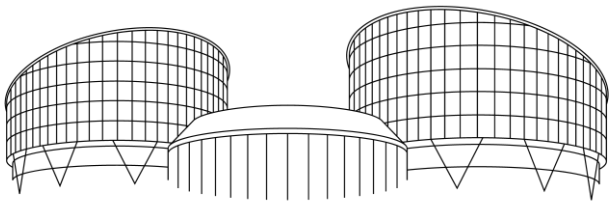

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIFTH SECTION

CASE OF POPOV v. FRANCE

(Applications nos. 39472/07 and 39474/07)

JUDGMENT
(Extracts)

STRASBOURG

19 January 2012

This judgment is final but it may be subject to editorial revision.

In the case of Popov v. France,

The European Court of Human Rights (Fifth Section), sitting as a Chamber composed of:

Dean Spielmann, *President,*
Elisabet Fura,
Karel Jungwiert,
Mark Villiger,
Ann Power-Forde,
Ganna Yudkivska,
André Potocki, *judges,*
and Claudia Westerdiek, *Section Registrar,*

Having deliberated in private on 13 December 2011,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in two applications (nos. 39472/07 and 39474/07) against the French Republic lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by Mr Vladimir Popov, his wife Mrs Yekaterina Yakovenko and their children ("the applicants") on 10 September 2007.

2. The applicants were represented by Mr D. Seguin, a lawyer practising in Angers. The French Government ("the Government") were represented by their Agent, Ms E. Belliard, Head of Legal Department, Ministry of Foreign Affairs.

3. The applicants alleged, in particular, that their administrative detention for fifteen days at the Rouen-Oissel detention centre, pending their removal to Kazakhstan, where they feared they would be persecuted, had breached Articles 3, 5 and 8 of the Convention.

4. On 19 October 2009 the President of the Fifth Section decided to give notice to the Government of the complaints under Articles 3 and 8 of the Convention. It was also decided that the Chamber would rule on the admissibility and merits of the applications at the same time (Article 29 § 1). On 12 May 2011 the President decided to give notice to the Government of the Article 5 complaint.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicants are Mr Vladimir Popov and Mrs Yekaterina Popov née Yakovenko, nationals of Kazakhstan, born in 1983 and 1982 respectively, and their two minor children, who were born in France on 7 April 2004 and 17 March 2007.

A. Applicants' arrival in France

6. The applicants were born in Kazakhstan. They were married on 18 June 2002. In the applicants' submission they were repeatedly persecuted in their country on account of their Russian origin and their affiliation to the Russian Orthodox Church. On 9 May 2002 the applicant's father was beaten up in the street and required treatment in hospital. The family filed a complaint and on 5 June 2002 the applicants received, at their house, a visit from unknown individuals of Kazakh origin who asked them to withdraw their complaint and threatened them with reprisals. On 15 July 2002 an incendiary device was thrown into their home through the window, starting a fire, and they were rescued by a neighbour. Following that incident, the applicant's father left Kazakhstan on 16 August 2002.

7. On 29 September 2002, when the second applicant was returning home, Kazakh police officers stopped her in the street and questioned her about her father. They took her away and she was beaten up. They tried to shut her in a vehicle and threatened to rape and kill her. She managed to escape. The next day, she went to the casualty department in the town of Taraz to have her injuries recorded and treated. On 2 October 2002 her mother came home having also been beaten up by Kazakh policemen who were looking for her husband. After that incident they moved to the country.

8. On 28 November 2002 the second applicant was again assaulted. She had gone shopping and did not return until the next day, covered in bruises and blood. Several days later she lost the child she was carrying. She then decided to leave the country and entered France on 15 December 2002 on a two-week visa. After her departure, the applicant, who had filed a complaint, was assaulted by policemen on 10 March 2003. He spent several months in hiding but the authorities found him, confiscated his papers, and threatened to kill him if he did not withdraw his complaint. He too decided to leave the country and joined his wife in France on 19 June 2003.

B. Asylum applications

9. The applicants each filed an asylum application with the French Office for the Protection of Refugees and Stateless Persons (OFPRA) and obtained residence permits. Their asylum applications were rejected on 20 January 2004 on the ground that their statements were "riddled with inconsistencies", followed "a stereotyped pattern" and were "unconvincing". On 31 May 2005 the Refugee Appeals Board dismissed their appeals.

10. On 12 January 2006, having learnt of the murder of the second applicant's father, after his return to Kazakhstan, the applicants requested a fresh examination of their case by the OFPRA. On 19 January 2006 the OFPRA refused to re-examine the case. On 13 September 2006 the Appeals Board rejected their appeal on the ground that the new fact could not be regarded as established.

11. They subsequently applied for recognition as stateless persons, but the OFPRA rejected their request on 5 April 2007, on the ground, first, that they had not provided evidence that the Kazakh authorities had withdrawn their nationality and they could not lose that nationality purely of their own volition, and, secondly, that they held passports issued by their national authorities that were valid until 2012. On 25 April 2007 the applicants appealed against that rejection before the Nantes Administrative Court. They subsequently dropped their appeal, however, having obtained refugee status in the meantime (see paragraph 27 below).

C. Refusal to grant residence permits together with an obligation to leave France and measures of administrative detention

1. First detention measure

12. On 21 June 2005 the Ardennes prefecture notified the applicants of its refusal to issue them with residence permits and directed them to leave the country within one month.

13. On 22 November 2005 Mr Popov was arrested during a vehicle check when he was found to be in the country illegally. On the next day he was issued with a removal order and placed in administrative detention in Charleville-Mézières. On 25 November 2005 the liberties and detention judge of the Charleville-Mézières *tribunal de grande instance* ordered the extension of his detention for fifteen days. On 9 December 2005 the detention was extended for a further fifteen days in order to "enable the enforcement of the removal measure".

14. On 28 November 2005 the Châlons-en-Champagne Administrative Court rejected Mr Popov's application for the annulment of the order for his removal to Kazakhstan. On 23 November 2006 the Nancy Administrative Court of Appeal upheld that judgment, finding that he had not adduced any

conclusive evidence in support of his allegations that he had been persecuted in his country of origin.

15. The removal order against the first applicant was not enforced, however, and he was released from the detention centre, as no laissez-passer had been issued.

2. Second detention measure

16. On 11 October 2006 it was decided to place the applicants in administrative detention but the prefect of the Ardennes ordered them to reside at a specific address, pursuant to Article L. 513-4 of the Entry and Residence of Aliens and Right of Asylum Code (CESEDA). Two attempts to remove the applicants failed as a result of the mobilisation of a support group. The family was thus released.

17. On 29 January 2007 the Ardennes prefecture rejected a new request for the issuance of a residence permit to the applicants. On the same day, a further decision was delivered imposing on them an obligation to leave the country. On 31 May 2007 the Châlons-en-Champagne Administrative Court dismissed their appeal against that decision.

18. On 25 June 2008 they again applied for residence permits. As the prefecture failed to respond, the applicants challenged the implicit rejection decision before the Nantes Administrative Court. However, having subsequently obtained refugee status, the applicants withdrew their complaint.

3. Disputed measures of administrative detention

(a) First attempt to remove the applicants

19. On 27 August 2007 the applicants and their children, who were then under six months and three years, respectively, were apprehended at the home of the applicant's mother, who was accommodating them, and taken into police custody. After a long wait, the Maine-et-Loire prefecture ordered their administrative detention in a hotel in Angers. On 28 August 2007 the applicants and their children were transferred to Charles-de-Gaulle airport pending their removal to Kazakhstan. However, the flight scheduled for the early afternoon was cancelled, without the prefecture having been informed, and the removal could not therefore be carried out. It was only in the evening that the applicants and their children were transferred, in a police van, to the administrative detention centre of Rouen-Oissel.

20. That centre, even though it is mentioned on the list of centres that cater for families, does not have any real leisure or learning area. Whilst one wing is reserved for families and single women, the atmosphere there is distressing and stressful, with a lack of privacy and a high level of tension. Announcements via loud-speakers reverberate throughout the centre and exacerbate the feeling of stress. The Oissel centre, at the time of the

applicants' detention, was not equipped with the basic facilities for the detention of young children (it had metal beds with pointed corners, no cots, just a few toys in the corner of a room, etc.). The only outdoor area is a courtyard, concreted over and with wire netting over the top, and the bedroom windows are covered with a tight grill obscuring the view to the outside ...

The eldest child refused to eat in the centre and showed signs of anxiety and stress. The parents had to negotiate with the police to recover their personal belongings, including the milk they had brought for the infant. They were only able to receive one short visit during their detention, as it was not easy to gain access to the centre.

21. On 29 August 2007 the liberties and detention judge of the Rouen *tribunal de grande instance* ordered the extension of the detention measure for fifteen days, after observing that the maintaining of a family in detention was not in breach of the decree of 30 May 2005 on administrative detention and holding areas and that their transfer to Rouen-Oissel was not vitiated by any defect. The decision also mentioned the loss of the second applicant's Kazakh nationality but it was found that this could not justify release, as the Administrative Court alone had jurisdiction to decide if that situation would have any consequences. On 30 August 2007 the Rouen Court of Appeal upheld the extension decision.

(b) Second attempt to remove applicants

22. Having been held in the detention centre since 28 August 2007, the applicants were again transferred to Roissy Charles-de-Gaulle airport pending their removal on 11 September 2007, the flight being scheduled for the early afternoon. It did not go ahead, however. The applicants were not taken back to the Rouen-Oissel centre until the evening, without any measure of placement in a detention facility being decided at Roissy during that period. The prefect then applied to the Rouen liberties and detention judge to have the applicants' detention extended for a further fifteen days, relying solely on the argument that the non-enforcement of the removal order could be attributed to the applicants themselves (CESEDA, Article L. 552-7). The applicants complained about the conditions of their detention and its length, arguing that the authorities had failed to prove that the length of the measure was strictly necessary.

23. On the same day the applicants submitted to the Court, under Rule 39 of the Rules of Court, a request for the suspension of the removal measure. The Court declined to indicate an interim measure in response to that request.

24. On 12 September 2007 the liberties and detention judge found that there was no evidence to show that the applicants had deliberately impeded their removal, because the documents concerning the circumstances of the attempt expressly stated that "no refusal to board the plane was recorded on

11 September 2007", and he ordered their release, with the obligation to leave France being maintained. The prefect appealed against that decision but without seeking suspensive effect. The applicants were thus released from the detention centre.

25. On 14 September 2007 the Rouen Court of Appeal set aside the liberties and detention judge's decision and extended the administrative detention measure for fifteen days, finding that it could be seen from certain documents in the file that the applicants had indeed prevented their removal (an e-mail from one of the border police officers mentioning the need for an escort to carry out the removal the next time, in view of Mrs Popov's reaction). It had been found that the next flight with an escort for the applicants' removal would not be available before 18 September 2007, and the prefect had not therefore shown a lack of diligence in organising the departure and limiting the length of the detention. He had thus been justified in seeking an extension of the administrative detention pending the organisation of a fresh removal. That decision was not enforced.

D. Obtaining of refugee status

26. Before their arrest the applicants had filed a fresh request to be granted refugee status. In a decision of 6 September 2007 the OFPRA rejected the request on account of the very general nature of the alleged facts, finding that this, together with the unlikely claim of blackmail on the part of the Kazakh authorities, precluded the establishment of their veracity. The OFPRA further stated that as the allegation that the applicants had lost their nationality had not been corroborated, the request for re-examination had to be rejected. The applicants appealed against that decision.

27. On 16 July 2009 the National Asylum Tribunal granted the applicants refugee status, finding that the enquiries made by the Ardennes prefecture *vis-à-vis* the Kazakh authorities, in breach of the confidentiality of asylum applications, had exposed the applicants to danger in the event of their return to Kazakhstan, and that their loss of Kazakh nationality, in August 2007 and April 2008 respectively, whilst not *per se* constituting persecution, did not, however, preclude the granting of refugee status.

II. RELEVANT DOMESTIC LAW AND PRACTICE

28. The detention of aliens pending their removal is mainly governed, in French domestic law, by the provisions of the Entry and Residence of Aliens and Right of Asylum Code (CESEDA).

...

B. Conditions of detention

...

31. The practice of detaining children accompanying their parents is governed by decree no. 2005-617 of 30 May 2005 concerning administrative detention and holding areas, which amended the CESEDA provision as follows:

Article R. 553-3

"Administrative detention centres, which are not entitled to accommodate over 140 residents, shall provide detained aliens with hotel-type facilities and collective catering services. They shall comply with the following standards:

1. A minimum usable surface area of 10 square metres per detainee consisting of a bedroom and areas freely accessible during opening hours;

2. Non-mixed shared rooms, housing a maximum of six;

3. Personal hygiene facilities, consisting of washbasins, showers and toilets, freely accessible and in sufficient numbers, representing one washroom for every ten detainees;

4. A telephone freely accessible for every fifty detainees;

5. Premises and facilities necessary for catering, in compliance with standards laid down in a joint decision of the Agriculture Minister, the Defence Minister, the Health Minister and the Minister for SMEs, trade and crafts;

6. For more than forty detainees, a leisure room separate from the canteen, with a surface area of at least 50 square metres, plus 10 square metres for every fifteen additional detainees;

7. One or more rooms containing medical equipment, reserved for medical personnel;

8. A room for visits by family members and consular staff;

9. The room mentioned in Article R. 553-7, reserved for lawyers;

10. A room assigned to the organisation mentioned in Article R. 553-13;

11. A room, containing furniture and a telephone, assigned to the association mentioned in the first paragraph of Article R. 553-14;

12. An area for open-air exercise;

13. A luggage room.

Administrative detention centres catering for families shall also contain bedrooms that are specially adapted, in particular for childcare."

Article L. 552-4

"By way of exception, the court may order aliens to reside at a specific address when they can provide effective guarantees that they will not abscond, after surrendering to the police or gendarmerie their original passport and any identity document, in exchange for an acknowledgment of receipt constituting proof of the person's identity and indicating the removal measure that is pending. Where an order

to reside at a specific address is made in respect of an alien who has previously absconded from the execution of an applicable removal or deportation measure, or has breached a ban on re-entry that has not been lifted, the order shall give specific reasoning."

32. The Court notes that French law precludes the placement of minors in administrative detention:

Article L. 511-4

"An obligation to leave French territory or a removal measure, pursuant to the present chapter, cannot be decided in respect of:

1° An alien who is under eighteen years of age; ..."

Article L. 521-4

"Deportation cannot be ordered in respect of an alien under eighteen years of age."

33. The Cimade, an ecumenical non-governmental organisation providing assistance to immigrants, in its report "Administrative detention centres and facilities" ("*Centres et locaux de rétention administrative*"), published in 2010, pointed out that even though the law did not permit the detention of minors, 318 children "accompanying" their parents had been deprived of their liberty in 2009. Their average age was eight. The Cimade emphasised that administrative measures of placement in detention could not be taken against children, so their detention was devoid of legal basis.

34. As a result, the administrative detention centres of Lille-Lesquin 2, Coquelles, Lyon, Rouen-Oissel, Marseille, Metz-Queuleu, Nîmes, Saint-Jacques de la Lande (Rennes), Perpignan, Hendaye, Le Mesnil-Amelot 2 and Toulouse-Cornebarrieu were thus "authorised to receive families". The Cimade observed that there were flagrant discrepancies between the various administrative detention centres in terms of how families were actually catered for. The total lack of guidelines as to what was indispensable for a child precluded any harmonisation of the conditions of detention for families in the centres. The task was left to each centre's director, whose responsibility it was to adapt the day-to-day management of the centre to the particular needs of a family with children, without having the support of staff specifically trained in education.

...

D. Case-law

42. The domestic courts have given a number of rulings on the practice of placing children accompanying their parents in administrative detention pending removal.

1. Case-law of the ordinary courts

43. In an order of 23 October 2007 (no. 87/2007) the President of the Rennes Court of Appeal ruled on an appeal by the public prosecutor with a view to the annulment of an order by the liberties and detention judge concerning the release of a family with an infant. The public prosecutor had argued that the fact of holding them "on premises that were specially adapted to receive families did not constitute inhuman treatment". The Court of Appeal upheld the first-instance order with the following reasoning:

> "even though it provides an area reserved for the 'reception' of families, the detention centre remains a place where aliens are detained pending their removal from France, for a maximum period of thirty-two days; in the present case, the fact of holding in such a place a young mother, her husband and their three-week-old baby constitutes inhuman treatment within the meaning of Article 3 of the European Convention on Human Rights on account, firstly, of the abnormal living conditions imposed on this very young child, virtually since birth, and secondly, of the great emotional and mental distress inflicted on the mother and father by detaining them with the infant, a distress which, by its nature and duration ..., exceeds the threshold of seriousness required for the above-mentioned provision to be engaged, and which, moreover, is manifestly disproportionate to the aim pursued, namely the couple's removal ..."

44. In another order, this time of 29 September 2008 (no. 271/2008), the same Court of Appeal took the view that "even though it provides an area reserved for the reception of families, the detention centre remains a place of seclusion [and] the fact of holding in such a place a very young mother, her husband and their one-year-old baby constitutes inhuman treatment within the meaning of Article 3 of the European Convention on Human Rights". That court further noted in particular that, for a family, such seclusion caused "great emotional and mental suffering" which "exceeded the threshold of seriousness for the purposes of the Convention".

In a decision of 10 December 2009 (Bulletin 2009, I, no. 250), the Court of Cassation quashed that order. It found that the reasons given by the Court of Appeal did not suffice for inhuman or degrading treatment to be established in the particular circumstances of the case.

45. In an order of 21 February 2008, the Toulouse Court of Appeal (no. 08/00088) ordered the immediate release of the appellants on the following grounds:

> "the fact of holding in such a place a young mother, her husband and their two-month-old baby constitutes inhuman treatment within the meaning of Article 3 of the European Convention on Human Rights on account, firstly, of the abnormal living conditions imposed on this very young child, virtually since birth, having been held in police custody with its mother, and secondly, of the great emotional and mental distress inflicted on the mother and father by the detention measure, a distress that is manifestly disproportionate to the aim pursued, namely the execution of the removal order ..."

That decision was quashed by the Court of Cassation, which decided in a judgment of 10 December 2009 (Bulletin 2009, I, no. 249) as follows:

> "inhuman or degrading treatment is not constituted by the provisional holding in administrative detention of a family, made up of a man, a woman and their child of a few months' old, pending the execution of an enforceable removal measure, where such deprivation of liberty has been lawfully ordered by a judicial authority, under its supervision, and is carried out in an area of the detention centre specially reserved for families, unless it is shown that the area is not adapted to the needs of family life or of human dignity."

2. Administrative case-law

46. The GISTI and the Cimade applied to the *Conseil d'Etat* seeking the annulment of the decree of 30 May 2005 "in so far as it organised the placement in administrative detention of families, including minors, but their applications were rejected in a judgment of 12 June 2006 (no. 282275). Concerning the detention of families, it took the view that Article 14 of the decree in question did not have the purpose or effect of permitting the administrative authorities to decide on the deprivation of liberty of the families of individuals placed in detention, but that it sought only to provide for the reception of such families. The *Conseil d'Etat* thus concluded that the administrative authority was competent to make such arrangements, which were not in breach either of the CESEDA or of the New York Convention on the Rights of the Child.

...

III. RELEVANT INTERNATIONAL LAW

...

B. Council of Europe

...

3. Commissioner for Human Rights

56. Following his visit from 5 to 21 September 2005, the Commissioner for Human Rights published, on 15 February 2006, a report on "the effective respect for human rights in France" (CommDH(2006)2). He observed, concerning the detention of minors, that children should not be kept in an enclosed facility, offering little in the way of activities and few, if any, outings, and where conditions were precarious and their safety could not be guaranteed. He recommended that an alternative solution be proposed to families with children (§ 196). He noted in this connection that compulsory residence orders, which were provided for by law, were "little used" (§ 257).

The Commissioner further observed that the placement of children in a detention centre was incompatible with the New York Convention and French law, which precluded the use of removal orders against minors. He found, however, that a legal vacuum made it possible to place children in detention centres and remove them, on the grounds of concern not to separate them from their families. In his view, the French authorities appeared to completely underestimate the legal and humanitarian problems posed by the presence of children in such centres (§ 255). He added, lastly, that in any event, no children should be detained on the grounds that their parents did not have the necessary papers to remain in France, especially "in places marked by overcrowding, dilapidation, promiscuity (*sic*) and very strong tensions" (§ 257).

57. In his report of 20 November 2008 (CommDH2008(34)) the Commissioner noted that "[n]otwithstanding the recommendation made in the 2006 report, an increasing number of children [were] placed in administrative holding centres with their parents". He added that it was regrettable that such holding centres and waiting zones at the border were the only places in France where minors under the age of 13 were deprived of their liberty. He found, lastly, that the French authorities continued to underestimate the problems posed by the presence of children in holding centres and invited the authorities to place families in administrative detention only in cases of extreme necessity, so as to avoid causing children irreparable trauma.

4. European Committee for the Prevention of Torture (CPT)

58. Following its visit to numerous administrative detention centres in France (Palaiseau, Vincennes 1 and 2, Marseille, Toulouse-Blagnac 2 and Cornebarrieu), in 2006, the CPT raised with the Government the question of detaining families, and in particular any "accompanying" children, in such centres. It noted that this type of situation was not exceptional.

In response to concerns about the conditions of accommodation, the French authorities acknowledged that "the current furnishings in the bedrooms [were] not always fully adapted to small children ...".

C. European Union

1. European Union legislation

59. On 16 December 2008 the Parliament and the Council of the European Union adopted Directive 2008/115/EC, known as the "Return Directive", on common standards and procedures in Member States for returning illegally staying third-country nationals (Official Journal L. 348, 24 December 2008, pp. 0098-0107).

The relevant provision reads as follows:

"(13) The use of coercive measures should be expressly subject to the principles of proportionality and effectiveness with regard to the means used and objectives pursued ..."

60. In Council Directive 2003/9/EC, the "Reception Directive", adopted on 27 January 2003, the European Union gave the following definition of vulnerable persons particularly requiring the authorities' attention:

Chapter IV

Provisions for persons with special needs

Article 17

"General principle

1. ... minors, unaccompanied minors, disabled people, elderly people, pregnant women, single parents with minor children and persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence ..."

Article 18

"Minors

1. The best interests of the child shall be a primary consideration for Member States when implementing the provisions of this Directive that involve minors. ..."

61. The European Union Charter of Fundamental Rights became binding with the entry into force of the Lisbon Treaty on 1 December 2009. Article 24 reads as follows:

Article 24: The rights of the child

"... 2. In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration. ..."

2. Report commissioned by the European Parliament Committee on Civil Liberties, Justice and Home Affairs (LIBE)

62. In December 2007 the LIBE Committee published a study entitled: "The conditions in centres for third country national (detention camps, open centres as well as transit centres and transit zones) with a particular focus on provisions and facilities for persons with special needs in the 25 EU member states" (PE 393.275) analysing the implementation of the "reception" directive.

The report's authors found that minors were detained in the vast majority of EU States (France, Germany, Belgium, the United Kingdom, the Czech Republic, Slovakia, Portugal, Luxembourg, Spain, Latvia, Estonia, Ireland, Greece, Malta and Cyprus). The report presents an exhaustive study of the conditions of reception of vulnerable persons in EU member States. Austria appears to be the only State that never has recourse to detention for minors and Sweden limits it to seventy-two hours. Countries such as Belgium,

France and the United Kingdom, however, have recourse to detention almost systematically for accompanied children.

The report further shows that in spite of the existence of separate sections reserved for families with children and improved conditions (game rooms, toys, etc.), the fact remains that the lack of privacy, stressful living conditions, food, daily routine, negation of intimacy and the human and material environment are not adapted to children. The detention centre staff interviewed all felt that children should not be imprisoned in detention centres for the short or long term, because of the negative impact this traumatic experience could have on the children's psychological balance, on their relations with their parents and on the image the children had of their parents whilst in detention.

63. In the part concerning France, the report noted a deterioration in the atmosphere in these secure centres and in particular a rise in the number of desperate acts committed, including physical assaults. It was also suggested that the improvement in physical conditions for families had the perverse effect of making this type of detention seem banal when the very principle of detaining them in this position could be questioned. The report's authors added: "The presence of children in these places where they are deprived of their freedom, even if these are 'family zones' and they are kept here in order to keep families together, was particularly shocking for the study team".

IV. ALTERNATIVES TO DETENTION

64. According to the non-governmental organisation "International Detention Coalition", the alternative of compulsory residence orders is used in France in only 5% of cases (see the report: "Survey on Alternatives to Detention of Asylum Seekers in EU Member States"). Many organisations, both governmental and non-governmental, advocate alternatives to detention.

...

THE LAW

...

II. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

70. The applicants complained of a violation of Article 3 of the Convention. ... Secondly, they alleged that their placement in administrative detention, from 27 August to 12 September 2007, in view of the conditions

and duration of the detention, had been incompatible with the provisions of Article 3 of the Convention. That provision reads as follows:

> "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

71. The Court begins by finding that the two applications should be joined.

...

B. The second aspect of the complaint alleging a violation of Article 3, on account of the conditions of administrative detention

...

2. Merits

(a) The parties' arguments

76. The applicants observed that foreign minors were accorded particular protection under the specific texts applicable to them, in particular the New York Convention on the Rights of the Child of 26 January 1990.

77. The applicants added that the Rouen-Oissel detention centre was overcrowded and dilapidated, with a lack of privacy and a high level of tension, especially for children, who could not comprehend the reasons for the detention. They explained that the centre reverberated with noise, as announcements were constantly being made via loud-speakers, thus exacerbating the feeling of stress and confinement. Despite the possibility of using some childcare facilities, a detention centre remained totally unsuitable for very small children. They added that in the accommodation block the bedroom windows were covered with a tight grill that completely obscured the view of the courtyard outside.

78. On their arrival, the applicants' personal belongings had been taken by the police officers, including the baby's milk. The bottle was returned to them only after they had negotiated with the officers.

79. The applicants had only been able to receive one visit from a family member, for ten minutes and without the children being present. The eldest daughter had refused to eat while in the centre and showed signs of anxiety and stress. The second applicant's requests concerning her daughter's dietary preferences had been denied and no exemption had been authorised in order to adapt the proposed meals to the child's needs. On several occasions the police officers had threatened the child with "placement by a judge" and the second applicant had been told that she was a "bad mother".

80. The applicants added that, as they had no spare clothing, they had been obliged to put on damp clothes after washing them.

81. They further argued that, in addition to the unsuitability of the conditions on the premises, the duration of their detention had been totally incompatible with their children's best interests and their eldest daughter had found it particularly traumatic, resulting in eating disorders and considerable anxiety and stress during and after her stay in the centre.

82. The Government observed that the administrative detention of illegal immigrants awaiting removal did not suffice in itself to establish the existence of inhuman and degrading treatment. They explained that in principle it was not prohibited to detain children accompanied by their parents. They recognised that it was necessary to preserve the child's interest when families were detained and consequently, once the legitimacy of the parents' detention had been established, there could be no question of separating them from their children.

83. In this connection they explained that the placement of minors in detention centres with their parents was not systematic and that other solutions existed. Moreover, the applicants had been placed in administrative detention in a hotel in Angers before being transferred to the airport. It was only because their flight had been cancelled that they had then been placed in the Rouen-Oissel centre.

84. The Government wished to distinguish the present case, firstly, from that of *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium* (no. 13178/03, ECHR 2006-XI), where the applicant had been an unaccompanied minor detained on her own; and, secondly, from the case of *Muskhadzhiyeva and Others v. Belgium* (no. 41442/07, 19 January 2010), where the Court had taken the view that the two eldest siblings were more vulnerable to the environment of the detention centre. Whilst in *Muskhadzhiyeva and Others* the children were aged seven months, three and a half, five and seven, in the present case the children were three years' old and six months' old. Applying the Court's case-law, the Government argued that the age of the applicant children was such that they would have a limited perception of their environment. The Government noted that in *Muskhadzhiyeva and Others* the children's psychological problems had been certified by doctors, one of them being diagnosed with "post-traumatic stress and showing an excess of anxiety far greater than that of children of her age". They pointed out that it had been the combination of the children's age and health, the length of the detention and the ill-adapted accommodation facilities that had led the Court to find the violation of Article 3 in that case.

85. The Government indicated that the authorities had deployed significant resources to improve the reception of families in detention. Rouen-Oissel was one of eleven centres that specifically catered for parents accompanied by their minor children. The Government explained that part of the centre was reserved for families, with family bedrooms containing facilities for children (childcare material and games). They did not dispute the fact that the windows were covered but pointed out that free access to

the entire accommodation area, including indoor and outdoor yards, was possible between 7.30 a.m. and 10.30 p.m.

86. The Government observed that visits were in principle authorised from 10 a.m. to 11.30 a.m. and 2 p.m. to 5 p.m. and that these times could be extended for visitors travelling from afar. They were surprised by the applicants' allegation that they had not enjoyed the right to receive visits.

87. The Government were also surprised by the allegation that police officers had proffered threats against the eldest child and noted that the accusations remained unsubstantiated. They further called into question the disorders from which the eldest child had allegedly suffered (refusal to eat, stress, anxiety) and wondered why the parents had not consulted the doctor on duty in the centre or used the infirmary. Moreover, they cast doubt on the alleged denial of the request for an exemption to adapt meals to the child's needs. Article 13 of the internal rules provided for special menus, especially for reasons of age or health, thus applicable to very small children. In addition, the Government pointed out that families did not take their meals with the other individuals in the centre.

88. As regards the length of the detention, the Government observed that it was strictly governed by law and that the lawfulness of any placement in detention was reviewed by a judge. In addition, the length of the detention in the present case had been relatively short compared to that observed in the cases of *Mubilanzila Mayeka and Kaniki Mitunga* and *Muskhadzhiyeva and Others*, cited above.

(b) The Court's assessment

(i) General principles

89. Concerning the general principles that are applicable in the area of administrative detention, the Court would refer to paragraph 48 of the *Mubilanzila Mayeka and Kaniki Mitunga* judgment, cited above.

90. As regards minors, more specifically, the Court observes that the international Convention on the Rights of the Child provides in Article 37 that "[e]very 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 or her age". Concerning the confinement of foreign minors, the Court has already had occasion to rule on the detention of children in custodial facilities pending their removal. In the case of *Rahimi v. Greece* (no. 8687/08, §§ 85-86, 5 April 2011), the Court found, in respect of an unaccompanied minor in such a facility, that the conditions of his detention were so poor that they undermined the very essence of human dignity and that they could be regarded in themselves, without taking into consideration the length of the detention, as degrading treatment in breach of Article 3 of the Convention.

The Court also found a violation of Article 3 in the *Muskhadzhiyeva and Others* judgment (cited above, § 63) concerning four young children who were held, accompanied by their mother, for one month pending their removal.

(ii) Application to the present case

(α) In respect of the children

91. The Court observes that in the present case, as in *Muskhadzhiyeva and Others*, the applicant children were accompanied by their parents throughout the period of detention. It finds, however, that this fact is not capable of exempting the authorities from their duty to protect children and take appropriate measures as part of their positive obligations under Article 3 of the Convention (ibid., § 58) and that it is important to bear in mind that the child's extreme vulnerability is the decisive factor and takes precedence over considerations relating to the status of illegal immigrant (see *Mubilanzila Mayeka and Kaniki Mitunga*, cited above, § 55). The European Union directive concerning the reception of aliens thus treats minors, whether or not they are accompanied, as a category of vulnerable persons particularly requiring the authorities' attention (see paragraph 60 above). To be sure, children have specific needs that are related in particular to their age and lack of independence, but also to their asylum-seeker status. The Court would, moreover, observe that the Convention on the Rights of the Child encourages States to take the appropriate measures to ensure that a child who is seeking to obtain refugee status enjoys protection and humanitarian assistance, whether the child is alone or accompanied by his or her parents (see, *mutatis mutandis*, *Muskhadzhiyeva and Others*, § 62).

92. The Court notes that during the period of detention in question, the applicant children were aged five months and three years, respectively. They were held for fifteen days at the Rouen-Oissel detention centre.

93. As regards the conditions of detention, the Court found that the Rouen-Oissel detention centre was among those "authorised" to receive families by the decree of 30 May 2005 (see paragraph 34 above). However, the Court observes that this text merely mentions the need to provide "bedrooms that are specially adapted, in particular for childcare" but does not expressly list the facilities required for the accommodation of families. Thus there are major discrepancies between the various centres in terms of the facilities provided, each centre's director being responsible for such matters and free to take decisions, without having the support of staff specifically trained in education (see paragraph 34 above).

94. The applicants described the Rouen-Oissel centre as overcrowded and dilapidated, with a lack of privacy. The detainees lived in constant fear of being deported, thus exacerbating tension that was already acute ...

95. It can be seen from the reports of visits to the Rouen-Oissel centre ... that whilst the authorities had been careful to separate families from other detainees, the facilities available in the "families" area of the centre were nevertheless ill-adapted to the presence of children: no children's beds and adult beds with pointed metal corners, no activities for children, a very basic play area on a small piece of carpet, a concreted courtyard of 20 sq.m. with a view of the sky through wire netting, a tight grill over the bedroom windows obscuring the view outside, and automatically closing bedroom doors with consequent danger for children.

96. The Commissioner for Human Rights and the CPT also raised the question of administrative detention centres being unsuited to the accommodation of families and to the needs of children, taking the view that, in addition to the ill-adapted material conditions, the lack of privacy, stress, insecurity and hostile environment in such centres also had harmful consequences for minors, at odds with the international principles on the protection of children. In response to this criticism, the French authorities acknowledged, in 2006, that the furnishings in family rooms were not always adapted to infants (see paragraphs 56 to 58 above).

97. The Court notes that such findings have also been made by certain appellate courts, which in various rulings have observed that confinement in conditions such as those in the present case caused "great emotional and mental suffering" to minors, and that the "abnormal living conditions" imposed on very small children "exceeded the threshold of seriousness for the purposes of Article 3 of the Convention" (see paragraphs 43 to 45 above).

Having regard to the foregoing, the Court is of the opinion that the conditions in which the applicant children were held were not adapted to their age.

98. The Court reiterates that the detention of an alien must be carried out in good faith and the length of the detention should not exceed that reasonably required for the purpose pursued (see, *mutatis mutandis*, *Saadi v. the United Kingdom* [GC], no. 13229/03, § 74, ECHR 2008).

The Court observes that the various international texts recommend that the authorities should be required to implement all necessary means to limit, as far as possible, the duration of the detention of minors ...

99. Domestic law stipulates that the length of detention for aliens pending removal should be limited to the time strictly necessary to organise their departure ...

100. In the present case, the Court finds that the length of detention of the children, over a period of fifteen days, whilst not excessive *per se*, could be perceived by them as never-ending, bearing in mind that the facilities were ill-adapted to their accommodation and age.

101. In addition, the applicants maintained that detention in this ill-adapted centre had subjected the children, especially the eldest, to a situation of stress that had entailed mental distress.

The Court would observe, like the Government, that these allegations by the applicants have not been corroborated by any evidence. However, in view of its findings as to the unsuitability of the premises for the detention of children, the Court does not doubt that this situation created anxiety, psychological disturbance and degradation of the parental image in the eyes of the children.

102. It can be seen from the foregoing that the conditions in which the children were held, for fifteen days, in an adult environment, faced with a strong police presence, without any activities to keep them occupied, added to the parents' distress, were manifestly ill-adapted to their age. The two children, a small girl of three and a baby, found themselves in a situation of particular vulnerability, accentuated by the confinement. Those living conditions inevitably created for them a situation of stress and anxiety, with particularly traumatic consequences.

103. Accordingly, in view of the children's young age, the length of their detention and the conditions of their confinement in a detention centre, the Court is of the view that the authorities failed to take into account the inevitably harmful consequences for the children. It finds that the authorities' treatment of the children was not compatible with the provisions of the Convention and exceeded the threshold of seriousness for Article 3 of the Convention to be engaged. There has therefore been a violation of that Article in respect of the children.

(β) In respect of the parents

104. The Court would reiterate that the issue whether a parent qualifies as a "victim" of the ill-treatment of his or her child will depend on the existence of special factors which give the applicant's suffering a dimension and character distinct from the emotional distress which may be regarded as inevitably caused to relatives of a victim of a serious human rights violation. Relevant elements will include the proximity of the family tie – in that context, a certain weight will attach to the parent-child bond – the particular circumstances of the relationship and the way in which the authorities responded to the parent's enquiries. The essence of such a violation lies in the authorities' reactions and attitudes to the situation when it is brought to their attention. It is especially in respect of this latter factor that a parent may claim directly to be a victim of the authorities' conduct (see *Mubilanzila Mayeka and Kaniki Mitunga*, cited above, § 61, and *Muskhadzhiyeva and Others*, cited above, § 64).

105. As in the case of *Muskhadzhiyeva and Others*, the Court finds that, whilst the administrative detention of the applicants with their children in a centre could have created a feeling of powerlessness, together with anxiety

and frustration, the fact that they were not separated from their children during the detention must have provided some degree of relief from those feelings, such that the threshold required for a violation of Article 3 has not been reached. Accordingly, there has been no violation of Article 3 of the Convention in respect of the parents.

III. ALLEGED VIOLATION OF ARTICLE 5 § 1 (f) AND 5 § 4 OF THE CONVENTION

106. The applicants argued that their administrative detention from 27 August to 12 September 2007 had taken place in conditions and for a duration that entailed a breach of Article 5 § 1 (f). The present case also raises an issue under Article 5 § 4. Those provisions read as follows:

> "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 prescribed by law: ...
>
> (f) the lawful arrest or detention of a person 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.
>
> ...
>
> 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."

...

2. Merits

(a) The parties' submissions

108. The applicants noted that a measure of removal or placement in detention could not, in principle, be taken against minors. As the measure concerned the parents and not the children themselves, the detention of children therefore had no legal basis or safeguards.

109. They added that the alternative of entrusting children to the care of a third party, as mentioned by the Government, was only a theoretical possibility as it would inevitably entail the separation of families for an indefinite duration. The applicants inferred that, for this reason, detention was not reasonably necessary.

110. The Government did not dispute the fact that the administrative detention of illegal immigrants constituted a restriction on their freedom of movement. They observed, however, that in the present case the detention had been imposed in a context of deportation, a situation that was provided for in Article 5 § 1 (f) of the Convention. The Government argued that administrative detention was prescribed by law and strictly supervised in

domestic law. They were of the opinion that the French law on administrative detention had the "necessary qualities" and sufficient safeguards to preclude any risk of arbitrariness.

111. As regards the status of minors accompanying their parents, the Government pointed out that in the cases of *Mubilanzila Mayeka and Kaniki Mitunga* and *Muskhadzhivyeva and Others*, cited above, the Court took the view that the detention of minors in the context of Article 5 § 1 (f) was not unlawful *per se* provided there was some relationship between the ground of permitted deprivation of liberty relied on and the place and conditions of detention. They recognised, however, that in the present case, the minor applicants had not been placed in detention on a personal basis and that minors were usually protected against any removal measure. The Government explained that this restriction did not, however, prevent a minor from accompanying his or her parents in the detention centre when they were affected by a measure of removal.

112. The Government added that parents placed in detention could always opt for the alternative of entrusting their children to the care of third parties. They insisted that, in any event, the Rouen-Oissel centre was specifically adapted to the children's situation of vulnerability on account of their status and that their detention was thus compliant with the provisions of the Convention.

113. As to whether the applicants had a remedy, in accordance with Article 5 § 4 of the Convention, through which they could challenge the lawfulness of their detention, the Government observed that any individual who was placed in administrative detention by order of the prefect was entitled to challenge that decision before the administrative courts. During the detention, the liberties and detention judge reviewed its lawfulness after forty-eight hours and again after fifteen days. As regards the particular case of children who were not entitled to challenge a measure of detention that was not directed against them personally, the Government explained that parents could use such remedies on behalf of their minor children.

114. The Government observed that the liberties and detention judge of the Rouen *tribunal de grande instance* had ordered, on 29 August 2007, an extension of the detention for fifteen days, a decision that was upheld by the Rouen Court of Appeal on 30 August 2007. The ordinary courts had thus found that the applicants' detention for the period in question was not excessive within the meaning of Article 5 of the Convention.

(b) The Court's assessment

115. The Court observes that the period under consideration, during which the applicants were placed in an administrative detention centre, lasted from 28 August to 12 September 2007.

(i) Article 5 § 1 (f) of the Convention

116. The Court reiterates that all that is required for detention to be compatible with Article 5 § 1 (f) is that action is being taken with a view to deportation and that the detention is carried out for the purposes of enforcing the measure. It is therefore immaterial whether the underlying decision to expel can be justified under national or Convention law, or whether the detention was reasonably considered necessary, for example to prevent the person concerned from committing an offence or fleeing. Deprivation of liberty under Article 5 § 1 (f) will be justified only for as long as deportation proceedings are in progress (see *Chahal v. the United Kingdom*, 15 November 1996, §§ 112-113, *Reports of Judgments and Decisions* 1996-V).

117. Whilst the general rule set out in Article 5 § 1 is that everyone has the right to liberty, Article 5 § 1 (f) provides an exception to that general rule, permitting States to control the liberty of aliens in an immigration context. As the Court has remarked before, subject to their obligations under the Convention, States enjoy an "undeniable sovereign right to control aliens' entry into and residence in their territory" (see *Chahal*, cited above, § 73, and *Saadi*, cited above, § 64).

118. It is well established in the Court's case-law under the sub-paragraphs of Article 5 § 1 that any deprivation of liberty must, in addition to falling within one of the exceptions set out in sub-paragraphs (a)-(f), be "lawful" (see, among other authorities, *Winterwerp v. the Netherlands*, 24 October 1979, § 37, Series A no. 33; *Amuur*, cited above, § 50; and *Witold Litwa v. Poland*, no. 26629/95, § 78, ECHR 2000-III). The Court has already stated, in two cases concerning similar facts, that there must be some relationship between the ground of permitted deprivation of liberty relied on and the place and conditions of detention (see *Mubilanzila Mayeka and Kaniki Mitunga*, cited above, § 102, and *Muskhadzhivyeva and Others*, cited above, § 73); lastly, the length of the detention should not exceed that reasonably required for the purpose pursued (see *Saadi*, cited above, § 74, and *Rahimi*, cited above, § 106).

119. In the present case, the members of the family were held in administrative detention on account of the illegality of their presence in France, on premises that were not adapted to the children's extreme vulnerability (see paragraphs 93 et seq. above). The Court finds, as in the above-cited case of *Muskhadzhivyeva and Others*, that, in spite of the fact that they were accompanied by their parents, and even though the detention centre had a special wing for the accommodation of families, the children's particular situation was not examined and the authorities did not verify that the placement in administrative detention was a measure of last resort for which no alternative was available. The Court thus finds that the French system did not sufficiently protect their right to liberty.

120. As regards the parents, however, the Court observes that Article 5 § 1 (f) does not demand that the detention of a person against whom action is being taken with a view to deportation be reasonably considered necessary (see *Chahal*, cited above, § 112).

121. Consequently, the Court finds that there has been a violation of Article 5 § 1 (f) of the Convention in respect of the children.

(ii) Article 5 § 4 of the Convention

122. The Court reiterates that the notion of "lawfulness" under paragraph 4 of Article 5 has the same meaning as in paragraph 1, such that the detained person is entitled to a review of his detention in the light not only of the requirements of domestic law but also of the text of the Convention, the general principles embodied therein and the aim of the restrictions permitted by Article 5 § 1. Article 5 § 4 does not guarantee a right to judicial review of such breadth as to empower the court, on all aspects of the case including questions of pure expediency, to substitute its own discretion for that of the decision-making authority. The review should, however, be wide enough to bear on those conditions which are essential for the lawful detention of a person according to Article 5 § 1 (see *Chahal*, cited above, § 127; *S.D. v. Greece*, no. 53541/07, § 72, 11 June 2009; and *Rahimi*, cited above, § 113).

123. The Court observes that the applicant parents were able to challenge their detention before the domestic courts: they applied to the administrative court for the annulment of the decision imposing on them an obligation to leave the country and then, during the period of administrative detention, the liberties and detention judge and the Court of Appeal ruled on the lawfulness of the detention. In this connection, the Court notes that on 12 September 2007 the liberties and detention judge decided that the failure to enforce the applicants' removal could not be attributed to them and annulled the detention. The Court cannot but infer from this that the parents had the possibility of using a remedy by which to obtain a decision on the lawfulness of their detention. There has not therefore been a violation of Article 5 § 4 in respect of the parents.

124. However, the Court notes that the law does not provide for the possibility of placing minors in administrative detention. As a result, children "accompanying" their parents find themselves in a legal vacuum, preventing them from using any remedies available to their parents. In the present case, there had been no order of the prefect for their removal that they could have challenged before the courts. Similarly, there had been no decision ordering their placement in administrative detention and the liberties and detention judge was therefore unable to review the lawfulness of their presence in the administrative detention centre. The Court thus finds that they were not guaranteed the protection required by the Convention.

125. Accordingly, there has been a violation of Article 5 § 4 of the Convention in respect of the children.

IV. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

126. The applicants complained, firstly, that the order for their removal to Kazakhstan had constituted a disproportionate interference with their right to a private and family life. They argued, secondly, that their placement in detention had not been a necessary measure in relation to the aim pursued and that the conditions and duration of their detention had constituted a disproportionate interference with their right to a private and family life. They relied on Article 8 of the Convention, which reads as follows:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

...

B. The second head of the complaint

...

2. Merits

(a) The parties' submissions

130. The applicants argued that no aim could justify their placement in detention and that the measure had been disproportionate. They pointed out that they had provided sufficient guarantees that they would not abscond and could have been ordered to reside at a specific address; and whilst there was no question of separating parents from their children in the case of placement in detention, a compulsory residence order would nevertheless, in the present case, have been better suited to their situation.

131. The Government observed that the applicants had enjoyed material conditions of reception adapted to families and had been accommodated on premises that catered specially for that purpose. They further noted that the present case did not raise any issue of family reunification.

(b) The Court's assessment

132. The Court finds that there is no doubt as to the existence of "family life", within the meaning of the *Marckx v. Belgium* case-law (13 June 1979, Series A no. 31), in the present case, and this has not in fact been disputed by the Government. Article 8 is thus applicable to the situation complained of by the applicants.

133. The Court reiterates that the essential object of Article 8 is to protect the individual against arbitrary action by public authorities and this creates positive obligations inherent in effective "respect" for family life (see *Maire v. Portugal*, no. 48206/99, § 69, ECHR 2003-VII). States are under an obligation to "act in a manner calculated to allow those concerned to lead a normal family life" (see *Marckx*, cited above, § 31).

134. The Court is of the opinion that whilst mutual enjoyment by parent and child of each other's company constitutes a fundamental element of family life (see *Olsson v. Sweden* (no. 1), 24 March 1988, § 59, Series A no. 130), it cannot be inferred from this that the sole fact that the family unit is maintained necessarily guarantees respect for the right to a family life, particularly where the family is detained. It finds that the fact of confining the applicants to a detention centre, for fifteen days, thereby subjecting them to custodial living conditions typical of that kind of institution, can be regarded as an interference with the effective exercise of their family life.

135. Such an interference entails a violation of Article 8 of the Convention unless it can be justified under paragraph 2 of that Article, that is, if it is "in accordance with the law", pursues one or more of the aims enumerated in that provision, and is "necessary in a democratic society" for the fulfilment of the said aim or aims.

136. The Court observes that the legal basis for the detention of the parents was Article L. 554-1 of the Entry and Residence of Aliens and Right of Asylum Code (CESEDA).

137. As regards the aim pursued by the measure in question, the Court observes that it was taken in the context of the prevention of illegal immigration and the control of the entry and residence of aliens. The decision could have been in the interests of national security or the economic well-being of the country or, just as equally, intended to prevent disorder or crime. The Court therefore concludes that the interference pursued a legitimate aim for the purposes of Article 8 § 2 of the Convention.

138. The Court must further determine whether the family's placement in detention, for a duration such as that in the present case, was necessary within the meaning of Article 8 § 2 of the Convention, that is to say, whether it was justified by a pressing social need and, in particular, proportionate to the legitimate aim pursued (see *Mubilanzila Mayeka and Kaniki Mitunga*, cited above, § 80).

139. The Court would observe in this connection that the authorities have a duty to strike a fair balance between the competing interests of the

individual and of society as a whole (see *Keegan v. Ireland*, 26 May 1994, § 49, Series A no. 290). It emphasises that this balance should be guaranteed taking account of international conventions, in particular the Convention on the Rights of the Child (see, *mutatis mutandis*, *Wagner and J.M.W.L. v. Luxembourg*, no. 76240/01, § 120, 28 June 2007). The protection of fundamental rights and the constraints imposed by a State's immigration policy must therefore be reconciled.

140. A measure of confinement must therefore be proportionate to the aim pursued by the authorities, namely the enforcement of a removal decision in the present case. It can be seen from the Court's case-law that, where families are concerned, the authorities must, in assessing proportionality, take account of the child's best interests. In this connection the Court would point out that there is currently a broad consensus – including in international law – in support of the idea that in all decisions concerning children, their best interests must be paramount (see *Rahimi*, cited above, § 108, and, *mutatis mutandis*, *Neulinger and Shuruk v. Switzerland* [GC], no. 41615/07, § 135, ECHR 2010).

141. Under the international Convention on the Rights of the Child (Article 3) the best interests of the child must be a primary consideration in all actions concerning children. Similarly, the "reception" directive (see paragraph 60 above), as transposed in the CESEDA legislation, provides expressly that member States must ensure that the child's best interest is a primary consideration. It can also be seen from international reports (see above, under relevant international law) that the protection of the child's best interests involves both keeping the family together, as far as possible, and considering alternatives so that the detention of minors is only a measure of last resort ...

142. The Court notes that the French practice of keeping families pending their deportation in detention centres has been criticised and that France is one of only three European countries which systematically have recourse to the detention of accompanied immigrant minors (see the report of the LIBE Committee, paragraph 62 above).

143. The Court further observes that since 1999 the UNHCR has invited States to study all alternatives to detention in the case of children accompanying their parents and to have recourse to detention only where there is no other means of keeping the family together ...

144. The Court notes, lastly, that the CNDS (National Commission for Ethics and Security) and the *Défenseur des enfants* (Children's Defender) have, on various occasions, criticised the detention of children who have not committed any criminal offence, whether or not they are accompanied, calling for their best interests to be upheld. In their view, when the parents of minors are awaiting removal, a compulsory residence measure, or failing that, rented hotel accommodation, should be considered as a priority ...

145. In the present case, the applicants did not present any risk of absconding that required their detention. Their confinement in a secure centre did not therefore appear justified by a pressing social need, especially as their compulsory residence in a hotel during the first phase of their administrative detention does not seem to have caused any problems.

146. The Court finds that there is no indication in the material transmitted by the Government that any alternative to detention was envisaged, whether a compulsory residence measure or, as decided by the Maine-et-Loire prefecture, confinement in hotel accommodation (see paragraph 19 above). Neither does it appear that the authorities ever re-examined the possibility of confinement outside a detention centre during the period in question.

Lastly, it does not appear from the facts of the case that the authorities took all the necessary steps to enforce the removal measure as quickly as possible and thus limit the time spent in detention. The applicants were held for fifteen days without any flight being arranged for them.

147. The Court is aware that a similar complaint was previously declared inadmissible, concerning the detention of four children with their mother for a period of one month, with no alternative to detention having been envisaged (see *Muskhadzhivyeva and Others*, cited above). However, in view of the foregoing and the recent developments in the case-law concerning the "child's best interests" in the context of the detention of immigrant minors (see *Rahimi*, cited above), the Court cannot agree with the arguments of the Government claiming that the children's best interests were upheld in the present case. The Court is of the view that the child's best interests cannot be confined to keeping the family together and that the authorities have to take all the necessary steps to limit, as far as possible, the detention of families accompanied by children and effectively preserve the right to family life. In the absence of any indication to suggest that the family was going to abscond, the measure of detention for fifteen days in a secure centre appears disproportionate to the aim pursued.

148. Accordingly, the Court finds that the applicants sustained a disproportionate interference with their right to respect for their family life and that there has been a violation of Article 8 of the Convention.

...

FOR THESE REASONS, THE COURT

...

3. *Holds*, unanimously, that there has been a violation of Article 3 of the Convention in respect of the children, on account of their administrative detention;

4. *Holds*, by six votes to one, that there has been no violation of Article 3 of the Convention in respect of the parents, on account of their administrative detention;

5. *Holds*, unanimously, that there has been a violation of Article 5 §§ 1 and 4 of the Convention in respect of the children, on account of their administrative detention;

6. *Holds*, unanimously, that there has been a violation of Article 8 of the Convention in respect of all the applicants, on account of their administrative detention;

...

Done in French, and notified in writing on 19 January 2012, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek
Registrar

Dean Spielmann
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judge Power-Forde is annexed to this judgment.

D.S.
C.W.

PARTLY DISSENTING OPINION OF JUDGE POWER-FORDE

This case raises an important question concerning the requisite threshold of suffering which an individual must endure before a violation of Article 3 will be found. The majority accept that in view of their young age, the duration of their stay in a camp wholly unsuited to their needs and the conditions of their detention therein, the minor applicants were victims of a violation under Article 3. However, when it came to their parents, no such violation was found.

The question arises as to whether the subjection of parents to the helpless role of onlooker while their children are treated in a degrading and inhumane manner constitutes, in itself, a violation of Article 3. I take the view that, depending on the relevant circumstances, it could – and that, in this particular case, that factor, when combined with the general conditions in which the entire family was detained, resulted in a violation of the parents' rights under Article 3 of the Convention.

It is well established that for impugned behaviour to fall within the scope of Article 3 it must attain a minimum level of severity. The assessment of this minimum, of course, depends on all the circumstances of the case, such as, the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim.[1] The Court has considered treatment to be "degrading" when it arouses in its victims feelings of fear, anguish and inferiority capable of humiliating and debasing them and, possibly, of breaking their physical or moral resistance.[2] Treatment has been held to be "inhuman" because, *inter alia*, it was premeditated, was applied for hours at a stretch and caused either actual bodily or intense physical and mental suffering.[3] The threat of conduct prohibited by Article 3, provided it is sufficiently real and immediate, may be in conflict with that provision and may constitute, at the very least, inhuman treatment.[4] To my mind, the facts of this case are sufficient to establish that the threshold for the 'minimum level of severity' required under Article 3 has been crossed.

The first and second applicants were detained with their young infant and toddler in a detention centre at Rouen-Oissel. Their living quarters consisted of small room in which they "lived" for 15 days. They were fearful and distressed at the danger they faced upon being returned to Kazakhstan (a

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[1] *Ireland v. the United Kingdom*, 18 January 1978, § 162, and *Jalloh v. Germany* [GC], no. 54810/00, § 67, ECHR 2006-IX.

[2] *Keenan v. the United Kingdom*, no. 27229/95, § 110, ECHR 2001-III, and *Jalloh*, cited above, § 68.

[3] *Labita v. Italy* [GC], no. 26772/95, § 120, ECHR 2000-IV, and *Selmouni v. France* [GC], no. 25803/94, § 96, ECHR 1999-V.

[4] *Campbell and Cosans v. the United Kingdom*, 25 February 1982, § 26, Series A no. 48.

danger which the authorities ultimately accepted in granting their request for asylum). In this stressful state, they were shipped, back and forth, some considerable distance between Rouen-Oissel and Charles de Gaulle airport, as their deportations were arranged and then suddenly cancelled and then subsequently rearranged. This uncertainty coupled with the circumstances of their incarceration cannot but have compounded their anguish and fear and instilled within them feelings of inferiority capable of humiliating and debasing them.

The applicants were frightened young parents – 23 and 24 years old – and the second applicant's state of health was, at least, vulnerable having regard to her post-natal condition. Upon arrival at the centre, their personal belongings – including their infant baby's milk – were taken from them. They were obliged to stay in a tension-filled and promiscuous environment (see paragraph 77) or remain 'cooped up' in a small room with two young children. There was nothing for them to do for days on end but to wait, deprived as they were of the basic necessity of fresh air (paragraph 20) and the benefit of outdoor facilities where their toddler could play.

The alleged behaviour of the guards at this detention centre (which has not been denied by the Government) was, on any assessment, reprehensible. Verbally abusive to the second applicant, they humiliated her with accusations of being 'a bad mother' and they intimidated her by issuing threats to her little girl that she would be taken away from her parents and placed in care. This three-year-old child, understandably, suffered anguish, trauma and distress under such circumstances and she refused to eat. This, in itself, must have been a source of great concern for her young parents – who were powerless to do anything to relieve their child's distress.

In *Muskhadzhiyeva and Others v. Belgium* and *Kanagaratnam and Others v. Belgium* the Court did not find violations of Article 3 in respect of parents who were held in detention centres with their children.[1] However, these cases are distinguishable. The humiliating taunts that were levied against the young mother in this case, the menacing threats that were directed against her child and the overall treatment of these applicants in the conditions described at the Rouen-Oissel centre lead me to conclude that the parents' rights under Article 3 were also violated.

The majority find no violation in this regard. Their rationale is that the parents' anguish and frustration must have been appeased by the fact that they were not separated from their children (paragraph 105). With due respect, I cannot endorse this reasoning. The fact that their situation could have been worse does not, in itself, bring what transpired in this case below the threshold required. Furthermore, when it comes to treatment that is prohibited, absolutely, by Article 3, it can never be a question of "either/or".

[1] *Muskhadzhiyeva and Others v. Belgium*, no. 41442/07, 19 January 2010, and *Kanagaratnam and Others v. Belgium*, no. 15297/09, 13 December 2011.

Parents should not have to choose between either enduring the immense psychological suffering of having their children taken away from them so as to ensure that they will not be kept in conditions that violate Article 3 or enduring the immense psychological suffering involved in having to watch their children being treated in an inhumane and degrading manner whilst being powerless to do anything about it.

Persons in the position of the first and second applicants are entitled to be treated with dignity and respect. They have committed no crime. They have exercised their right to seek asylum in a country governed by the rule of law. At every stage in the asylum process they retain the dignity that inheres in every human being. States may be entitled, in accordance with law, to detain illegal immigrants pending deportation but they are not entitled to forget that they are detaining human beings who have the absolute right not to be subjected to inhuman or degrading treatment.

As is clear from the judgment, the Court of Appeal of Rennes (paragraphs 43 and 44) and the Court of Appeal of Toulouse (paragraph 45) recognise that, detaining a young mother and her husband with young children in the conditions described at the detention centre in Rouen-Oissel:

> "... constitutes inhuman treatment within the meaning of Article 3 of the European Convention on Human Rights on account, firstly, of the abnormal living conditions imposed on this very young child, virtually since birth, and secondly, of the great emotional and mental distress inflicted on the mother and father by detaining them with the infant, a distress which, by its nature and duration ..., exceeds the threshold of seriousness required for the above-mentioned provision to be engaged, and which, moreover, is manifestly disproportionate to the aim pursued ..."

In my view, this Court should have done likewise.