BEFORE THE THIRD SECTION
EUROPEAN COURT ON HUMAN RIGHTS

Bahoumou TOTOPA

v.

Spain

Application no. 74048/17

WRITTEN SUBMISSION ON BEHALF OF ADVICE ON INDIVIDUAL RIGHTS IN EUROPE (THE AIRE CENTRE), DUTCH COUNCIL FOR REFUGEES (DCR), THE EUROPEAN COUNCIL ON REFUGEES AND EXILES (ECRE) AND THE INTERNATIONAL COMMISSION OF JURISTS (ICJ)

INTERVENERS

pursuant to the Registrar's notification dated 13 November 2019 that the Court had granted permission under Rule 44 § 3 of the Rules of the European Court of Human Rights

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18 December 2019

Summary.

I. The interveners submit that there is a strong presumption under international human rights law, including the European Convention on Human Rights (ECHR) and this Court's jurisprudence and EU law, that family unity and the primacy of the best interests of the child are underlying substantive principles in the assessment of Contracting Parties' obligations under Article 8 ECHR where families are separated in the migration context. Such obligations entail accessible, effective measures to be adopted in order to facilitate family reunion and contact during separation between children and the family members with whom they have a *prima facie* right to enjoy family life. These measures should not be excessively formalistic, be taken with a view of facilitating family reunion and recognise a child's particular vulnerability in the migration context while respecting their best interests.

II. It is the interveners' submission that family ties cannot be equated with biological ties. When the particular circumstances of the case necessitate the proof of biological family ties, excessively rigid evidentiary requirements to verify such ties will undermine the effectiveness of the right to respect for family life. The principles of family unity and best interests of the child dictate that before resorting to invasive and insensitive methods of proving biological family ties, such as DNA testing, the Contracting Parties need to give proper weight to all other available evidence. DNA testing should never be undertaken as a routine practice and should only be used in cases where serious doubts may exist and where no other conclusive evidence is available to prove biological family ties.

III. The Contracting Parties are under an obligation to make all necessary arrangements to provide individuals with a remedy that is effective in speedily addressing complaints of unlawful family separation, including remedial actions that can rectify such situations by way of family reunion.

IV. Finally, the interveners reiterate that the Convention does not exist in vacuum. Article 53 ECHR stipulates that the Convention rights must be construed in accordance with other international human rights obligations of the Contracting Parties,[1] including the Convention on the Rights of the Child (CRC) and International Covenant on Civil and Political Rights (ICCPR), which have attracted near universal ratification. Moreover, Articles 8 and 13 ECHR must be interpreted in a manner consistent with EU law obligations binding on States as a matter of national law.

I. The right to respect for family life and the standards applying to family reunification procedures under international law including Article 8 ECHR

1. In the context of migration and displacement, the separation of families, particularly those with children, raises significant ethical, legal and public health concerns. In the absence of accessible and flexible options for families to stay together or of effective family reunification pathways, children frequently end up separated from their parents or attempt unsafe and irregular paths to reunify with family members. Such efforts include crossing the sea in rubber dinghy boats, traversing deserts by foot, and placing their lives in the hands of profit-oriented human smugglers, where they risk being trafficked into a situation of exploitation.[2]
2. Family separation has been found to carry highly adverse effects on migrants in vulnerable situations. The effects may include severe distress, sleeping or eating disorders, depression, anxiety, and feelings of guilt for leaving family members behind in dangerous situations.[3] Disrupting the caregiver-child relationship can also be highly stressful and damaging to very

[1] Pini and Ors v. Romania (No. 78028/01), 22 June 2004, para.138.
[2] UNICEF Working Paper, Family Unity in the Context of Migration, p.1 and 3: https://www.unicef.org/media/58341/file/Family%20unity%20issue%20brief.pdf
[3] The European Council on Refugees and Exiles and the Red Cross (2014), Disrupted Flight: The Realities of Separated Families in the EU, 2014: https://www.asylumlawdatabase.eu/en/content/ecre-and-red-cross-eu-office-disrupted-flight-realities-separated-refugee-families-eu

young children, with negative long-term consequences, including substance abuse, school failures, financial hardship and poor health.[4]

3. The family is entitled to respect and protection by the State under international law and standards, giving rise to legal obligations incumbent on Spain and other ECHR High Contracting Parties.[5] In this connection, this Court has also repeatedly stressed that "*family unity is an essential right of the refugee and that family reunification is a fundamental element in allowing persons who have fled persecution to return to normal life*".[6] Enjoyment of this right is, however, not limited to refugees. As recently reiterated by the Grand Chamber in a case concerning child adoption and removal of parental authority, *Strand Lobben and Others v. Norway:*[7]

   205. […] regard for family unity and for family reunification in the event of separation are inherent considerations in the right to respect for family life under Article 8. Accordingly, in the case of imposition of public care restricting family life, a positive duty lies on the authorities to take measures to facilitate family reunification as soon as reasonably feasible.[8]

4. In the migration context, respect for family unity and the right to family life necessarily entails allowing families to move together and separated families to reunify. When considering returns, as with other matters of public concern affecting children, primacy must always be given to the best interests of the child. [9]
5. The right to respect for private and family life as guaranteed in Article 8 ECHR essentially aims at protecting individuals from arbitrary interference by a public authority.[10] This Court has emphasized that it does not merely compel the State to abstain from such interferences, but that positive obligations inherent in an effective respect for private and family life may be engaged.[11]
6. This Court has also found that the mutual enjoyment by parent and child of each other's company is a fundamental element of family life within the meaning of Article 8 of the Convention. Even if the relationship between the parents has broken down, domestic measures hindering such enjoyment amount to an interference with the right protected by Article 8 of the Convention.[12]
7. This Court also repeatedly recognised specific ties between the mother and the child. In a case, where a child was unjustifiably taken into care and separated from her mother and the local authority failed to submit the issue to the court for determination, the Court found that the natural mother had been deprived of an adequate involvement in the decision-making process concerning the care of her daughter and thereby of the requisite protection of their interests, resulting in a failure to respect family life.[13]

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[4] American Academy of Pediatrics, 'Early Childhood Adversity, Toxic Stress, and the Role of the Pediatrician: Translating Developmental Science into Lifelong Health', Policy Statement, Pediatrics, Vol 129, January 2012, p. 224-25.

[5] See the Art. 16(3) UDHR, Art. 23(1) ICCPR, and Art. 17(1) American Convention on Human Rights, 1969; Art. 16 European Social Charter, 1961; and Art. 18(1) African Charter on Human and Peoples' Rights, 1981. The UN Convention on the Rights of the Child ('CRC') in Art. 2(1), 22(1) and 39, the International Covenant on Civil and Political Rights (ICCPR) in Art. 24 and the International Covenant on Economic, Social and Cultural Rights ('ICESCR') in Art.3 also all acknowledge the specific vulnerability and status of a child and the extreme vulnerability of children.

[6] Mugenzi v. France, no. 52701/09, para 54; Tanda-Muzinga v. France, no. 2260/10, para 75.

[7] Strand Lobben and Others v. Norway (GC), no. 37283/13, para. 205.

[8] See also, K. and T. v. Finland [GC], no. 25702/94, para 178.

[9] UNICEF Working Paper, Family Unity in the Context of Migration, p.1: https://www.unicef.org/media/58341/file/Family%20unity%20issue%20brief.pdf

[10] Similarly, the right not to be subject to arbitrary or unlawful interference with family, is protected, *inter alia*, by Article 17(1) of the ICCPR and in other instruments as outlined in thus submission. Further, Article 17(2) of the ICCPR affirms the right of everyone "*to the protection of the law against such interference or attacks*". The right to family life is reflected in the general preference for preserving the family unit and non-separation of its members, particularly dependent ones.

[11] Bédat v. Switzerland [GC], no. 56925/08, para. 7. It should be noted that in Spain, Ley Orgánica 1/1996, de 15 de enero, de Protección Jurídica del Menor Ley 26/2015, de 28 de julio, de modificación del sistema de protección a la infancia y a la adolescencia, in Art. 19 bis (4) and (5) specifically obliges the state entities responsible for the foreign unaccompanied minor to initiate the process of searching for their family where it is in the best interests of the child and will not put their security in danger. http://noticias.juridicas.com/base_datos/Privado/lo1-1996.t2.html#a19b

[12] K. and T. v. Finland (GC), no. 25702/94, para. 151; Marckx v Belgium, no. 6833/74, para. 31

[13] T.P. and K.M v United Kingdom, no. 28945/95, para. 83

8. Moreover, where children are involved, the right to family life covers not only relationships between biological parents and children but also where there may exist close personal ties,[14] that in the absence of a legally recognised parental relationship, may be demonstrated *inter alia* by the role played by the adults *vis-à-vis* the child, and the time spent together.[15] To illustrate, this Court found as amounting to family life relationships between a child and its grandparents; [16] non-biological parents; [17] uncles and aunts and nieces and nephews, particularly where parents have been absent[18] and evidence of elements of dependency, involving more than the normal emotional ties was present.[19]
9. While no universal definition of a family exists under international law, the UN Human Rights Committee, interpreting the ICCPR, has made clear that *"[…] family must be understood broadly*[20] *as to include all those comprising a family as understood in the society concerned. [..] Nor is the right to protection of family life necessarily displaced by geographical separation […]. However, there must first be a family bond to protect*." Similarly, the Committee on the Rights of the Child has construed the notion of family in the broad sense "[...] *to include biological, adoptive or foster parents or, where applicable, the members of the extended family or community as provided for by local custom (art. 5)*."[21]
10. **It is the interveners' submission that family ties cannot be equated with biological ties. When the particular circumstances of the case necessitate the proof of biological family ties, excessively rigid or unrealistic document requirements [22] will undermine the effectiveness of the right to family life. The principles of family unity and best interests of the child dictate that before resorting to invasive methods of proving biological family ties, the Contracting Parties need to take into account all relevant evidence which may include interviews with family members, any non-official documents they may provide, family photographs and videos, communication records and witness statements[23] and, above all, hearing and seeing the child himself or herself.[24]**
12. Indeed, an invasive and insensitive measure such as DNA testing, which is in addition not always available and affordable to migrants in vulnerable situations, should be used as a last resort, only where necessary and appropriate, and where serious doubts remain after all other evidence has been examined.[25] Where DNA testing is used, it should be with the full and informed consent of those involved and any material or other requirements involved should not obstruct the right to family life by making the exercise of it impossible or excessively difficult.
13. Any margin of appreciation that the State may enjoy in guaranteeing rights under Article 8, will be particularly limited, in cases that involve individuals in vulnerable situations, including victims of torture and trafficking, asylum applicants and children.[26]

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[14] Paradiso and Campanelli v. Italy [GC], no. 25358/12, para. 140.
[15] Moretti and Benedetti v. Italy, no. 16318/07, para. 48; Kopf and Liberda v. Austria, no. 1598/06, para. 37.
[16] L. v. Finland, no. 25651/94, para. 101; Manuello and Nevi v. Italy, no. 107/10, para. 54, 58-59.
[17] Sahin v. Germany [GC], no. 30943/96, para. 65; Sommerfeld v. Germany [GC], no. 31871/96, para. 63.
[18] Butt v. Norway, no. 47017/09, paras. 4 and 76; Jucius and Juciuvienė v. Lithuania, no. 14414/03, para. 27.
[19] *Mutatis mutandis* Slivenko v. Latvia [GC], no. 48321/99, para. 97
[20] Benjamin Ngambi and Marie-Louise Nébol, CCPR/C/81/D/1179/2003, para. 6.4; General comment No. 16: Article 17 (Right to privacy), para. 5. In Y B and N S v Belgium communication No. 12/2017, CRC/C/79/D/12/2017, para. 8.11. the Committee noted that the broad definition of a family is to include biological, adoptive or foster parents or, where applicable, the members of the extended family or community as provided for by local custom.
[21] UN Committee on the Rights of the Child (CRC), General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1), CRC /C/GC/14, para.59: https://www.refworld.org/docid/51a84b5e4.html
[22] See by analogy, Parliamentary Assembly Recommendation 1686 (2004) on Human mobility and the right to family reunion, available here: http://bit.ly/1YryCY7, para. 8(e).
[23] For example, for verification of family ties for the purpose of family reunion, CoE Committee of Ministers recommends that this be exercised in a 'positive, humane and expeditious manner' and that the verification of the existence of family ties can be based 'in any other way' apart from documents. Council of Europe Committee of Ministers Recommendation No. R (99) 23 of the Committee of Ministers to Member States on family reunion for refugees and other persons in need of international protection, 15 December 1999.
[24] Art. 12 UN CRC.
[25] See by analogy, UNHCR, UNHCR Note on DNA Testing to Establish Family Relationships in the Refugee Context, June 2008, available at: http://www.refworld.org/docid/48620c2d2.html, paras. 28, 12, 13.
[26] Tarakhel v. Switzerland, (GC), no. 29217/12, mutatis mutandis, para. 118 – 119; Alajos Kiss v. Hungary, no. 38832/06, 25 May 2010, para. 42. See also Kiyutin v. Russia, no. 2700/10, para. 74.

14. This Court has consistently held that children, due to their age and personal situation, are amongst the most vulnerable persons in society.[27] Respect for this heightened vulnerability must be a primary consideration, taking precedence over their irregular migration status[28] and entail a number of protective measures as guaranteed by ECHR, including under Article 8. This Court has recognised that vulnerability is not exclusively individual, but it is also the product of specific group-based experiences such as social, economic, political, and historical circumstances.[29] Under this Court's case law relating to children, their "extreme vulnerability" is recognised as the "decisive factor" in the broader migration context.[30] This is due to children's specific needs arising *inter alia* from their age, and lack of independence and maturity.[31]
15. The need for family unity is even more urgent when children are affected.[32]Any margin of appreciation will be more limited regarding questions of contact and information rights[33] and much narrower when it comes to prolonged separation of a parent and child, particularly where limitations entail the danger that the family relations between a young child and one or both parents would be effectively curtailed.[34] In such cases, States have an obligation to take effective measures to reunite parents and children.[35]
16. In relation to Article 8 ECHR, this Court has held that *"[w]here children are concerned, the national authorities must, in their review of proportionality for the purposes of the Convention give precedence to their best interests."*[36] It further recognized that it is in principle in a child's interest to preserve family ties, save where weighty reasons justify severing those ties.[37] Indeed, this Court has emphasized that the child's best interests must come before all other considerations, particularly in cases involving the care of children and contact.[38]
17. **The interveners submit that the separation of a young child from the family member who has been accompanying him/her is measure that requires justification through a transparent and recorded best interest's assessment. This need is even more compelling where the family has already undergone a hazardous and traumatizing journey. The assessment would need to show the measure as necessary, proportionate, and in the child's best interests, in the absence of alternatives that might have kept the child and the family member together.[39]**
18. **The interveners further submit there is a strong presumption that in the assessment of Contracting Parties' obligations under Article 8 where families are separated in the migration context the underlying substantive principles are of family unity and of the primacy of the best interests of the child. Such obligations entail accessible, effective measures to be adopted in order to facilitate contact between children and the family members with whom they have the *prima facie* right to enjoy family life. Such measures should not impose onerous formalistic requirements and should be taken with a view of facilitating family reunion.**

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[27] Mubilanzila Mayeka and Kaniki Mitunga v Belgium, (No. 13178/03), para. 53; X and Y v. the Netherlands, 26 March 1985, §§ 23-24 and 27, Series A no. 91
[28] Ibid, para. 55
[29] M.S.S. v. Belgium and Greece, (GC), no. 30696/09, para. 232, 251.
[30] Mubilanzila Mayeka and Kaniki Mitunga v. Belgium, no. 13178/03, 12 October 2006, § 55; Popov v. France, nos. 39472/07 and 39474/07, 19 January 2012, § 91.
[31] Mubilanzila Mayeka and Kaniki Mitunga v. Belgium, no. 13178/03, 12 October 2006, § 51
[32] The African Charter on the Rights and Welfare of the Child (1990), art XIX(1): ; the Vienna Declaration and Programme of Action (1993, adopted by the World Conference on Human Rights: The African Charter on the Rights and Welfare of the Child (1990) art. XIX(1): https://www.un.org/en/africa/osaa/pdf/au/afr_charter_rights_welfare_child_africa_1990.pdf; the Vienna Declaration and Programme of Action, 1993, adopted by the World Conference on Human Rights: https://www.ohchr.org/en/professionalinterest/pages/vienna.aspx
[33] Strand Lobben and others v Norway [GC], op. cit, para. 211.
[34] K. and T. v Finland, op. cit., Johansen v Norway, no. 17383/90.
[35] Elsholz v. Germany [GC], no. 25735/94; K.A. v. Finland, op. cit.
[36] Tanda-Muzinga v. France, no. 2260/10, para. 67 (citing Popov v. France, no. 39472/07 and 39474/07, para. 139; Berisha v. Switzerland, no. 948/12, para. 51); A.B. and Others v. France, no. 11593/12, para. 152. See also Article 24 of the Charter of Fundamental Rights of the European Union: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:12012P/TXT
[37] A.K. and L. v Croatia, no. 37956/11, para. 49.
[38] Jovanovic v Serbia, no. 21794/08, para. 77; Gnahore v France, no. 40031/98, para. 59.
[39] *Mutatis mutandis* K and T v Finland, op. cit. para. 166.

19. In assessing what is considered to be in the best interests of the child, the potential negative consequences of the separation from and lack of contact between a child and a close family member, and the positive duty to take measures to facilitate family reunification as soon as reasonably possible have to be both sufficiently weighed and reflected in the relevant decision by the Contracting Party.[40]
20. Indeed, the CRC as well as other international human rights treaties[41] oblige States to provide specific safeguards and guarantees for the protection and care of children. The best interest of the child principle requires that any decision-making process involving children includes an evaluation of the possible impact of the decision on the child's best interests.[42] The Committee on the Rights of the Child (CRC) has stated that, in the case of a displaced child, the "*best interest of the child*" principle must be respected during all stages of displacement.[43] Parallel to this best interests principle, as the Committee noted in its General Comment No 12 that "*it is urgent to fully implement [migrant children's] right to express their views on all aspects of the immigration and asylum proceedings. (…). A guardian or adviser should be appointed, free of charge*."[44]
21. Similarly, the Committee on the Elimination of all Forms of Discrimination Against Women (CEDAW) found that *" […] In order to demonstrate that the right of the child to have his or her best interests assessed and taken as a primary/paramount consideration, has been respected,* ***any decision concerning a child must be reasoned, justified and explained***".[45] [emphasis added]
22. The Committee on the Rights of the Child has stated that the elements to be taken into account when assessing and determining the child's best interests include preservation of the family environment and maintaining relations. It encompasses the preservation of the ties of the child in a wider sense. These ties apply to the extended family, such as grandparents, uncles/aunts as well friends, school and the wider environment and are particularly relevant in cases where parents are separated.[46]
23. Preventing family separation and preserving family unity are important components of the child protection system, and are based on the right provided for in Article 9 CRC, which requires "*that a child shall not be separated from his or her parents against their will, except when […] such separation is necessary for the best interests of the child*". Furthermore, the child who is separated from one or both parents is entitled "*to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests*". This extends to any person holding custody rights, legal or customary primary caregivers, foster parents and persons with whom the child has a strong personal relationship.
24. This Court has also affirmed that *"whilst Article 8 contains no explicit procedural requirements, the decision-making process leading to measures of interference must be fair and such as to afford due respect to the interests safeguarded by Article 8*".[47] In this regard, the quality of the decision-making process depends on the speed with which the Contracting Party takes action.[48]
25. This requirement of prompt and effective review of applications is also extended to the broader context of safeguarding the right to respect for family life under Article 8 of the Convention.[49]

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[40] CRC, General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1), 29 May 2013, CRC /C/GC/14, https://www.refworld.org/docid/51a84b5e4.html

[41] UN General Assembly, Convention on the Rights of the Child, op. cit., articles 2(1), 22(1) and 39; UN General Assembly, International Covenant on Civil and Political Rights, op. cit., article 24; and UN General Assembly, International Covenant on Economic, Social and Cultural Rights, 16 December 1966, United Nations Treaty Series vol. 993, p. 3, article 10.

[42] CRC, GC No. 14, op. cit., paras. 6(c) and 14(b).

[43] CRC, GC No. 6, op. cit., paras. 19 and 20. At any of these stages, a "best interest" determination must be documented in preparation of any decision fundamentally affecting the unaccompanied or separated child's situation, and should include a comprehensive assessment of the child's identity, upbringing, ethnic, cultural and linguistic background, particular vulnerabilities and protection needs.

[44] CRC, General comment No. 12 (2009): The right of the child to be heard, paras 123-124. https://www.refworld.org/docid/4ae562c52.html

[45] M.W. v Denmark, CEDAW/C/63/D/46/2012, para. 5.13.

[46] CRC General Comment no. 14, paras 52, 60, 66, 70.

[47] Cılız v. the Netherlands, no. 29192/95, ECHR 2000-VIII, para. 66; Saleck Bardi v. Spain, no. 66167/09, para. 30.

[48] *Mutatis mutandis* S.H. v Italy, no. 52557/14, para 42

[49] Tanda-Muzinga v. France, no. 2260/10, para. 82.

The Court has also stressed the "positive obligation" of Contracting Parties under Article 8 "*to establish an effective and accessible procedure to protect the right to private life* (...), *to ensure that his situation of insecurity is as short-lived as possible*".[50] Measures to reunite parent and child must be put in place promptly since the passage of time can cause irremediable damage to the relationship of separated children with their parents.[51]

26. The CRC and the UN Committee on Migrant Workers ("CMW") in their joint comment on children in the context of international migration (No. 4 and No. 23) stressed that States should facilitate family reunification procedures in order to complete them in an expeditious manner, in line with the best interests of the child.[52] The Convention on the Rights of the Child similarly requires that applications involving family reunification "*be dealt with by States Parties in a positive, humane and expeditious manner*".[53] In its General Comment No.19,[54]addressing the State obligations in respect of the ICCPR the Human Rights Committee acknowledged that "[...] *the possibility to live together implies the adoption of appropriate measures, both at the internal level and as the case may be, in cooperation with other States, to ensure the unity or reunification of families, particularly when their members are separated for political, economic or similar reasons.*"
27. **The interveners submit (i) that an abrupt separation from the adult relative who has been closely accompanying a child, and (ii) any acts and/or omissions by the Contracting Parties that result in delays in the registration and assessment of applications for family reunification, contravene the above legal obligations and standards and exacerbate the harmful impact of a family separation in the migration context. This causes an unnecessarily and excessively long family separation of migrants in vulnerable situations, including children. Such a practice renders the exercise of the right to family life illusory and damages the best interests of the child.**

II. The right to an effective remedy under Article 13 in family reunification cases.

28. The right to an effective remedy, a general principle of law enshrined in Article 13 of the Convention, guarantees the effective functioning of the Convention system.[55] This Court reiterated on numerous occasions that "*[t]he Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective.*"[56] Along with Articles 1 and 35 (1), Article 13 serves as the basis for the principle of subsidiarity by requiring the availability of a domestic remedy that applicants can resort to "*before having to set in motion the international machinery of complaint before the Court*".[57]
29. The remedy can be deemed effective when it is available in practice without it being compromised by acts and omissions of the domestic authorities.[58] Even where a national remedy is available and has been accessed by the applicant, the question of its effectiveness will still depend on whether authorities are willing and able to follow the procedure and comply with the outcome of a specific remedy that is able to address the applicant's situation. [59] With particular regard to family reunion cases, the Court has repeatedly stated that "*the understanding and cooperation of all concerned is always an important ingredient*" of any acts

[50] B.A.C. v. Greece, no. 11981/15, para. 46
[51] Saleck Bardi v. Spain, no. 66167/09, 2011, para. 52.
[52] Joint general comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 (2017) of the Committee on the Rights of the Child on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return, 16 Nov 2017 (paras 32-38).
[53] UN Convention on the Rights of the Child (1989) Art. 9(1), 10 (1) and 22.
[54] UN Human Rights Committee (HRC), CCPR General Comment No. 19: Article 23 (The Family) Protection of the Family, the Right to Marriage and Equality of the Spouses, 27 July 1990, para. 5: https://www.refworld.org/docid/45139bd74.html
[55] See, ICJ, The Right to a Remedy and Reparation for Gross Human Rights Violations, A Practitioners' Guide Revised Edition, 2018, for more detailed information: https://www.icj.org/wp-content/uploads/2018/11/Universal-Right-to-a-Remedy-Publications-Reports-Practitioners-Guides-2018-ENG.pdf
[56] Airey v. Ireland, no. 6289/73, para. 24; Perez, v. France, no. 47287/99, para. 80; Hirsi Jamaa and others v. Italy, no. 27765/09, 23 February 2012, para. 175;
[57] Kudła v. Poland, no. 30210/96, para. 152
[58] *Ibid,* para. 157; Ilhan v. Turkey, no. 22277/93, para. 97; De Souza Ribeiro v. France, no. 22689/07, para. 80
[59] Iatridis v. Greece, no. 31107/96, para. 66.

taken to reunite a child with a parent in accordance with a domestic procedure/remedy.[60] Moreover, the use of an effective domestic remedy may also be hindered by an "*extremely formalistic attitude*" on behalf of the authorities, for example administrative fees that are unreasonable in respect of a person's monthly income.[61] Regarding family relationships in the migration context, the Court has emphasised the need for a humane and flexible approach. In this regard, the Court has stressed that evidentiary requirements must not be applied strictly or in a way that lead to complex and lengthy procedures of reunification. [62]

30. The ICCPR also guarantees the right to have access to effective remedy against violations of the rights under the Covenant, including right not to be subjected to arbitrary or unlawful interference with family, and requires States to have an obligation to follow procedural safeguards to ensure that the right to a remedy remains effective in practice.[63] Such remedies should be effective and accessible and appropriately adapted so as to take account of the special vulnerability of certain categories of person, including in particular children.[64]

31. The interveners submit that, where remedies are available in law to address Article 8 complaints, barriers to their accessibility in practice and a high degree of demands that the procedure places on applicants are likely to preclude compliance with the effectiveness requirement of Article 13.

32. The factors to be included in the assessment of the effectiveness of a domestic remedy under Article 13 are, *inter alia*, situation under assessment and the right that is at stake. This Court highlighted that the scope of the States Parties' obligations under Article 13 will depend on the nature of the complaint under examination.[65] In the context of remedies under Article 13 addressing Article 8 complaints, any interpretation by this Court should take into account principles that have already been established under the procedural limb of Article 8. As highlighted under Section I, this Court has noted the narrow margin of appreciation that States enjoy in respect of separation of family members falling under the scope of Article 8.[66] More specifically, parental rights of access have been repeatedly considered as an interference that calls for a strict scrutiny, during which the Court attaches weight to "*whether the decision-making process sufficiently protected a parent's interests*" depending on the circumstances of each case,[67] or whether a "*relevant and sufficient*" reasoning provided the basis for a refusal to grant contact rights with a child.[68]

33. In cases of temporary parent-child separation, the Court has found a violation of Article 8 when the parent's involvement in the decision making was not sufficient,[69] or when the authorities imposed a visitation regime that put the natural evolution of family ties at risk and failed "*to take sufficient steps directed towards a possible reunification*".[70] Given the Court's strict position on the parents' right under Article 8 to participate in a procedure involving their separation from their child[71] and the obligation to provide sufficient and relevant reasoning for access-related decisions, an equally high level of scrutiny should be considered applicable to the question of whether an Article 13 remedy was effective in addressing a complaint in that regard.

34. As this Court has repeatedly found, an effective remedy under Article 13 should be examined in the light of the applicant's personal circumstances, while the general legal and political context that existing domestic remedies operate in will also determine their actual

[60] Mihailova v. Bulgaria, no. 35978/02, para. 82; Kosmopoulo v. Greece, no. 60457/00, para. 45; Ignaccolo Zenide v. Romania, no. 31679/96, para. 94
[61] G.R. v. The Netherlands, no. 22251/07, paras. 50-55
[62] Tanda-Muzinga v. France, no. 2260/10, para. 76
[63] Article 2 ICCCPR
[64] UN Human Rights Committee (HRC), General comment no. 31 [80], The nature of the general legal obligation imposed on States Parties to the Covenant, 26 May 2004, CCPR/C/21/Rev.1/Add.13, para.15: https://www.refworld.org/docid/478b26ae2.htm
[65] *Ibid*, in *Kudła* para. 157; Budayeva and Others v. Russia, no. 15339/02, para. 190-192.
[66] Gnahore v. France, no. 40031/98, para. 50. See also A.S. v Norway, no. 60371/15, para. 61; Abdi Ibrahim v Norway, no. 15379/16, para. 55.
[67] Sommerfeld v. Germany, no. 31871/96, paras. 63-68; Sahin v. Germany, no. 30943/96, paras. 65-68.
[68] Fröhlich v. Germany, no. 16112/15, para. 66.
[69] Elsholz v. Germany, no. 25735/94, para. 53.
[70] K. and T. v. Finland, op.cit. para. 179; K.A. v. Finland, no. 27751/95, paras. 139 and 146.
[71] *Mutatis mutandis*, T.P. and K.M v United Kingdom, no. 28945/95, para. 83.

effectiveness.[72] The Court has already confirmed the particular vulnerability of asylum-seekers following the traumatic experience of migration,[73] including the fact of irregular stay in a country they do not know.[74] In asylum cases touching upon Article 8, this Court has attached weight to the particular situation of persons fleeing their country, especially when children are involved.

35. In *Tanda-Muzinga v. France*, the Court noted its role in assessing Article 8 compliance when domestic authorities review the authenticity of documents from other countries but emphasised that the authorities were required "*to take account of the applicant's vulnerability and his particularly difficult personal history, to pay close attention to his arguments of relevance to the outcome of the dispute, to inform him of the reasons preventing family reunification, and, lastly, to take a rapid decision on the visa applications.*"[75]
36. In *Mayeka Mitunga*, this Court recognised the urgency of cases that involve unaccompanied foreign minors and emphasised that due to the child's age and status "*the Belgian State was under an obligation to facilitate the family's reunification.*"[76] Examining the exhaustion of domestic remedies in paternity identification cases, the Court has held that the individual's vulnerability must be taken into account, in that it may render applicants unable to correctly lodge a complaint or to instigate any domestic proceedings at all.[77]
37. By analogy, it follows that the irregular situation of separated family members in a foreign country, including any vulnerability and child considerations, requires the strict observance of safeguards to ensure that existing domestic remedies to complain about the separation are effective and practically accessible to them. Generally, the remedies of Article 13 should share "*the guarantees of flexibility, promptness and effectiveness*" [78] that the Court has already elaborated under Article 8 in the migration context.
38. The "*speediness of the remedial action itself*" has been described by this Court as requiring particular attention, as the lack thereof could undermine a remedy that would otherwise comply with Article 13.[79] Notably, the Court has specified that when "[…] *the length of the proceedings has a clear impact on the applicant's family life (and which thus fall to be examined under Article 8 of the Convention) the Court has considered that a more rigid approach is called for, which obliges the States to put into place a remedy which is at the same time preventive and compensatory* […]".[80] The latter reasoning was also followed in *Macready v. Czech Republic,*[81] where the Court assessed the compliance with Article 8 of procedures to return a child and specifically noted "[…] *that if the applicant had raised a complaint under Article 13, the same considerations should be applied to it*".[82]
39. By analogy with child custody cases, family separation cases should be dealt with in a speedy manner,[83] especially when they involve rights to visit and there is a risk of rupture of the family bond.[84] In a case against Spain, involving the return of a daughter from a temporary foster family back to her mother, the Court clearly stated that reunion measures "[…] *must be implemented quickly, as the passage of time can have irreparable consequences for the relationship between the child and that of the parents who do not live with the child."*[85] Moreover, in cases of international abduction, the Court has repeatedly stressed the obligation of the authorities to act expeditiously in order to reunite parent and a child[86] and has specifically pointed to Article 11 of the Hague Convention on the Civil Aspects of International Child

[72] Đorđević v. Croatia, no. 41526/10, para. 101.
[73] M.S.S. v. Belgium and Greece, op. cit, para. 232.
[74] Mubilanzila Mayeka and Kaniki Mitunga v. Belgium, no. 13178/03, para. 55.
[75] Tanda-Muzinga, op. cit, para. 75.
[76] Mubilanzila Mayeka and Kaniki Mitunga v. Belgium, op. cit, para. 85.
[77] A.M.M. v. Romania, no. 2151/10, para. 59; V.D. v. Romania, no 7078/02, 16 February 2010, para. 87.
[78] Tanda-Muzinga v. Belgium, op. cit, para. 82.
[79] Doran v. Ireland, Application no. 50389/99, para. 57.
[80] Kuppinger v. Germany, no. 62198/11, para. 137.
[81] Mcready v. Czech Republic, no. 4824/06, para. 48.
[82] *Ibid,* para. 51.
[83] Hokkanen v. Finland, no. 19823/92, para. 72.
[84] Tsikakis v. Germany, no. 1521/06, para. 68.
[85] Saleck Bardi v. Spain, no. 66167/09, para. 52; see also, Ignaccolo Zenide v. Romania, op. cit, para. 102.
[86] Bianchi v. Switzerland, no. 7548/04, para. 85; Pini and others v. Romania, op.cit.

Abduction,[87] which provides that the judicial or administrative authorities responsible for the return of the child may be required to provide a statement of reasons for the delay, if they fail to return the child in six weeks.[88] Furthermore, due regard should be had to the 1996 Hague Convention [89] expressly applicable to the situations involving "internationally displaced" children and the Council Regulation (EC) No 2201/2003[90]. Article 11.3 of the latter provides that the court dealing with the return of a child shall act expeditiously, using the most expeditious procedures available in national law. Articles 12 and 13 of the said Regulation reiterate the applicability of the 1996 Hague Convention to children in the migration context.

40. In *Bermann v. Czech Republic*, the Court affirmed that such considerations as those referred to in the *Macready* case above,[91] are not only applicable to situations of international child abduction "[…] *but also in other situations where the conduct or inactivity of the authorities in a proceeding affects the applicants' private or family life*".[92]

41. The interveners submit that Contracting Parties are under an obligation to make all necessary arrangements to provide individuals with a remedy that is practically accessible and effective in promptly addressing complaints of unlawful family separation, including remedial actions that can rectify such situations by way of family reunion.

III. Contracting Parties' obligations vis-à-vis separated families with children under EU law.

42. Under EU law applicable to interpreting rights under the Convention by virtue of Article 53 ECHR, the best interests of the child must also be a primary consideration in all decisions taken with regard to children.[93] Respect for this obligation requires children to have access to legal procedures and conditions which enable them to express their views freely.[94] Moreover, Article 8 of EU the Charter of Fundamental Rights (CFREU) and the EU Data Protection Regulation[95] require specific protection of child's personal data that includes genetic data, for example, obtained through DNA testing. It recognizes "*the risk to the rights and freedoms of natural persons, of varying likelihood and severity that may result from personal data processing which could lead to physical, material or non-material damage. This is particularly so, where personal data of vulnerable natural persons, in particular of children, are processed"*.[96]

43. By analogy, regard should be had to the fact that the European Commission acknowledges in its 2014 guidance on the application of the Family Reunification Directive that EU Member States have a certain margin of appreciation in deciding whether it is appropriate and necessary to verify evidence of the family relationship through interviews or other investigations, including DNA testing. However, the Commission reiterated that "*the appropriateness and necessity criteria imply that* ***such investigations are not allowed if***

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[87] Article 11, Convention of 25 October 1980 on the Civil Aspects of International Child Abduction: https://www.hcch.net/en/instruments/conventions/full-text/?cid=24

[88] Maire v. Portugal, no. 48206/99, para. 74.

[89] Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children, Articles 1, 3 and 6: https://www.hcch.net/en/instruments/conventions/full-text/?cid=70

[90] The Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32003R2201

[91] Mcready v. Czech Republic, op. cit.

[92] Bergmann v. Czech Republic, no. 8857/08, paras. 45-46.

[93] European Union, Charter of Fundamental Rights of the European Union, 26 October 2012, 2012/C 326/02, Article 24; and European Commission, Communication from the Commission to the European Parliament and the Council: The Protection of Children in Migration, COM(2017) 211 final.

[94] Joseba Andoni Aguirre Zarraga v. Simone Pelz, Case C- 491/10, paras. 65 and 66.

[95] Regulation (EU) 2016/679 of the European Parliament and the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC: https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:32016R0679 applicable in the instances of processing of personal data under EU law.

[96] Ibid, Recital 75.

there are other suitable and less restrictive means to establish the existence of a family relationship."[97] [emphasis added]

44. Furthermore, the CFREU accords the family legal, economic and social protection and recognizes the right to family life.[98] On numerous occasions the EU Court of Justice found that Article 7 of the Charter must be read in conjunction with the obligation to take into consideration the best interests of the child, which are recognised in Article 24(2) thereof.[99] In other words, the Member States must make the best interests of the child a paramount consideration when, acting through public or private authorities, they issue a legislative act or procedural decision relating to children.[100]
45. In that context, the national court must carry out an in-depth examination of the family situation and take due account of the particular circumstances of the case, whether they are of a factual, emotional, psychological, or financial nature.[101] When giving interpretation to family ties necessary to establish family life, the CJEU accorded particular importance to the situation of dependency. To illustrate, in a case concerning a reunification of a child placed under the Algerian kafala system and her parent-guardians, who are citizens of the Union, the Court found that a genuine family life, dependency of a child on its guardians, the requirements relating to the fundamental right to respect for family life, combined with the obligation to take account of the best interests of the child, demand that the child is enabled to live with its guardians in their host Member State.[102]
46. Finally, the Charter also enshrines guarantees fundamental to the issues under consideration, such as the protection of human dignity (Article 1), and right to an effective remedy and to a fair trial (Article 47).
47. **The Interveners conclude that in cases of family separation, particularly those involving children in a migration context, EU law requires national authorities to carry out a fair assessment of all relevant facts and circumstances of the case with due regard to the fundamental right to respect for family life and to expeditiously determine a solution for the family while respecting the primacy of the best interests of the child.**

[97] European Commission, Guidance for application of Directive 2003/86/EC on the right to family reunification,2014, p. 9.
[98] European Union, Charter of Fundamental Rights of the European Union, 26 October 2012, 2012/C 326/02, Articles 7 and 33.
[99] Parliament v Council, C 540/03, para. 58; Detiček, C 403/09 PPU, para. 54; Chavez-Vilchez and Others, C 133/15, para.70
[100] SM v Entry Clearance Officer, UK Visa Section, C-129/18, para. 68.
[101] Advocate General Opinion in Joined Cases C-356/11 and C-357/11, O (C-356/11), S v Maahanmuuttovirasto and Maahanmuuttovirasto (C-357/11) v L, para. 90
[102] C-129/18, op. cit.