Article 31 CRC, is an important innovation in the proposed recast.⁶⁵ Unfortunately, however, it is subject to derogation in Article 11(5) 'in duly justified cases and for a reasonable period which shall be as short as possible' when the applicant is detained at a border post or in a transit zone for purposes other than an accelerated or admissibility procedure. Surprisingly, in view of the finding in the Commission evaluation of the RCD that 'many Member States deny detained minors access to education or make it impossible or very limited in practice',⁶⁶ no mention is made of the right to education. It is submitted that the partial nature of the commitment to child rights while in detention signals a deviancy from the requirements of Article 37(c).

As for the right of detained children to be separated from adults unless contrary to their best interests and to be kept together with their parents unless contrary to their best interests, Article 11(2) provides that '[w]here unaccompanied minors are detained, Member States shall ensure that they are accommodated separately from adults', while Article 11(3) establishes that detained families must be accommodated separately in conditions guaranteeing them adequate privacy. However, the latter provision is subject to the derogation provision in Article 11(5), previously outlined. In the light of the judgment of the ECtHR in *Popov v France*, it seems highly likely that any derogation from the right to family life while in detention would fall foul of Article 8 ECHR.⁶⁷ In this regard, the proposed recast RCD has already been overtaken by developments in human rights law. Furthermore, neither Article 11(2) nor Article 11(3) mentions the best interests of the child.

Finally, Article 10(3) and (4) provide that UNHCR, legal advisors and family members have the right to communicate with and be granted access to detained applicants. This is consistent with the right in Article 37(c) CRC to maintain contact with family members and others.

Overall, the proposed recast RCD contains some improvements in the conditions of detention of minors but these are piece-meal and often subject to derogation and consequently do not reflect the requirements of Article 37(c) CRC.

65 Article 31 CRC provides in paragraph 1: 'States Parties recognize the right of the child to rest and leisure, to engage in play and recreational activities appropriate to the age of the child and to participate freely in cultural life and in the arts.'

66 Commission evaluation of the RCD, *supra* n. 1, § 3.4.4, p. 8.

67 ECtHR, *Popov v France*, Appl. No. 39472/07 and 39474/07, Judgment of 19 January 2012.

7.4.3 Procedural protection

It will be recalled that pursuant to Article 37(d) CRC minors have right to legal and other appropriate assistance in challenging their detention, while the jurisprudence of the ECtHR establishes a requirement that information relating to the detention and how to challenge it should be in a format appropriate to the particular detainee.

Article 9(5) of the proposed recast RCD provides that '[i]n cases of an appeal or review of the detention order, Member States shall ensure that asylum seekers have access to free legal assistance and representation, where they cannot afford the costs involved and in so far as it is necessary to ensure their effective access to justice.' Although the final clause suggests a limitation of the right, it is submitted that since access to legal assistance and representation is a *sine qua non* for the effective access of a minor to justice, this provision meets the requirements of Article 37(d).

On the issue of a representative for the unaccompanied minor in detention, although the provisions on detention in the proposed recast RCD are silent on the role of the representative in the detention context, the revised definition of the representative in Article 2(j) states that the role of the representative is 'to assist and represent an unaccompanied minor in procedures provided for in this Directive with a view to ensuring the child's best interests'. Since Article 11(2) establishes that minors can only be detained if it is in their best interests, it follows that the representative has an important role to play in any decision to detain.

Finally, as regards the requirement of age-appropriate information, Article 9(3) provides that '[d]etention shall be ordered in writing. The detention order shall state the reasons in fact and in law on which it is based and the procedures laid down in national law for challenging it, in a language the asylum seeker understands or is reasonably supposed to understand. It shall immediately be provided to the detained asylum seeker.' This provision can be criticized for failing to establish that the information should be clear, in a language that the asylum seeker actually does understand and, preferably, in an age-appropriate form.

In sum, the proposed recast RCD better secures the right of the detained child to procedural protection than the existing directive, although access to information is still problematic, a problem that is likely to be compounded in the case of a child.

7.5 SYNTHESIS OF FINDINGS

This chapter explored whether the relevant CEAS instruments comply with the right of the child to liberty. The right was delineated along three main lines, all suggested by the wording of Article 37(b)-(d) CRC: permissible de-

tention, conditions of detention and procedural protection. It was found that the relevant Phase One CEAS instruments do not fully comply with *any* of the elements of the right of the child to liberty. Thus, the directives fail to establish any general, much less age-specific, criteria relating to lawfulness or non-arbitrariness. They contain weak provisions relating to the conditions of detention, which fail to acknowledge that where children are detained they must be detained in conditions appropriate to their age and, indeed, rights. The directives also contain weak procedural guarantees for challenging the legality of detention which do not appear to conform with the right of the detained child to legal assistance. Phase Two is a vast improvement on Phase One in one area: establishing that the detention of minors is only permitted in exceptional circumstances, subject to the principle of last resort and the best interests of the child. In the area of conditions of detention, some improvements can be noted, but these are neither systematic nor absolute. The same can be said of procedural protection. Consequently, some important improvements are contained in the proposed Phase Two recasts but these stop short of securing full compliance with the right of the child to liberty.