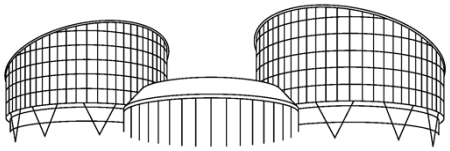

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIRST SECTION

CASE OF M.H. AND OTHERS v. CROATIA

(Applications nos. 15670/18 and 43115/18)

JUDGMENT

Art 2 (procedural) • Ineffective investigation into child's death after alleged denial of opportunity to seek asylum and order by Croatian police to return to Serbia following train tracks Art 3 (substantive) • Degrading treatment • Child applicants kept in immigration centre with prison-type elements for more than two months in material conditions adequate for the adult applicants Art 5 § 1 • Lawful detention • Failure to demonstrate required assessment, vigilance and expedition in proceedings in order to limit family detention as far as possible Art 34 • Effective exercise of individual petition hindered through restriction of contact with chosen lawyer, and pressure placed on lawyer aimed at discouraging pursuit of case Art 4 P4 • Collective expulsion • Summary return of parent and six children by Croatian police outside official border crossing and without prior notification of Serbian authorities

STRASBOURG

18 November 2021

FINAL

04/04/2022

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of M.H. and Others v. Croatia,

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

Péter Paczolay, *President,*
Ksenija Turković,
Krzysztof Wojtyczek,
Alena Poláčková,
Gilberto Felici,
Erik Wennerström,
Raffaele Sabato, *judges,*
and Liv Tigerstedt, *Deputy Section Registrar,*

Having regard to:

the applications (nos. 15670/18 and 43115/18) against the Republic of Croatia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by fourteen Afghan nationals, Ms M.H. ("the first applicant"), Mr R.H. ("the second applicant"), Ms F.H. ("the third applicant"), Ms N.H. ("the fourth applicant") and ten other applicants, whose details are given in the appendix;

the decision to give notice to the Croatian Government ("the Government") of the complaints under Articles 2, 3, 5 §§ 1 and 4, 8, 14 and 34 of the Convention, Article 4 of Protocol No. 4 and Article 1 of Protocol No. 12, and to declare the remainder of the applications inadmissible;

the decision not to have the applicants' names disclosed (Rule 47 § 4 of the Rules of Court);

the decision to give priority to the applications (Rule 41);

the observations submitted by the respondent Government and the observations in reply submitted by the applicants;

the parties' further observations in the light of the Court's judgment in the case of *N.D. and N.T. v. Spain* ([GC], nos. 8675/15 and 8697/15, 13 February 2020);

the comments submitted by the Hungarian Helsinki Committee, the Centre for Peace Studies, the Belgrade Centre for Human Rights, Rigardu e.V. and the Asylum Protection Center, who were granted leave to intervene by the President of the Section;

Having deliberated in private on 6 July 2021 and 12 October 2021,

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

INTRODUCTION

1. The case concerns the death of a six-year-old Afghan child, MAD.H., near the Croatian-Serbian border, the lawfulness and conditions of the applicants' placement in a transit immigration centre, the applicants' alleged

summary removals from Croatian territory, and the respondent State's alleged hindrance of the effective exercise of the applicants' right of individual application.

THE FACTS

2. The applicants, who had been granted legal aid, were represented by Ms S. Bezbradica Jelavić, a lawyer practising in Zagreb.

3. The Government were represented by their Agent, Ms S. Stažnik.

4. The facts of the case, as submitted by the parties, may be summarised as follows.

I. BACKGROUND TO THE CASE

5. The applicants are an Afghan family of fourteen. The second applicant is the father of the family. The first and third applicants are his wives. The remaining applicants are the children of the first and second applicants, and of the second and third applicants. Their details are set out in the appendix.

6. According to the applicants, in 2016 they left their home country, Afghanistan. Before coming to Croatia, they travelled through Pakistan, Iran, Turkey, Bulgaria and Serbia.

II. EVENTS OF 21 NOVEMBER 2017

7. According to the applicants, on 21 November 2017 the first applicant and her six children (the ninth, tenth, twelfth, thirteenth and fourteenth applicants and MAD.H.), entered Croatia from Serbia together with one adult man named N. The other applicants remained in Serbia. The Croatian police officers approached the group while they were resting in a field. The group told the police officers that they wished to seek asylum, but the officers ignored their request, ordered them to get in the vehicle and took them to the border. At the border the police officers told them to go back to Serbia by following the train tracks. The group started walking and after several minutes a train passed and hit one of the children, MAD.H. The police officers with whom they had previously been talking had taken them to the Tovarnik railway station where a doctor established that MAD.H. had died. The group then returned to Serbia.

8. According to the Government, at around 8 p.m. on 21 November 2017 the Croatian border police officers spotted a group of migrants with a thermographic camera while they were in Serbian territory, 300 metres from the Croatian-Serbian border. They were walking along the train tracks, using them as a guide for the direction to reach Croatia. The area was under constant surveillance owing to the frequent attempts by migrants to illegally

cross the border there. At that moment a train appeared, travelling from Croatia to Serbia. The police officers heard the train sounding its horn and braking. Shortly afterwards, a man and a woman came running to the border, carrying a child with visible head injuries. The police officers immediately called an ambulance and transported the woman and the child to the car park at Tovarnik railway station. The rest of the group stayed at the border without entering Croatia. The emergency medical team attempted to resuscitate the child, but at 9.10 p.m. the doctor established that she had died. The first applicant voluntarily returned to the border to the other members of the group and they all returned to Šid in Serbia. None of them sought asylum from the Croatian authorities.

III. CRIMINAL INVESTIGATION INTO THE DEATH OF MAD.H.

9. MAD.H.'s death was heavily covered by the national and international media.

10. On 22 December 2017 the lawyer S. Bezbradica Jelavić (hereinafter S.B.J.) lodged a criminal complaint on behalf of the first and second applicants and five of the child applicants against unidentified Croatian border police officers, on charges of causing death by negligence, abuse of office and authority, torture and other cruel, inhuman and degrading treatment and breaching the rights of the child. The complaint stated that on the night of 21 November 2017, after encountering them on Croatian territory, the Croatian police officers had denied the first applicant and her six children any possibility of seeking asylum, and had ordered them to return to Serbia by following the train tracks, after which MAD.H. had been hit by a train and died.

11. On 30 January 2018 the police reported to the Vukovar County State Attorney's Office that the recordings of the thermographic camera by means of which the applicants had been spotted could not be submitted because the storage system had been broken at the material time. They enclosed statements of police officers on duty on 21 November 2017 and of the doctor who had attempted to resuscitate the child.

According to the report submitted on 22 November 2017 by police officers A., B. and C., at around 8 p.m. the previous day, while conducting surveillance of the Croatian-Serbian border by using a thermographic camera, they had spotted a group of persons some 300 metres inside Serbian territory. After about fifteen seconds they heard a train passing in the direction of Serbia, sounding its horn and braking. A man and a woman then came running to the border carrying a child with visible head injuries. The officers immediately called an ambulance. Officers A. and B. took the woman and the child by car to Tovarnik railway station, while officer C. and the other police officers who had arrived in the meantime stayed at the border with the rest of the group.

On 16 January 2018 M.E., the doctor who had attempted to resuscitate MAD.H., stated that when she arrived at Tovarnik railway station at 8.36 p.m., there had been several police officers and a police van with several migrants inside. Next to the van was a man holding a child.

12. On 23 January 2018 the Croatian Ombudswoman (*Pučka pravobraniteljica Republike Hrvatske*) sent a letter to the State Attorney of the Republic of Croatia (*Glavni državni odvjetnik Republike Hrvatske*) informing him that she had conducted an inquiry into MAD.H.'s death. She noted that the applicants and the police officers had reported differently on the sequence of events and that there had been no thermographic camera recordings of the event, as had been the situation in previous cases in which she had sought to obtain such recordings. She suggested that the contact between the applicants and the police before the train had hit MAD.H. be established by inspecting the signals from their mobile telephones and the police car GPS (see paragraph 104 below).

13. On 9 February 2018 the Vukovar County State Attorney's Office heard police officers B. and C. They stated that once the group of migrants had come within approximately 50 metres of the border, all three police officers came to the border and made signals to the group with lights and sirens, warning them not to cross it. Seeing their signals, the group had not entered Croatian territory; they had turned back, and soon afterwards the police officers had heard the train braking. They further stated that the thermographic camera by means of which they had spotted the applicants had no capacity to store content. The only camera with storage capacity was the one installed at Tovarnik railway station, controlled by police officer D.

14. On 9 February 2018 the train driver submitted that some 100 metres after entering Serbian territory he had spotted a group of migrants walking along the train tracks in the direction of Šid. He had sounded the horn and braked, but one child had not moved from the tracks and the train had hit her.

15. On 16 February 2018 the Vukovar County State Attorney's Office heard police officer D., who was monitoring the Croatian-Serbian border with two cameras on the date in question. Around 8 p.m. a colleague informed him that a train had stopped close to the tracks. He pointed his camera in that direction and saw a train in Serbian territory and two persons approaching the border. He did not know what exactly had happened because at that time he had not had the cameras directed towards that area. He submitted that both cameras had been broken for one year before the event, that they were still out of order, and that therefore it was not possible to view or download their recorded content.

16. On 31 March 2018 the investigating judge of the Vukovar County Court heard the first applicant. She submitted as in paragraph 7 above and added that her husband, the second applicant, had not been with them that night but had stayed in Serbia.

On the same day the second applicant submitted that he had been with the group on the night in question when they had crossed the Croatian border and were returned by the Croatian police.

On the same day the first and second applicants informed the investigating judge that they had signed a power of attorney in favour of the lawyer S.B.J., while they were in Serbia.

17. On 14 April 2018 S.B.J., on behalf of the applicants, asked the Vukovar County State Attorney's Office about the progress of the investigation. She proposed investigating the "loss" of recordings by the thermographic cameras, which could have helped establish whether the applicants had entered Croatian territory. On 19 April 2018 the State Attorney's Office refused to provide any information to the lawyer on the grounds that she had no valid power of attorney to represent the applicants. On 24 April 2018 S.B.J. submitted that her power of attorney was valid, and that on 31 March 2018 the first and second applicants had confirmed to the investigating judge that they had signed the power of attorney in her favour (see paragraph 16 above).

18. On 17 May 2018 the Vukovar Criminal Police forwarded to the Vukovar County State Attorney's Office documents obtained from Interpol Belgrade in relation to the events of 21 November 2017.

According to a note drawn up by the Serbian police on 22 November 2017 at 1.30 a.m., RA.H., the thirteenth applicant, submitted that on 21 November 2017 he and his family had entered Croatian territory. They had been walking for several hours when the police had stopped them, made them board a van, transported them to the border and told them to return to Serbia by following the train tracks.

According to the documents concerning the on-site inspection, the train accident occurred some 200 metres from the border with Croatia.

19. On 1 June 2018 the Office for the Suppression of Corruption and Organised Crime (*Ured za suzbijanje korupcije i organiziranog kriminala* – "the OSCOC") rejected the applicants' criminal complaint against police officers A., B. and C. The decision was served on S.B.J. as the applicants' representative. The relevant part of the decision reads:

> "The information gathered indicated that on the critical occasion the suspects – the police officers of the Tovarnik border police station ... – were [on duty] at surveillance point no. 2 on the Tovarnik-Šid railway line. With the help of a manual thermographic camera – which, as transpires from the information gathered, did not have the technical facility for storing content – they spotted a group of persons by the train tracks in Serbian territory. The group did not enter Croatian territory, nor did the suspects have any direct contact with them prior to the train hitting the child MAD.H. ...
>
> In the present case, during the incident in question the suspects were conducting surveillance of the State border, which includes controlling and protecting the State border. The suspects were conducting those tasks in accordance with the law and international standards.

> Relying on the results of the proceedings, and having regard in particular to the statements of presumed witnesses – the police officers who were on duty on the critical occasion – who gave concurring statements, whereas the statements of the witnesses [the first, second and thirteenth applicants] differed as regards crucial facts and contradicted the other information gathered, it does not transpire that the suspects conducted actions in their service in respect of [the applicants] and the late MAD.H., or failed to conduct any due action, which would have had the consequence of violating any of their rights, that is to say of having had any consequences detrimental to the [applicants] and MAD.H. ..."

20. On 14 June 2018 the applicants took over the prosecution and asked the investigating judge of the Osijek County Court (*Županijski sud u Osijeku*) to conduct an investigation. They submitted that the OSCOC had not explained why their statements had been contradictory. They proposed obtaining recordings of the thermographic cameras, an expert report on their functioning, whether they had recorded the events of 21 November 2017 and whether their recorded content had been deleted, the GPS location of the suspects and the applicants, Croatian police instructions on practice in dealing with illegal migrants, and reports of national and international organisations on Croatian police practice *vis-à-vis* asylum-seekers. Lastly, they submitted that the Serbian authorities had established that the Croatian authorities had forcefully returned the first applicant and her children to Serbia on 21 November 2017 in breach of the readmission agreement between the two countries.

21. On 22 August 2018 the investigating judge dismissed the applicants' request on the grounds that the allegations against the three police officers had not been supported by evidence. The evidence gathered showed that the group had never crossed the border and entered Croatia, talked to the Croatian police officers or sought asylum. The police officers had lawfully deterred the applicants from crossing the border by signalling to them with lights and lamps not to enter and their conduct had been unrelated to the train hitting the child. The first and second applicants' statements had been contradictory as regards the relevant facts, since the second applicant had stated that he had been with the group at the material time, whereas according to the first applicant and the Serbian police reports, the second applicant had stayed in Serbia.

22. On 30 August 2018 the applicants lodged an appeal with the Osijek County Court appeal panel.

23. Meanwhile, on 6 April 2018, they had lodged a constitutional complaint with the Constitutional Court (*Ustavni sud Republike Hrvatske*), complaining, *inter alia*, of the lack of an effective investigation into the death of MAD.H.

24. On 18 December 2018 the Constitutional Court examined the complaint under the procedural limb of Article 2 of the Convention and found that the investigation into the death of MAD.H. had been effective. The competent authorities made inquiries into the applicants' criminal

complaint of December 2017, examined all possible leads and established that there was no reasonable suspicion that the Croatian police officers had committed criminal offences in respect of the applicants or the late MAD.H. The applicants' criminal complaint had been rejected within the statutory time-limit, after which they had taken over the prosecution. The applicants had an effective remedy for their complaint concerning the alleged ineffectiveness of the investigation; they could have sought information from the competent State Attorney about the actions undertaken in relation to their criminal complaint, and they were also able to lodge a constitutional complaint, which was examined.

25. Three Constitutional Court judges appended a separate opinion to that decision, stating that the examination of the effectiveness of the investigation into the death of a child should not have been reduced to mere procedural formalism. The authorities had not considered the possibility that the discrepancy between the first and second applicants' statements had been the result of a translation error.

In the three judges' view, it was not credible that a group of migrants would simply turn around and give up on their plan to cross the border owing to the mere presence of police officers, without trying to communicate with them in any manner or express their wish to seek asylum, as usually happened at that border crossing point.

The three judges further noted that the investigating authorities had ignored the fact that the Ministry of the Interior of the Republic of Serbia had publicly stated that "the Croatian police did not comply with the readmission agreement when forcefully returning the family of ... MAD.H., who died in a train accident ... immediately after the Croatian police officers had forcefully tried to return her to Serbia" and that "at the meeting held concerning the event, the representatives of the [Serbian] Border Police Administration had informed the Croatian [authorities] of their point of view, namely that the family of the late child had been transferred to Serbia from Croatia contrary to the agreement between the two countries". The three judges noted that the latter statement had been in the case file, but that the investigating authorities had not referred to it in their decisions.

Finally, the investigating authorities had not explored whether the impugned events had been recorded by any kind of recording device. It did not transpire from the case file whether they had tried to verify the location of the applicants and the police officers by using their mobile telephone signals, which had been a common and easy investigative method. The Croatian Ombudswoman had pointed to the same deficiencies in the investigation in question, as well as to deficiencies in other cases concerning asylum-seekers in Croatia (see paragraphs 12 above and 104 below).

26. On 20 December 2018 the Osijek County Court appeal panel dismissed the applicants' appeal (see paragraph 22 above). It held that the

case file did not contain any information to support the accusations against the three police officers.

27. On 4 March 2021 the Constitutional Court dismissed a subsequent constitutional complaint lodged by the applicants against the Osijek County Court's decision. It reiterated that the investigation into MAD.H.'s death had complied with the procedural requirements of Article 2 of the Convention. In particular, the fact that the recordings from the thermographic cameras had not been obtained had not affected the thoroughness of the investigation, as even without the recordings it was clear that MAD.H. had been hit by a train in the territory of Serbia, not Croatia. Even though there had been some delay in the applicants' ability to contact their lawyer upon entering Croatia (see paragraphs 56-66 below), the applicants had been able to participate effectively in the investigation. The Constitutional Court also found no breach of Article 2 of the Convention in its substantive aspect in that it had not been proven that the State authorities had been responsible for the death of MAD.H.

IV. THE APPLICANTS' ENTRY TO CROATIA ON 21 MARCH 2018

28. On 21 March 2018 the Croatian police caught the applicants clandestinely crossing the Serbian-Croatian border and took them to Vrbanja Police Station (*Policijska uprava Vukovarsko-srijemska*, *Policijska postaja Vrbanja*). They were examined by a doctor and found to be in good health. The doctor noted, *inter alia*, that the fourth applicant was seventeen years old. The applicants did not have any identification documents with them. They signed a statement on their personal identification information and expressed a wish to seek international protection.

V. THE APPLICANTS' PLACEMENT IN THE TOVARNIK CENTRE

29. On 21 March 2018 the police issued decisions in respect of the first to fourth applicants, restricting their freedom of movement and placing them and the applicant children in a transit immigration centre in Tovarnik (*Tranzitni prihvatni centar za strance Tovarnik* – hereafter "the Tovarnik Centre") for an initial period of three months. The decisions stated that on 21 March 2018 the applicants, Afghan citizens, had expressed an intention to seek international protection in Croatia. They had not had any identification documents and their freedom had been restricted under section 54 of the International and Temporary Protection Act (*Zakon o međunarodnoj i privremenoj zaštiti*; see paragraph 78 below), in order to verify their identities. On the same day the applicants were placed in the Tovarnik Centre.

30. On 26 March 2018 the second applicant contacted the Are You Syrious NGO via Facebook. He stated that the family was in a bad situation, locked up in their rooms without any information, and asked for help.

31. On 3 April 2018 the fourth applicant sent several voice messages to L.H., an employee of the Centre for Peace Studies NGO. She stated that they were being kept in prison-like conditions. They were placed in three rooms without any opportunity to see each other except during meals. They had been told that they had no lawyer in Croatia, even though the first applicant had confirmed to the officials that she had signed a paper with a lawyer in Serbia.

32. On 28 March and 6 April 2018, a psychologist visited the applicants in the Tovarnik Centre. The fourth applicant, who spoke some English, translated for the others. The psychologist noted that the applicants were mourning the death of MAD.H. and that they had been experiencing fear of uncertainty. He recommended providing them with further psychological support and organising activities to occupy the children's time. He visited them again on 13, 18 and 27 April and 2, 8, 11, 23 and 25 May 2018.

33. On 6 April 2018 the Croatian Ombudswoman sent a letter to the Minister of the Interior (*Ministar unutarnjih poslova Republike Hrvatske*) and the Head of Police (*Glavni ravnatelj policije*) concerning the applicants' restriction of freedom of movement. She asked about the action taken to verify the applicants' identity, which had been the reason for their placement in the Tovarnik Centre (see paragraph 105 below).

34. On 10 April 2018 the authorities took the applicants' fingerprints and transmitted them to the Central Unit of Eurodac (the European Union (EU) fingerprint database for identifying asylum-seekers). The Eurodac search system identified that the applicants had entered Bulgaria on 22 August 2016. On the same day the authorities sought information from Interpol Sofia and Interpol Belgrade on the applicants' stay in those countries, with a view to checking their identities.

On 23 April 2018 Interpol Sofia informed the Croatian authorities that the applicants had applied for asylum in Bulgaria and that their applications had been rejected in February and March 2017. The applicants' names as registered in the Bulgarian system differed from those registered in the Croatian system, mostly in the suffix of their last name. In the Bulgarian system the fourth applicant was registered as being born on 16 April 2000.

On 30 April 2018 the Serbian authorities informed the Croatian authorities that the applicants had expressed an intention to seek international protection in Serbia, but that they had left that country on 21 March 2018.

35. Meanwhile, on 19 April 2018 the lawyer I.C. asked the Osijek Administrative Court (*Upravni sud u Osijeku*) to restore the proceedings concerning restrictions on the applicants' freedom of movement to the

status quo ante (*prijedlog za povrat u prijašnje stanje*) and to authorise the applicants to lodge administrative actions against them.

She submitted that on 30 March 2018 she had been appointed as the applicants' legal aid lawyer in the proceedings concerning their application for international protection (see paragraph 51 below). On 3 April 2018 she had inspected the case file and discovered the decisions of 21 March 2018 restricting the applicants' freedom of movement. On 12 April 2018 she visited the applicants in the Tovarnik Centre, who told her that they had not been served with the decisions and could not understand them. She inspected the case file again and learned that the disputed decisions and the document informing the applicants of their right to legal aid issued in the Croatian language had not been served on them with the help of an interpreter for Pashto or Farsi, which languages the applicants could understand.

I.C. further submitted that the applicants had not hidden their identity and had given their fingerprints to the authorities and that placing the applicants in a closed-type immigration centre had been in breach of Article 3 of the Convention.

36. On 10 May 2018 Vrbanja Police Station replied to the applicants' administrative actions. The mere submission of their personal identification information and fingerprinting had been insufficient to establish their identities. They had not been registered in the Schengen or Eurodac systems. The applicants said to the Croatian authorities that they had not sought asylum in other countries, whereas it had emerged that they had applied for asylum in Bulgaria and Serbia. Vrbanja Police Station deemed that restricting the applicants' freedom of movement had also been justified by a flight risk pursuant to section 54(2)(1) of the International and Temporary Protection Act, in that it was possible that the applicants would leave Croatia for other countries.

37. By decisions of 11 and 14 May 2018, the Osijek Administrative Court allowed the applicants' administrative actions as having been brought in due time. It found that even though the case file indicated that the decisions restricting the applicants' freedom of movement had been served on them on the day they had been issued, there was no evidence that the applicants had been apprised of the decisions in a language they could understand.

38. On 17 May 2018 the lawyer S.B.J. informed the Osijek Administrative Court that she was taking over as the applicants' representative in the proceedings. She submitted that as a result of the Court's intervention on 7 May 2018 she had finally been allowed to meet the applicants (see paragraph 66 below). She also submitted a copy of the citizenship certificate issued to the first and second applicants and explained that the differences in the applicants' names had been the result of the

transliteration and translation of Afghan names into different languages, a common problem as regards Afghan names (see paragraph 116 below).

39. On 18 May 2018 the Osijek Administrative Court heard the first, second, third and fourth applicants individually.

They submitted that the family had been placed in three rooms in the Tovarnik Centre and that they had been kept locked up except during meals. As of recent the rooms had been locked only during the night, but they were still not allowed to leave. The children, traumatised by all the border crossings, encounters with the police and their sister's death, were suffering. The psychologist who had visited them did not speak English, Farsi or Pashto. They had not been served the decisions restricting their freedom of movement and had not known of their existence until I.C. informed them about thereof. The fourth applicant submitted that she did not know her exact date of birth, but that she had probably turned eighteen one month earlier.

40. On 22 May 2018 the Osijek Administrative Court partly allowed the third applicant's administrative action and ordered that she and her two children (the seventh and eight applicants) be released from the Tovarnik Centre the following day. The third applicant asked not to be transferred from the Centre without the rest of her family. The relevant part of that judgment read as follows:

> "... this court finds that at the time of the disputed decision the plaintiffs' restriction of freedom of movement was justified ...
>
> However, even with all the conditions mentioned [by the State], this court cannot disregard the fact that [the Tovarnik Centre] is a prison-type facility which in the longer term is not an environment suitable for children ..., aged one and three.
>
> If the most severe type of measure is not to be arbitrary, it must be closely and consistently related to the purpose for which it had been ordered, and the duration of application of such measures must not exceed the time logically necessary for obtaining the desired aim ...
>
> Thus, if the defendant suspects any kind of abuse of the international protection system, based on the lack of kinship between the children and the adults, the defendant is obliged to obtain such data urgently. In the present case the identity and kinship of the child born on 1 January 2017 was easily accessible because she was born in Bulgaria, an EU Member State ... During these proceedings the court was not presented with any evidence that the third applicant is not the mother of [the two children]. The court heard the third applicant ... and concluded that she was illiterate and uneducated and unable to understand her current life circumstances.
>
> Furthermore, under section 52, subsection 3(8), of the International and Temporary Protection Act, persons seeking international protection are required to stay in Croatia during the proceedings. The case file contains a decision of 28 March 2018 dismissing the third applicant's application for international protection...The court therefore no longer finds justified the existence of the reasons set out in section 54(2)(1) of the Act (and the related flight risk). The very fact that the request was already dismissed means that the other grounds from section 54(2)(2) of the Act relating to the establishing of identity and citizenship is also not founded ...

> ... keeping persons in an immigration centre solely on the basis of their irregular entry into Croatia is not legally justified, and the defendant did not submit to the court any kind of evidence in support of the allegation that the measure entailing restriction of freedom of moment by placing the [third applicant and her two children] in the Tovarnik Centre is still necessary ..."

41. On 24 and 25 May 2018, in different formations, the Osijek Administrative Court dismissed the remaining applicants' administrative actions as unfounded.

The court deemed that the restriction of their freedom of movement was still justified because it had not yet been possible to establish their identity. They were not registered in the Schengen or the Eurodac systems and they had used different identities in their applications for international protection in other countries. The flight risk could be established on the basis of the first applicant's statement of 23 March 2018 that the family had spent around a year in Serbia without seeking international protection because there were no job opportunities there, which was untrue because they had sought asylum both in Serbia and Bulgaria and had repeatedly illegally crossed the Croatian border. Additionally, the applicants had instituted proceedings for international protection and were required to stay in Croatia until the end of those proceedings.

The court further stated that the Tovarnik Centre had met the minimum requirements for short-term placement of a family with children. The child applicants were accompanied by their parents and the Centre had been accommodating only one other family with small children. From the photographs submitted it concluded that the Centre had facilities and activities capable of keeping the children occupied, and that the applicants had been provided with the necessary clothing, medications, access to hygiene products, fresh air and medical assistance.

The overall conditions in the applicants' case were Article 3 compliant, given that they had left their home country almost two years previously and that during the long journey the children had undoubtedly been exposed to numerous stressful factors owing to the presence of the police. Even though the death of MAD.H. had undoubtedly caused them immense pain, that had nothing to do with the conditions of their placement in the Tovarnik Centre.

42. The first, second and fourth applicants lodged appeals with the High Administrative Court (*Visoki upravni sud Republike Hrvatske*), which were dismissed on 3 October, 14 November and 12 December 2018, respectively.

43. Meanwhile, on 6 April 2018, the applicants had also lodged a constitutional complaint in which they complained, *inter alia*, of the unlawfulness, disproportionality and inadequate conditions of their placement in the Tovarnik Centre, under Article 3, Article 5 § 1 and Article 8 of the Convention; their inability to contact their lawyer S.B.J., and their *refoulement* by the Croatian police, who had denied them the opportunity to seek asylum contrary to Article 4 of Protocol No. 4.

44. On 7 December 2018 the applicants made further submissions to the Constitutional Court, complaining, *inter alia*, of a breach of Article 5 § 4 of the Convention in that they had not been able to challenge their placement in the Tovarnik Centre until 19 April 2018, and that the Osijek Administrative Court had decided on their case only after they had already spent two months in detention.

45. On 18 December 2018 the Constitutional Court examined the applicants' constitutional complaint concerning their placement in the Tovarnik Centre. It found that even though the Centre was a closed-type facility, it was equipped with all the requisite amenities for accommodating children with parents. The children were able to play and spend time in the open air from 8 a.m. to 10 p.m. and had access to a psychologist and a social worker.

The Constitutional Court further found that the length of the children's placement in the Centre (two months and fourteen days) had been lawful because under domestic law, the maximum period allowed was three months, and that it had been justified by the need to verify their identities and kinship with the adult applicants and the need to prevent the criminal offence of human trafficking. Although it appeared that the child applicants had suffered stress which could affect their development, the Constitutional Court did not find that their placement in the Tovarnik Centre had caused any additional stress with traumatic consequences, given that at that time the children had already been travelling for around two years through different countries. It held that the situation did not attain the requisite threshold of severity under Article 3 of the Convention.

As regards the adult applicants, the Constitutional Court deemed that their placement in the Centre could have caused a sense of helplessness, panic and frustration, but that the fact that they had not been separated from their children had had a soothing effect, and that therefore the threshold of severity under Article 3 of the Convention had not been attained.

The Constitutional Court noted that on their placement in the Tovarnik Centre all the adult applicants had been informed of their right to legal aid and had chosen I.C. to represent them. The lack of contact between the applicants and their lawyer S.B.J. from 21 March to 7 May 2018 had not been unreasonably long in view of the number of applicants and the need to accommodate them in the immigration centre, as well as of the availability of an interpreter and other staff. That circumstance had not affected the applicants' right of access to effective legal assistance concerning their placement in the Tovarnik Centre.

Lastly, the conditions of the applicants' placement in the Tovarnik Centre did not fall within the scope of Article 5 § 1 (f) of the Convention and the facts of the case did not indicate any possible violation of Article 4 of Protocol No. 4.

46. On 11 July 2019 the Constitutional Court examined the first, second and fourth applicants' constitutional complaints lodged against the High Administrative Court's decisions of 3 October, 14 November and 12 December 2018 (see paragraph 42 above).

The Constitutional Court held that the conditions of their placement in the Tovarnik Centre had not been in breach of Article 3 of the Convention. The Centre had been equipped for accommodating families; the applicants had been provided with clothes, toiletries and food; the children had not been separated from their parents; they had been able to play in the open air; the rooms in which they had been placed had not been locked; and they had been visited by a psychologist and a social worker. Even though the applicants had suffered as a result of certain stressful events, their placement in the Centre could not have caused them additional stress with particularly traumatic consequences.

The Constitutional Court further held that there had been no breach of Article 5 §§ 1 (f), 2 and 4 of the Convention. In particular, it held that the applicants had been deprived of their liberty in accordance with Article 5 § 1 (f) of the Convention, having regard that there were proceedings deciding on the lawfulness of their entry into the country and on their deportation. Their detention had been based on section 54(6) of the International and Temporary Protection Act, because their identity and citizenship and the circumstances on which they had based their application for international protection could not have otherwise been established, in particular having regard to the risk of flight. The applicants had been informed about the reasons for their deprivation of liberty and had been represented by a lawyer. The Osijek Administrative Court and the High Administrative Court had provided relevant and sufficient reasons for their decisions upholding the first, second and fourth applicants' deprivation of liberty.

47. Meanwhile, on 4 June 2018 the applicants were transferred to an open-type centre in Kutina. Having tried to leave Croatia for Slovenia clandestinely on several occasions, they ultimately managed to do so and their subsequent whereabouts are unknown.

VI. PROCEEDINGS CONCERNING INTERNATIONAL PROTECTION

48. On 23 March 2018 the applicants submitted applications for international protection.

49. On the same day the Ministry of the Interior heard the first, second and third applicants individually in the presence of a Farsi interpreter. The applicants submitted that they had left Afghanistan in 2016 owing to their fear of the Taliban. Prior to coming to Croatia, they had spent about nine months in Bulgaria and then a year in Serbia in different migrant camps. They had not sought asylum in those countries. Even though they

considered Serbia a safe country, they had not wished to stay there because, in their view, Serbia was in Asia and there were no job opportunities there. They wanted to live in Europe so that the children could go to school and have a good life.

The first applicant stated that the signature on the power of attorney of 18 December 2017 under which she had allegedly authorised S.B.J. to represent her had not been hers. She had been in Serbia at that time and three persons from Croatia had approached her and talked to her about their daughter's death and then she had signed something.

50. On 28 March 2018 the Ministry of the Interior declared the applicants' applications for international protection inadmissible on the grounds that they should be returned to Serbia, which was considered a safe third country.

51. The decisions were served on the applicants on 30 March 2018 when the applicants were informed of their right to free legal aid and given a list of legal aid lawyers. The applicants appointed the lawyer I.C. to represent them; I.C. visited them in the Tovarnik Centre on 2 April 2018.

52. On 9 April 2018 the applicants lodged administrative actions with the Osijek Administrative Court against the decisions dismissing their applications for international protection.

53. On 11 June 2018 the Osijek Administrative Court heard the first, second and third applicants.

The first applicant submitted that when lodging her application for international protection on 23 March 2018 she had been scared owing to the presence of the police. She was illiterate and had never gone to school. She had told the interviewers that she had a lawyer who had represented her deceased daughter MAD.H. She had asked that her lawyer be called to the Tovarnik Centre, but she had been called a liar and told that she did not have a lawyer in Croatia, only in Serbia.

54. On 18 June and 2 July 2018, the Osijek Administrative Court dismissed the applicants' administrative actions. The High Administrative Court dismissed their further appeals.

55. On 4 March 2021 the Constitutional Court upheld the applicants' constitutional complaint, quashed the judgments of the High Administrative Court and the Osijek Administrative Court and remitted the case to the Osijek Administrative Court. It found that the authorities had failed to properly examine whether Serbia could be considered a safe third country.

VII. CONTACT BETWEEN THE APPLICANTS AND THEIR LAWYER

56. On 21 March 2018, after being informed by two NGOs that the applicants were in the Vrbanja Police Station, the lawyer S.B.J. submitted a power of attorney which the first and second applicants had signed in her favour in December 2017 in Serbia in the presence of the Centre for Peace

Studies NGO. She asked the police to inform the applicants that she was trying to contact them. The following day S.B.J. submitted the power of attorney to the Asylum Department of the Ministry of the Interior and requested leave to represent the applicants.

57. On 28 March 2018 the Ministry of the Interior informed S.B.J. that she could not represent the applicants in the international protection proceedings since the power of attorney she had submitted was invalid. They added that on 23 March 2018 the first applicant had stated that the signature on the power of attorney was not hers and that she had been in Serbia at the time.

58. On 28 March 2018 an employee of the Centre for Peace Studies NGO, issued a written statement confirming that on 18 December 2017 he and two other employees of that NGO, together with A.C., a doctor from Médecins sans Frontières, had met the first, second and fourth applicants in Serbia and explained to them the legal procedures in Croatia. They suggested that S.B.J. represent them in all proceedings before the Croatian authorities. The first applicant had then signed the power of attorney.

59. On the same day three employees of the Centre for Peace Studies NGO asked to visit the applicants in the Tovarnik Centre in order to provide them with legal assistance and to clarify the circumstances of their signing of the power of attorney, which they had witnessed. The Ministry of the Interior denied them access to the applicants on security grounds.

60. On 29 March 2019 S.B.J. again asked the Ministry of the Interior to be allowed to meet the applicants and represent them in the international protection proceedings.

61. On 3 April 2018 the fourth applicant contacted S.B.J. via Viber. S.B.J. replied that she had been helping the fourth applicant's family with their asylum claims, and that she was requesting an interim measure from the Court and lodging a constitutional complaint.

62. Meanwhile, the police and the Vukovar Municipal State Attorney's Office (*Općinsko državno odvjetništvo u Vukovaru*) initiated an inquiry into the power of attorney which the first and second applicants had signed in favour of S.B.J., on suspicion that the signatures had been forged.

On 31 March 2018 the investigating judge of the Vukovar County Court heard the first and second applicants, who stated that they had signed the impugned power of attorney while they were in Serbia.

On 3 April 2018 the Vukovar Municipal State Attorney informed the police that, having regard to the applicants' statement, there had been no reasonable suspicion that a criminal offence had been committed and that therefore she would not request a graphological expert assessment.

On 4 April 2018 a meeting was held between the Vukovar Municipal State Attorney and two police officers, during which it was agreed that a graphological expert assessment would be commissioned and that the

officers would obtain the original copy of the power of attorney from S.B.J. for that purpose.

On 5 April 2018 an officer from the Vukovar Criminal Police arrived at S.B.J.'s law firm and asked her to hand over the original of the power of attorney signed in her favour by the first applicant.

On 11 April 2018 the forensics department of the Ministry of the Interior reported that the first and second applicants had probably not signed the power of attorney in question.

On 12 April 2018 an officer from the Vukovar Police Department interviewed S.B.J. and two other lawyers from her law firm as regards the first and second applicants' signing of the power of attorney. On 18 April 2018 he also interviewed a trainee from that law firm.

On 23 April 2018 S.B.J. obtained an expert report from a permanent court expert in graphology, who concluded that it could not be ruled out that the first applicant had signed the power of attorney and that the second applicant had probably signed the power of attorney.

There is no information about the subsequent steps undertaken in the investigation.

63. On 6 and 9 April 2018 S.B.J. again asked the Ministry of the Interior to be allowed to contact the applicants, but to no avail. The Centar za mirovne studije NGO also asked to be allowed to contact the applicants, no more successfully.

64. On 19 April 2018 the Croatian Bar Association (*Hrvatska odvjetnička komora*) sent a letter to the Head of Police stating that the police actions against S.B.J. had been in breach of the Lawyers Act (*Zakon o odvjetništvu*) and had impeded the independence of the legal profession as guaranteed by the Constitution. Restricting contact between the lawyer and her clients was contrary to the Convention and the International and Temporary Protection Act. The Croatian Bar Association invited the police to immediately allow S.B.J. to contact the applicants.

65. On 2 May 2018 the Croatian Children's Ombudswoman, an independent and impartial human rights officer, visited the applicants in the Tovarnik Centre in order to ascertain the circumstances of their legal representation and the case pending before the Court. The applicants had expressly confirmed to her that they were familiar with the fact that S.B.J. had instituted proceedings before the Court on their behalf, and that they wished to meet her and be represented by her.

66. On 7 May 2018 S.B.J. met the applicants in the Tovarnik Centre and they signed a new power of attorney in her favour. They also signed a statement confirming that in December 2017 they had signed a power of attorney in her favour for the purposes of lodging a criminal complaint concerning the death of their daughter, as well as for other proceedings.

VIII. REQUESTS FOR INTERIM MEASURES UNDER RULE 39 OF THE RULES OF COURT

67. On 4 April 2018 S.B.J. submitted a request under Rule 39 of the Rules of Court, asking the Court to allow the applicants to contact her, to order their release from the Tovarnik Centre and to prevent their removal to Serbia.

68. On 6 April 2018 the Court temporarily granted the interim measure under Rule 39 until 27 April 2018, and indicated to the Government that the applicants should be placed "in such an environment which complies with requirements of Article 3 of the Convention, taking into account the presence of minors (see especially *Popov v. France*, nos. 39472/07 and 39474/07, 19 January 2012)". The Court asked the Government to submit, *inter alia*, whether the Tovarnik Centre was adapted to the accommodation needs of families with small children, and whether, having regard to the Court's case-law, they had taken all necessary measures to ensure that the environment where the applicants were placed complied with the requirements of Article 3 of the Convention.

The Court adjourned the decision on the interim measure in respect of the lack of access to their lawyer and the risk they would face if expelled to Serbia and requested factual information from the parties on, *inter alia*, whether practical arrangements had been made in order to allow the applicants to contact representatives, if they so wished, to seek legal advice and initiate legal proceedings, and whether the authorities had allowed S.B.J. and/or the Centre for Peace Studies NGO, to contact the applicants.

69. On 16 April 2018 the Government submitted numerous photographs of the Tovarnik Centre and information concerning the applicants' placement there. They explained that the applicants had appointed I.C. as their legal aid lawyer, that the domestic authorities did not consider that S.B.J. had a valid power of attorney to represent them and that they were awaiting the outcome of the criminal investigation in that regard.

70. On 16 and 23 April 2018 S.B.J. submitted that she had unsuccessfully been trying to contact the applicants and that the domestic authorities were conducting a criminal investigation against her, even though the first and second applicants had confirmed to the investigating judge that they had signed the impugned power of attorney.

71. On 24 April 2018 the Government submitted that the applicants' identities had still not been confirmed and that their placement in the Tovarnik Centre was still necessary. They further submitted that S.B.J. had not been present when the applicants had allegedly signed the power of attorney and that she had never met the applicants in person.

72. On 25 April 2018 the Court prolonged the interim measure concerning the applicants' placement in an Article 3 compliant environment until 11 May 2018. It also asked the Government to provide information on

whether the applicants had been informed that S.B.J. had instituted proceedings before the Court on their behalf and whether they had accepted her legal representation for that purpose, as well as whether practical arrangements had been made to enable the applicants to meet S.B.J.

73. On 4 May 2018 the Government informed the Court that the applicants had confirmed that they were aware that S.B.J. had instituted proceedings before the Court on their behalf, and that they wished to be represented by her and to meet her.

74. On 11 May 2018 the Court prolonged the interim measure concerning the applicants' placement in an Article 3 compliant environment until further notice. It rejected the Rule 39 request as regards the issue of the applicants' legal representation to the extent that the matter had been resolved, as well as the Rule 39 request concerning the risk the applicants would face if expelled to Serbia, inasmuch as that issue was premature.

75. On 3 July 2018 the Court granted an interim measure indicating to the Government that the applicants should not be removed to Serbia.

76. On 14 March 2019 the Court lifted the two interim measures because the applicants had left Croatia and thus the circumstances for which the measures had been granted had ceased to exist (see paragraph 47 above).

RELEVANT LEGAL FRAMEWORK

I. DOMESTIC LAW

77. The relevant provisions of the Criminal Code (*Kazneni zakon*, Official Gazette, no. 125/2011, with subsequent amendments), read as follows:

Article 9 § 1

"A criminal offence shall be deemed to have been committed in the place where the perpetrator [undertook an action] or was obliged to undertake it, and in the place where the consequence [corresponding to] the legal description of the criminal offence occurred in whole or in part ..."

Article 10

"The criminal law of the Republic of Croatia shall apply to anyone who commits a criminal offence within its territory."

78. The relevant provisions of the International and Temporary Protection Act (*Zakon o međunarodnoj i privremenoj zaštiti*, Official Gazette nos. 70/2015 and 127/2017) read as follows:

Meaning of terms
Section 4

"...

5. *An international protection seeker* (hereafter: 'the seeker') is a third-country national or a stateless person who expresses an intention to submit an application for international protection (hereafter: 'the application'), until the decision on the application becomes enforceable. ...

...

12. *An intention to submit an application for international protection* (hereafter: 'the intention') is an intention expressed by a third-country national or a stateless person, orally or in written, to submit an application pursuant to section 33 of this Act.

...

16. *A child* is a seeker ... younger than eighteen.

...

21. A decision on an application shall become enforceable upon its delivery to the seeker, provided that an administrative action is not brought or does not have suspensive effect. If the action has suspensive effect, the decision on the application shall become enforceable upon the delivery of the first-instance judgment of the administrative court.

..."

Expressing an intention
Section 33

"(1) A third-country national or a stateless person may express an intention [to seek international protection] during border controls at the border crossing.

(2) If the third-country national or stateless person is already on the territory of Croatia, he or she may express such an intention to the police administration; that is, at a police station or an immigration reception centre.

(3) By derogation from subsection 2 of this section, such an intention may be expressed in a reception centre for seekers of international protection in extraordinary circumstances, so that access to the procedure for granting international protection is ensured.

(4) If a third-country national or a stateless person cannot, for justified reasons, express an intention in accordance with subsections 2 and 3 of this section, the body to which he or she expressed the intention shall be obliged to inform the Ministry within three days.

...

(8) The police officers or officials of the reception centre shall be obliged, immediately after the intention has been expressed, to take fingerprints from the seeker and his or her photograph, establish his or her identity, the way he or she arrived in Croatia, the direction of travel from his or her country of origin to Croatia and his or her personal circumstances ..., of which they shall be obliged to immediately inform the Ministry.

..."

Procedure at the border or in transit area
Section 42

"(1) The procedure for granting international protection following an expressed intention or a subsequent application at the border, or in the transit area of an airport, sea port or internal port, shall be conducted at the border crossing or in the transit area ... provided that:

- the seeker is provided with reception conditions set out in section 55 of this Act and

- the application, or subsequent application, can be dismissed as manifestly ill-founded under section 38(1)(5) of this Act or declared inadmissible under section 43 of this Act.

(2) Organisations for protecting the rights of refugees which, on the basis of an agreement with the Ministry, provide legal counselling under section 59(3) of this Act shall have effective access to border crossings or transit areas of airports, sea ports or internal ports.

(3) The representative of an organisation that deals with protection of the rights of refugees, except UNHCR, may temporarily be restricted in accessing the seeker, when this is strictly necessary for protecting the national security or public order of Croatia.

(4) The Ministry shall decide on an application for international protection in the procedure at the border or transit area within twenty-eight days from the submission of the application.

(5) If a decision is not given within [twenty-eight days], the seeker shall be allowed to enter the Republic of Croatia for the purpose of conducting the procedure for international protection.

..."

Declaring inadmissible an application or a subsequent application
Section 43

"1. The Ministry shall declare an application inadmissible if:

...

(3) it is possible to apply the concept of a safe third country, pursuant to section 45 of this Act;

...

3. The decision declaring the application inadmissible ...may be challenged by an administrative action before the administrative court pursuant to section 51 of this Act. ..."

Legal remedy
Procedure before the administrative court
Section 51

"1. An administrative action lodged with the administrative court shall have suspensive effect ...

...

3. An appeal against the first-instance judgment of the administrative court shall not have suspensive effect."

Rights and obligations
Section 52

"(1) The seeker has the right to:

1. stay [in Croatia];

2. freedom of movement in Croatia;

3. adequate reception conditions;

...

(3) The seeker is obliged to:

1. respect the Croatian Constitution and laws;

2. cooperate with the state authorities and comply with their measures and instructions;

3. submit to verification and establishing of identity;

4. submit to a medical exam;

5. respect the immigration reception centre's house rules;

6. report to the immigration reception centre within given deadline;

7. appear at the interview before the Ministry and cooperate during the procedure for international protection;

8. stay on the territory of Croatia during the procedure for international protection;

9. inform the Ministry within two days after changing residence;

10. comply with the Ministry's instructions and measures concerning restriction of freedom of movement."

Right to stay
Section 53

"(1) A seeker shall have the right to stay in Croatia from the day of expressing an intention [to seek international protection] until the decision on his or her application becomes enforceable.

..."

Freedom of movement of seekers
Section 54

"(1) Seekers and foreigners in transit shall have the right to freedom of movement in Croatia.

(2) The freedom of movement of seekers may be restricted if, on the basis of all the facts and circumstances of the specific case, this is deemed to be necessary for [the purpose of]:

1. establishing the facts and circumstances on which the application for international protection is based, and which cannot be established without restriction of movement, in particular if it is deemed that there is a risk of flight;

2. establishing and verifying identity or citizenship:

3. protection of the national security or public order of the Republic of Croatia;

4. prevention of abuse of the procedure if, on the basis of objective criteria, which include the possibility of access to the procedure for granting international protection, there is a well-founded suspicion that the intention expressed during the procedure of expulsion was aimed at preventing the procedure from continuing.

...

(4) The risk of flight shall be assessed on the basis of all the facts and circumstances of the specific case, especially in view of earlier attempts to leave Croatia, the refusal to submit to verification and establishment of identity, concealment of information or providing false information on identity and/or nationality, violations of the provisions of the house rules of the reception centre, the results from the Eurodac system, and opposition to transfer.

(5) The freedom of movement of a seeker or foreigner in transit may be restricted by the following measures:

1. prohibition of movement outside the reception centre;

2. prohibition of movement outside a specific area;

3. appearance in person at the reception centre at a specific time;

4. handing over travel documents or tickets for deposit at the reception centre;

5. accommodation in a reception centre for foreigners.

(6) The measure of accommodation in a reception centre for foreigners may be imposed if, following an individual assessment, it is established that other measures referred to in subsection 5 of this section would not achieve the purpose of restriction of freedom of movement.

(7) The freedom of movement of a member of a vulnerable group may be restricted by means of accommodation in a reception centre for foreigners if, following an individual assessment, it is established that such a form of accommodation is suitable for the applicant's personal circumstances and needs, and especially for his or her health.

...

(9) The measure of restriction of freedom of movement shall be imposed for as long as there are reasons for this as referred to in subsection 2 of this section, but for no longer than three months. Exceptionally, for justified reasons, the application of the measure of restriction of freedom of movement may be extended for no longer than three more months.

..."

Right to information and legal counselling
Section 59

"(1) [When] a third-country national or a stateless person placed in a reception centre, at the border crossing, in the transit area of an airport, seaport or internal port,

wishes to express an intention [to seek international protection], the police officers shall provide to that person all the necessary information concerning the procedure for international protection in a language which that person is justifiably presumed to understand and in which he or she can communicate.

(2) The Ministry shall, within fifteen days from expressing the intention, inform the seeker about the way the procedure for international protection is conducted, his or her rights and obligations in those proceedings and the possibility of contacting UNHCR and other organisations that deal with protection of rights of refugees, as well as the possibility of being granted legal aid.

..."

79. The relevant provisions of the Aliens Act (*Zakon o strancima*, Official Gazette nos. 130/2011, 74/2013, 69/2017 and 46/2018), in force from 1 January 2012 to 31 December 2020, read as follows:

Section 35

"A third-country national who meets the requirements for entry under the Schengen Borders Code shall be granted entry to the Republic of Croatia."

Section 36

"(1) A third-country national who does not meet the requirements for entry under the Schengen Borders Code may be granted entry to the Republic of Croatia at a border crossing on the basis of serious humanitarian grounds, international obligations or the interest of the Republic of Croatia.

(2) The Ministry of the Interior shall issue a decision granting the entry referred to in subsection 1 of this section through the police station in charge of controlling the crossing of the State border.

(3) The decision referred to in subsection 2 of this section shall determine the purpose of the stay, the place and address of the accommodation, the period in which the person may lawfully reside in Croatia ... The decision shall be issued without hearing the third-country national, unless he or she is an unaccompanied minor.

..."

80. Under the Act confirming the Readmission Agreement between Croatia and Serbia (*Zakon o potvrđivanju Sporazuma između Vlade Republike Hrvatske i Vlade Republike Srbije o predaji i prihvatu osoba kojih je ulazak ili boravak nezakonit*, Official Gazette no. 1/2010), the two countries were required to accept into their territory, at each other's request, a foreigner or a person without citizenship who did not meet the requirements to enter or stay in the country making the request, if it was established or could reasonably be assumed that the person had entered that country directly from the country receiving the request.

81. Pursuant to the Regulation on the internal structure of the Ministry of the Interior (*Uredba o unutarnjem ustrojstvu Ministarstva unutarnjih poslova*, Official Gazette nos. 70/2012, 140/2013, 50/2014, 32/2015 and 11/2017), the Tovarnik Centre (*Tranzitni prihvatni centar za strance*

Tovarnik) is designated for, *inter alia*, restriction of the freedom of movement of foreigners caught irregularly crossing the external EU border, pending their transfer to an immigration centre or their expulsion under a readmission agreement; participation in the procedure of establishing the identity of the foreigners placed there; provision of medical and psychological support; and fingerprinting for Eurodac.

82. Section 11(2) of the Ordinance on the Treatment of Third-Country Nationals (*Pravilnik o postupanju prema državljanima trećih zemalja*, Official Gazette no. 68/2018) defined the humanitarian grounds referred to in section 36(1) of the Aliens Act as emergency medical assistance, human organ donation, natural disasters and unforeseen events involving close family members (such as severe illness or death).

83. The Government submitted that in 2019 the authorities had issued eighty decisions granting entry to Croatia on the basis of section 36 of the Aliens Act (see paragraph 79 above). As an example, they submitted two decisions granting entry to Croatia in 2019; one was issued at the Strmica border crossing point with Bosnia and Herzegovina to a Serbian national in possession of a valid passport on the grounds of unforeseen events involving close family members. The other one was issued at the Bajakovo border crossing point with Serbia to a person born in Bosnia and Herzegovina on the grounds of urgent medical assistance.

84. Section 18 of the Lawyers' Ethics Code (*Kodeks odvjetničke etike*, Official Gazette nos. 64/2007, 72/2008 and 64/2018) reads as follows:

> "Any disloyalty in conducting business is contrary to the honour and reputation of the advocacy service, and in particular:
>
> – acquiring clients through intermediaries;
>
> – giving third persons an empty power of attorney to complete;
>
> ..."

II. EUROPEAN UNION LAW AND PRACTICE

85. As regards European Union law, see *N.D. and N.T. v. Spain* ([GC], nos. 8675/15 and 8697/15, §§ 41-43, 13 February 2020).

86. Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast) states, in its 33rd introductory remark, that "the best interests of the child should be a primary consideration of Member States when applying this Directive, in accordance with the Charter of Fundamental Rights of the European Union (the Charter) and the 1989 United Nations Convention on the Rights of the Child. In assessing the best interest of the child, Member States should in particular take due account of the minor's well-being and social

development, including his or her background". The relevant provisions of that Directive further read as follows:

Article 6
Access to the procedure

"1. ...

Member States shall ensure that those other authorities which are likely to receive applications for international protection such as the police, border guards, immigration authorities and personnel of detention facilities have the relevant information and that their personnel receive the necessary level of training which is appropriate to their tasks and responsibilities and instructions to inform applicants as to where and how applications for international protection may be lodged."

Article 8
Information and counselling in detention facilities and at border crossing points

"1. Where there are indications that third-country nationals or stateless persons held in detention facilities or present at border crossing points, including transit zones, at external borders, may wish to make an application for international protection, Member States shall provide them with information on the possibility to do so. In those detention facilities and crossing points, Member States shall make arrangements for interpretation to the extent necessary to facilitate access to the asylum procedure.

...."

Article 26
Detention

"1. Member States shall not hold a person in detention for the sole reason that he or she is an applicant. The grounds for and conditions of detention and the guarantees available to detained applicants shall be in accordance with Directive 2013/33/EU.

2. Where an applicant is held in detention, Member States shall ensure that there is a possibility of speedy judicial review in accordance with Directive 2013/33/EU."

87. The relevant provisions of Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast) read as follows:

Article 8
Detention

"1. Member States shall not hold a person in detention for the sole reason that he or she is an applicant in accordance with Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection.

2. When it proves necessary and on the basis of an individual assessment of each case, Member States may detain an applicant, if other less coercive alternative measures cannot be applied effectively.

3. An applicant may be detained only:

(a) in order to determine or verify his or her identity or nationality;

(b) in order to determine those elements on which the application for international protection is based which could not be obtained in the absence of detention, in particular when there is a risk of absconding of the applicant;

...”

Article 9
Guarantees for detained applicants

“1. An applicant shall be detained only for as short a period as possible and shall be kept in detention only for as long as the grounds set out in Article 8(3) are applicable.

Administrative procedures relevant to the grounds for detention set out in Article 8(3) shall be executed with due diligence. Delays in administrative procedures that cannot be attributed to the applicant shall not justify a continuation of detention.

...

3. Where detention is ordered by administrative authorities, Member States shall provide for a speedy judicial review of the lawfulness of detention to be conducted *ex officio* and/or at the request of the applicant. ... When conducted at the request of the applicant, it shall be decided on as speedily as possible after the launch of the relevant proceedings. To this end, Member States shall define in national law the period within which the judicial review *ex officio* and/or the judicial review at the request of the applicant shall be conducted.

Where, as a result of the judicial review, detention is held to be unlawful, the applicant concerned shall be released immediately.

4. Detained applicants shall immediately be informed in writing, in a language which they understand or are reasonably supposed to understand, of the reasons for detention and the procedures laid down in national law for challenging the detention order, as well as of the possibility to request free legal assistance and representation.

...”

Article 10
Conditions of detention

“...

2. Detained applicants shall have access to open-air spaces.

...

4. Member States shall ensure that family members, legal advisers or counsellors and persons representing relevant non-governmental organisations recognised by the Member State concerned have the possibility to communicate with and visit applicants in conditions that respect privacy. Limits to access to the detention facility may be imposed only where, by virtue of national law, they are objectively necessary for the security, public order or administrative management of the detention facility, provided that access is not thereby severely restricted or rendered impossible.”

Article 11
Detention of vulnerable persons and of applicants with special reception needs

“...

2. Minors shall be detained only as a measure of last resort and after it having been established that other less coercive alternative measures cannot be applied effectively. Such detention shall be for the shortest period of time and all efforts shall be made to release the detained minors and place them in accommodation suitable for minors.

The minor's best interests, as prescribed in Article 23(2), shall be a primary consideration for Member States.

..."

Article 23
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. Member States shall ensure a standard of living adequate for the minor's physical, mental, spiritual, moral and social development.

....

3. Member States shall ensure that minors have access to leisure activities, including play and recreational activities appropriate to their age within the premises and accommodation centres referred to in Article 18(1)(a) and (b) and to open-air activities.

4. Member States shall ensure access to rehabilitation services for minors who have been victims of any form of abuse, neglect, exploitation, torture or cruel, inhuman and degrading treatment, or who have suffered from armed conflicts, and ensure that appropriate mental health care is developed and qualified counselling is provided when needed.

..."

88. In its judgment of 14 May 2020 in the case of *FMS and Others v. Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság and Országos Idegenrendészeti Főigazgatóság* (C-924/19 PPU and C-925/19 PPU), the Court of Justice of the European Union held, *inter alia*, as follows:

"In the first place, it should be observed that the first subparagraph of Article 8(3) of Directive 2013/33 lists exhaustively the various grounds that may justify the detention of an applicant for international protection and that each of those grounds meets a specific need and is self-standing ...

...

In addition, Article 8(2) of that directive provides that detention may be applied only when it proves necessary, on the basis of an individual assessment of each case and if other less coercive alternative measures cannot be applied effectively. It follows that the national authorities cannot place an applicant for international protection in detention without having previously determined, on a case-by-case basis, whether such detention is proportionate to the aims which it pursues ...

It follows from the foregoing that Article 8(2) and (3) and Article 9(2) of Directive 2013/33 preclude an applicant for international protection being placed in detention without the necessity and proportionality of that measure having first been examined

and without an administrative or judicial decision stating the reasons in fact and in law for which such detention is ordered having been adopted."

III. UNITED NATIONS

89. The relevant provisions of the Convention on the Rights of the Child, which came into force on 2 September 1990, read as follows:

Article 1

"For the purposes of the present Convention, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier."

Article 3

"1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

..."

Article 22

"1. States Parties shall take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures shall, whether unaccompanied or accompanied by his or her parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present Convention and in other international human rights or humanitarian instruments to which the said States are Parties.

..."

Article 37

"States Parties shall ensure that:

...

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

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

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

90. The relevant part of General Comment No. 6 (2005) of the United Nations Committee on the Rights of the Child – Treatment of unaccompanied and separated children outside their country of origin (UN Doc. CRC/GC/2005/6, 1 September 2005) – reads as follows:

> "12. ... the enjoyment of rights stipulated in the Convention [on the Rights of the Child] are not limited to children who are citizens of a State party and must therefore, if not explicitly stated otherwise in the Convention, also be available to all children - including asylum-seeking, refugee and migrant children - irrespective of their nationality, immigration status or statelessness ...
>
> 19. ... In the case of a displaced child, [the principle of the best interests of the child] must be respected during all stages of the displacement cycle. At any of these stages, a best interests determination must be documented in preparation of any decision fundamentally impacting on the unaccompanied or separated child's life.
>
> 20. A determination of what is in the best interests of the child requires a clear and comprehensive assessment of the child's identity, including her or his nationality, upbringing, ethnic, cultural and linguistic background, particular vulnerabilities and protection needs. Consequently, allowing the child access to the territory is a prerequisite to this initial assessment process. The assessment process should be carried out in a friendly and safe atmosphere by qualified professionals who are trained in age and gender sensitive related interviewing techniques.
>
> ...
>
> 66. Asylum-seeking children, including those who are unaccompanied or separated, shall enjoy access to asylum procedures and other complementary mechanisms providing international protection, irrespective of their age. In the case that facts become known during the identification and registration process which indicate that the child may have a well-founded fear or, even if unable to explicitly articulate a concrete fear, the child may objectively be at risk of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion, or otherwise be in need of international protection, such a child should be referred to the asylum procedure and/or, where relevant, to mechanisms providing complementary protection under international and domestic law."

91. The relevant part of General Comment No. 14 (2013) of the United Nations Committee on the Rights of the Child on the right of the child to have his or her best interests taken as a primary consideration (UN Doc. CRC/C/GC/14, 29 May 2013), reads as follows:

> "6. The Committee underlines that the child's best interests is a threefold concept:
>
> (a) A substantive right: The right of the child to have his or her best interests assessed and taken as a primary consideration when different interests are being considered in order to reach a decision on the issue at stake, and the guarantee that this right will be implemented whenever a decision is to be made concerning a child, a group of identified or unidentified children or children in general. Article 3, paragraph 1, creates an intrinsic obligation for States, is directly applicable (self-executing) and can be invoked before a court.
>
> (b) A fundamental, interpretative legal principle: If a legal provision is open to more than one interpretation, the interpretation which most effectively serves the child's best interests should be chosen. The rights enshrined in the Convention and its Optional Protocols provide the framework for interpretation.

(c) A rule of procedure: Whenever a decision is to be made that will affect a specific child, an identified group of children or children in general, the decision-making process must include an evaluation of the possible impact (positive or negative) of the decision on the child or children concerned. Assessing and determining the best interests of the child require procedural guarantees. Furthermore, the justification of a decision must show that the right has been explicitly taken into account. In this regard, States parties shall explain how the right has been respected in the decision, that is, what has been considered to be in the child's best interests; what criteria it is based on; and how the child's interests have been weighed against other considerations, be they broad issues of policy or individual cases.

...

37. The expression "primary consideration" means that the child's best interests may not be considered on the same level as all other considerations. This strong position is justified by the special situation of the child: dependency, maturity, legal status and, often, voicelessness. Children have less possibility than adults to make a strong case for their own interests and those involved in decisions affecting them must be explicitly aware of their interests. If the interests of children are not highlighted, they tend to be overlooked.

....

39. However, since article 3, paragraph 1, covers a wide range of situations, the Committee recognizes the need for a degree of flexibility in its application. The best interests of the child – once assessed and determined – might conflict with other interests or rights (e.g. of other children, the public, parents, etc.). Potential conflicts between the best interests of a child, considered individually, and those of a group of children or children in general have to be resolved on a case-by-case basis, carefully balancing the interests of all parties and finding a suitable compromise. The same must be done if the rights of other persons are in conflict with the child's best interests. If harmonization is not possible, authorities and decision-makers will have to analyse and weigh the rights of all those concerned, bearing in mind that the right of the child to have his or her best interests taken as a primary consideration means that the child's interests have high priority and not just one of several considerations. Therefore, a larger weight must be attached to what serves the child best.

40. Viewing the best interests of the child as "primary" requires a consciousness about the place that children's interests must occupy in all actions and a willingness to give priority to those interests in all circumstances, but especially when an action has an undeniable impact on the children concerned."

92. As regards the views adopted by the Committee on the Rights of the Child on 1 February 2019 under the Optional Protocol to the Convention on the Rights of the Child on a communications procedure, concerning communication No. 4/2016, see *N.D. and N.T. v. Spain* (cited above, § 68). The relevant part of these views reads as follows:

"14.2. The issue before the Committee is whether, in the circumstances of this case, the author's return to Morocco by the Spanish Civil Guard on 2 December 2014 violated his rights under the Convention. In particular, the author claimed that, by summarily deporting him to Morocco on 2 December 2014, without performing any form of identity check or assessment of his situation, the State party: (a) failed to provide the author with the special protection and assistance to which he was entitled as an unaccompanied minor (art. 20); (b) failed to respect the principle of

non-refoulement and exposed the author to the risk of violence and cruel, inhuman and degrading treatment in Morocco (art. 37); and (c) failed to consider the best interests of the child (art. 3).

14.3. The Committee is of the view that the State's obligations to provide special protection and assistance to unaccompanied children, in accordance with article 20 of the Convention, apply even 'with respect to those children who come under the State's jurisdiction when attempting to enter the country's territory'. Similarly, the Committee considers that 'the positive aspect of these protection obligations also extends to requiring States to take all necessary measures to identify children as being unaccompanied or separated at the earliest possible stage, including at the border'. Accordingly, it is imperative and necessary that, in order to comply with its obligations under article 20 of the Convention and to respect the best interests of the child, the State conducts an initial assessment, prior to any removal or return, that includes the following stages: (a) assessment, as a matter of priority, of whether the person concerned is an unaccompanied minor, with, in the event of uncertainty, the individual being accorded the benefit of the doubt such that, if there is a possibility that the individual is a child, he or she is treated as such; (b) verification of the child's identity by means of an initial interview; and (c) assessment of the child's specific situation and particular vulnerabilities, if any.

14.4. The Committee is also of the view that, in compliance with its obligations under article 37 of the Convention, in order to ensure that no child is subjected to torture or other cruel, inhuman or degrading treatment, the State should not return a child 'to a country where there are substantial grounds for believing that there is a real risk of irreparable harm to the child'. The Committee therefore considers that, in accordance with article 37 of the Convention and the principle of non-refoulement, the State has an obligation to carry out a prior assessment of the risk, if any, of irreparable harm to the child and serious violations of his or her rights in the country to which he or she will be transferred or returned, taking into account the best interests of the child, including, for example, 'the particularly serious consequences for children of the insufficient provision of food or health services'. In particular, the Committee recalls that, in the context of best interest assessments and within best interest determination procedures, children should be guaranteed the right to: (a) access the territory, regardless of the documentation they have or lack, and be referred to the authorities in charge of evaluating their needs in terms of protection of their rights, ensuring their procedural safeguards.

...

14.6. The Committee also notes the State party's allegation that the principle of non-refoulement does not apply in the present case because it only applies when the person comes from a territory where there is a risk of persecution. However, the Committee reiterates that the State party has an obligation not to return a child 'to a country where there are substantial grounds for believing that there is a real risk of irreparable harm to the child'. The Committee also notes that, before returning the author to Morocco, the State party did not ascertain his identity, did not ask about his personal circumstances and did not conduct a prior assessment of the risk, if any, of persecution and/or irreparable harm in the country to which he was to be returned. The Committee considers that, given the violence faced by migrants in the Moroccan border area and the ill-treatment to which the author was subjected, the failure to assess the risk of irreparable harm to the author prior to his deportation or to take into account his best interests constitutes a violation of articles 3 and 37 of the Convention.

14.7. The Committee considers that, in the light of the circumstances of the case, the fact that the author, as an unaccompanied child, did not undergo an identity check and assessment of his situation prior to his deportation and was not given an opportunity to challenge his potential deportation violates his rights under articles 3 and 20 of the Convention.

14.8. Lastly, the Committee considers that the manner in which the author was deported, as an unaccompanied child deprived of his family environment and in a context of international migration, after having been detained and handcuffed and without having been heard, without receiving the assistance of a lawyer or interpreter and without regard to his needs, constitutes treatment prohibited under article 37 of the Convention.

14.9. The Committee, acting under article 10 (5) of the Optional Protocol, is of the view that the facts before it amount to a violation of articles 3, 20 and 37 of the Convention."

93. The General Assembly of the United Nations stated in Article 3 of its Declaration on Territorial Asylum, adopted on 14 December 1967 (A/RES/2312 (XXII)):

"No person referred to in article 1, paragraph 1, shall be subjected to measures such as rejection at the frontier or, if he has already entered the territory in which he seeks asylum, expulsion or compulsory return to any State where he may be subjected to persecution."

94. On 19 September 2016 the General Assembly of the United Nations adopted the New York Declarations for Refugees and Migrants, in which it stated:

"24. ... We will ensure that public officials and law enforcement officers who work in border areas are trained to uphold the human rights of all persons crossing, or seeking to cross, international borders. ... We reaffirm that, in line with the principle of *non-refoulement*, individuals must not be returned at borders. ...

33. Reaffirming that all individuals who have crossed or are seeking to cross international borders are entitled to due process in the assessment of their legal status, entry and stay, we will consider reviewing policies that criminalize cross-border movements. ...

65. We reaffirm the 1951 Convention relating to the Status of Refugees and the 1967 Protocol thereto as the foundation of the international refugee protection regime. ..."

95. The relevant part of the Joint General Comment No. 3 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of their Families and No. 22 (2017) of the Committee on the Rights of the Child on the general principles regarding the human rights of children in the context of international migration, reads as follows:

"3. In the context of international migration, children may be in a situation of double vulnerability as children and as children affected by migration who (a) are migrants themselves, either alone or with their families ...

...

11. States should ensure that children in the context of international migration are treated first and foremost as children. States parties to the Conventions have a duty to comply with their obligations set out therein to respect, protect and fulfil the rights of children in the context of international migration, regardless of their or their parents' or legal guardians' migration status.

...

30. ... the best interests of the child should be ensured explicitly through individual procedures as an integral part of any administrative or judicial decision concerning the entry, residence or return of a child, placement or care of a child, or the detention or expulsion of a parent associated with his or her own migration status.

...

32. The Committees stress that States parties should:

...

(h) "ensure that children are identified promptly in border controls and other migration-control procedures within the State's jurisdiction, and that anyone claiming to be a child is treated as such, promptly referred to child protection authorities and other relevant services, and appointed a guardian, if unaccompanied or separated".

IV. COUNCIL OF EUROPE

96. On 4 May 2005 the Committee of Ministers of the Council of Europe adopted twenty guidelines on forced return. The guideline of relevance to the present case reads as follows:

Guideline 11. Children and families

"1. Children shall only be detained as a measure of last resort and for the shortest appropriate period of time.

2. Families detained pending removal should be provided with separate accommodation guaranteeing adequate privacy.

3. Children, whether in detention facilities or not, have a right to education and a right to leisure, including a right to engage in play and recreational activities appropriate to their age. The provision of education could be subject to the length of their stay.

...

5. The best interest of the child shall be a primary consideration in the context of the detention of children pending removal."

97. In Recommendation Rec(2003)5 of the Committee of Ministers of the Council of Europe to member States on measures of detention of asylum-seekers, adopted by the Committee of Ministers on 16 April 2003 at the 837th meeting of the Ministers' Deputies, the Committee of Ministers recommended that, in particular in respect of minors:

"4. Measures of detention of asylum-seekers should be applied only after a careful examination of their necessity in each individual case. These measures should be specific, temporary and non-arbitrary and should be applied for the shortest possible

time. Such measures are to be implemented as prescribed by law and in conformity with standards established by the relevant international instruments and by the case-law of the European Court of Human Rights.

...

6. Alternative and non-custodial measures, feasible in the individual case, should be considered before resorting to measures of detention.

...

20. As a rule, minors should not be detained unless as a measure of last resort and for the shortest possible time.

21. Minors should not be separated from their parents against their will, nor from other adults responsible for them whether by law or custom.

22. If minors are detained, they must not be held under prison-like conditions. Every effort must be made to release them from detention as quickly as possible and place them in other accommodation. If this proves impossible, special arrangements must be made which are suitable for children and their families.

23. For unaccompanied minor asylum-seekers, alternative and non-custodial care arrangements, such as residential homes or foster placements, should be arranged and, where provided for by national legislation, legal guardians should be appointed, within the shortest possible time."

98. In Recommendation 1985 (2011) of 7 October 2011, entitled "Undocumented migrant children in an irregular situation: a real cause for concern", the Parliamentary Assembly of the Council of Europe considered that undocumented migrant children were triply vulnerable: as migrants, as persons in an undocumented situation and as children. It recommended that member States refrain from detaining undocumented migrant children, and protect their liberty by abiding by the following principles:

"9.4.1. a child should, in principle, never be detained. Where there is any consideration to detain a child, the best interest of the child should always come first;

9.4.2. in exceptional cases where detention is necessary, it should be provided for by law, with all relevant legal protection and effective judicial review remedies, and only after alternatives to detention have been considered;

9.4.3. if detained, the period must be for the shortest possible period of time and the facilities must be suited to the age of the child; relevant activities and educational support must also be available;

9.4.4. if detention does take place, it must be in separate facilities from those for adults, or in facilities meant to accommodate children with their parents or other family members, and the child should not be separated from a parent, except in exceptional circumstances;

9.4.5. unaccompanied children should, however, never be detained;

9.4.6. no child should be deprived of his or her liberty solely because of his or her migration status, and never as a punitive measure;

9.4.7. where a doubt exists as to the age of the child, the benefit of the doubt should be given to that child;

...”

99. Prior to the above recommendation, in Resolution 1707 (2010) of 28 January 2010, the Parliamentary Assembly called on Council of Europe member States in which asylum-seekers and irregular migrants were detained to comply fully with their obligations under international human rights and refugee law, and encouraged them to abide by a number of guiding principles requiring, *inter alia*, that vulnerable people should not, as a rule, be placed in detention and specifically that unaccompanied minors should never be detained.

100. In Resolution 2295 (2019) of 27 June 2019, the Parliamentary Assembly reiterated its position of condemning violent practices such as detaining migrant children and using invasive methods in age-assessment procedures, which may have devastating effects on the child’s physical, emotional and psychological development. It welcomed the activities of the Parliamentary Campaign to End Immigration Detention of Children in promoting alternatives to immigration detention and encouraging a holistic approach to age assessment. It urged the member States of the Council of Europe to prevent all cases of violence against migrant children by:

“...

8.1.2. ensuring the compliance of national legislation with international standards for the protection of migrant children, in particular prohibiting their detention and ensuring the best interests of the child and their right to participate in decisions affecting them;

8.1.3. supporting the development of alternatives to detention of migrant children – such as foster care and supervised independent living with reporting obligations – and the setting out of a clear roadmap to end the practice of detention of children in a migration context;

8.1.4. providing legal safeguards for migrant children regarding their access to asylum procedures and guarantees that children are provided with child-friendly and age-appropriate information about asylum possibilities and other rights; ...

8.2.1. refraining from push-back practices in particular in relation to migrant children; ...

8.2.4. providing special training for law-enforcement and immigration officers, and border guards on international humanitarian law and the main international standards on the treatment of migrant children; ...

8.2.9. creating asylum units specialised in assisting migrant children and providing child-friendly information in the child’s native language; ...”

101. In Resolution 2299 (2019) of 28 June 2019 on pushback policies and practice in Council of Europe member States, the Parliamentary Assembly expressed concern about the persistent and increasing practice and policies of pushbacks, which were in clear violation of the rights of asylum-seekers and refugees, including the right to asylum and the right to protection against *refoulement*, which were at the core of international

refugee and human rights law. It urged the member States of the Council of Europe:

"12.1. with respect to border controls, to

12.1.1. refrain from any measure or policy leading to pushbacks or collective expulsions, as they lead to a violation of the core rights of international asylum law, notably the right to asylum, the right to be protected against *refoulement* and the right to access an asylum procedure;

12.1.2. refrain from any type of violence against migrants and measures depriving them of their basic needs such as food, water, housing and emergency health care;

12.1.3. ensure independent and sustainable monitoring of border control activities, which is essential in putting an end to (violent) pushback action, by granting independent bodies and NGOs access to all border areas, by granting independent bodies access to all border surveillance material, and by effectively addressing reports and complaints by migrants and NGOs, ensuring sufficient independence;

12.1.4. combine the investigation of incidents with protective measures for alleged victims pending conclusions. Prevention measures must be introduced against informal forced return procedures, including standardised procedures at borders and clear rules of conduct;

12.1.5. encourage and support legal research, investigative journalism and reliable information from recognised, reputable, international and non-governmental organisations as a means of correctly informing the public, rather than relying on unsubstantiated reports, hearsay and misinformation. Satellite and digital data enable registration of cases which require investigation by official and impartial bodies;

12.1.6. comply with judgments of national courts and of the European Court of Human Rights, including their interim measures, in relation to pushbacks and refusing access to asylum and even to an asylum procedure, and to follow up recommendations of national independent bodies such as ombudspersons;

12.1.7. introduce and/or improve police training programmes, emphasising that border protection and surveillance must be carried out in full compliance with international obligations to respect individual rights to protection, to information, to legal assistance and not to be detained arbitrarily;

12.2. with respect to services at borders, to:

12.2.1. increase the means given to border services to allow them to provide adequate services to refugees, asylum seekers and migrants arriving at national borders, whatever their status and pending the implementation of appropriate procedures;

12.2.2. ensure the provision to migrants arriving at borders of information on their legal position, including on their right to apply for international protection (as enshrined in Article 8 of Directive 2013/32/EU of the European Parliament and of the Council on common procedures for granting and withdrawing international protection – the recast Asylum Procedures Directive) in a language they can understand, including oral interpretation (if necessary using the possibilities of distant interpretation using services available on the internet), taking into account the special difficulties of vulnerable people such as children and traumatised and illiterate people;

12.2.3. ensure the provision of interpretation at borders and throughout reception and medical examinations, registration and asylum processing, and to immediately

cease any practices consisting in obliging migrants to sign documents they do not comprehend, which could lead them to believe they are signing asylum applications when the documents concern deportation;

12.3. concerning legal assistance, to:

12.3.1. ensure migrants can make a claim for protection at borders, and obtain legal aid and accessible and comprehensible information regarding their legal rights, taking into account the special circumstances of vulnerable people;

12.3.2. allow NGOs to provide assistance at places where human rights violations are reported (in particular in transit zones and along borders);

12.4. concerning medical and psychological assistance, to:

12.4.1. provide adequate access to medical services and health care at borders and immediately after transportation to reception centres, ensuring a permanent presence of medical staff, taking into account the special needs of vulnerable people, such as children, traumatised people and pregnant women;

12.4.2. in this framework, enable formal testimonies of physical violence perpetrated by border officials to be verified objectively;

12.4.3. give access to psychological support for asylum seekers, especially children, who often suffer from multiple trauma on arrival in Europe. The psychologists working with NGOs should be involved as partners in providing support, in view of the extensive experience and expertise of international NGO networks working with migrants;

12.5. concerning NGOs, to:

12.5.1. consider NGOs as partners and refrain from action that undermines their legitimate activities aimed at saving human lives;

12.5.2. refrain from using stigmatising rhetoric against NGOs assisting migrants, and refrain from taking any measures criminalising, stigmatising or putting at any disadvantage individuals and NGOs providing humanitarian assistance to, and defending the rights of, refugees, asylum seekers and migrants; the authorities are thereby invited to restore an enabling environment conducive to their work;

12.5.3. investigate allegations of infractions by NGOs of national laws or regulations before independent courts for adjudication and sanctions, which should only be applied in proven cases, respecting the principle of proportionality and founded on a clear legal basis."

102. The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) Factsheet on immigration detention (CPT/Inf(2017)3), in so far as relevant, reads as follows:

5. Open regime

"Conditions of detention for irregular migrants should reflect the nature of their deprivation of liberty, with limited restrictions in place and a varied regime of activities. Within the detention facility, detained persons should be restricted in their freedom of movement as little as possible.

Detained irregular migrants should in principle have free access to outdoor exercise throughout the day (i.e. considerably more than one hour per day) and outdoor exercise areas should be appropriately equipped (benches, shelters, etc.).

The longer the period for which persons are held, the more developed should be the activities which are offered to them. ...

Immigration detention centres should include access to a day room and to radio/television and newspapers/magazines, as well as other appropriate means of recreation (e.g. board games, table tennis, sports), a library and a prayer room. All multiple occupancy rooms should be equipped with tables and chairs commensurate with the number of persons detained.

The presumption should be in favour of open visits for detained foreign nationals. Visiting rooms should enable immigration detainees to meet under open conditions with family and friends visiting them, and the environment should be child-friendly (including a play area for children). If, exceptionally, it is considered necessary to impose restrictions on a particular foreign national, this should be done on the basis of an individual risk assessment.

..."

10. Care of vulnerable persons (in particular children)

"Specific screening procedures aimed at identifying victims of torture and other persons in situation of vulnerability should be put in place and appropriate care should be provided. In this context, the CPT considers that there should be meaningful alternatives to detention for certain vulnerable categories of person. These categories include *inter alia* victims of torture, victims of trafficking, pregnant women and nursing mothers, children, families with young children, elderly persons and persons with disabilities.

The CPT wishes to recall its position that every effort should be made to avoid resorting to the deprivation of liberty of an irregular migrant who is a child.

When, exceptionally, children are held with their parents in a detention centre, the deprivation of liberty should be for the shortest possible period of time. Mother (or any other primary carer) and child should be accommodated together in a facility catering for their specific needs.

...

Children should only be held in centres designed to cater for their specific needs and staffed with properly trained men and women.

In order to limit the risk of exploitation, special arrangements should be made for living quarters that are suitable for children, for example, by separating them from adults, unless it is considered in the child's best interests not to do so. This would, for instance, be the case when children are in the company of their parents or other close relatives. In that case, every effort should be made to avoid splitting up the family.

Children deprived of their liberty should be offered a range of constructive activities (with particular emphasis on enabling a child to continue his/her education)."

V. MATERIAL DESCRIBING THE SITUATION OF MIGRANTS ARRIVING IN CROATIA

A. European Union Agency for Fundamental Rights

103. The relevant part of the European Union Agency for Fundamental Rights (FRA) report "Periodic data collection on the migration situation in the EU - February 2018 – Highlights" concerning Croatia reads:

> "According to the Ombudsperson and UNHCR, Croatian police continued to force asylum-seekers back to Serbia and Bosnia and Herzegovina, in some cases using violence, without giving them an opportunity to lodge claims for international protection. For example, a Syrian national who had allegedly been subject to abuse and sexual exploitation was pushed back to Bosnia and Herzegovina although the police was informed about his vulnerability, the Croatian Law Center reported. A 6-year-old Afghani girl, who had already applied for asylum with her family in Croatia, lost her life after a train hit her at the border between Croatia and Serbia. According to media reports, the police had allegedly instructed the family to follow the railroad tracks back to Serbia, instead of processing the asylum application.
>
> ...
>
> According to the Ombudspersons Office, police stations at the Eastern border of Croatia recorded only some 150 asylum applications, while 1,100 persons were returned to Serbia or Bosnia and Herzegovina. All decisions on expulsion had the same non-individualised wording. As no interpreter was available, procedures were held in English.
>
> ...
>
> Reception centres in Croatia did not respect procedural and reception guarantees for vulnerable people as prescribed by law, the Croatian Law Center stated. No identification procedures, interpreters or specialised support services for victims of torture, trauma or human trafficking, people with mental health problems or addictions were available, according to the Centre for Peace Studies.
>
> ...
>
> During the reporting period in Croatia, 40 immigrants were detained, including a girl who had been a trafficking victim. She was detained for five weeks before being transferred to the Centre for missing and abused children, according to the Jesuit Refugee Service."

The relevant part of the FRA report "Periodic data collection on the migration situation in the EU - March 2018 Highlights" concerning Croatia reads:

> "The Ombudsperson confirmed that the allegations of pushbacks at the border of Croatia continued, as stated in his letter to the State Attorney in January.
>
> ...
>
> In Croatia, the Centre for Peace Studies has unsuccessfully been trying to access the detention centre since the beginning of 2018, in order to conduct regular visits as previously informally agreed with the Head Officer of the Detention Centre. As the main building is under reconstruction, persons in detention cannot get out for fresh air, according to the Jesuit Refugee Service.
>
> ..."

In Croatia, the NGO 'Are You Syrious' reported on the police driving migrants back to the Serbian border or forcing them to walk for eight hours back to Šid. According to their reports, at least one woman was physically assaulted by officers. Pushed back migrants had to sleep outside in harsh winter conditions without food or water."

The relevant part of the FRA report "Periodic data collection on the migration situation in the EU – May 2018 Highlights" concerning Croatia reads:

"Pushbacks of people who crossed the border without authorisation, including children who intended to seek asylum, continued from Croatia towards Serbia and Bosnia and Herzegovina on a daily basis, sometimes involving the use of excessive force, according to an interview with the NGO Welcome Initiative Service and media reports. Several children suffered injuries, including a 17-year-old boy from Afghanistan who sustained a concussion and a broken arm. Two men drowned trying to cross the river Kupa between Croatia and Slovenia.

...

According to an interview with the Ombudsperson's Office in Croatia, the conditions for children and vulnerable persons in the Ježevo Detention Centre and the Tovarnik Transit Detention Centre were sub-standard. Following a visit, the Ombudsperson's Office reported his observations to the relevant state bodies. The Asylum and Foreigners Service introduced a new practice making the approval of visits of NGOs to detention facilities more cumbersome, the Croatian Law Centre reported."

The relevant part of the FRA report "Periodic data collection on the migration situation in the EU – November 2018 Highlights" concerning Croatia reads:

"Reports noted that the Croatian police continue to use force against migrants to push them back to neighbouring countries after they have crossed the Croatian border in an unauthorised manner. The Ministry of the Interior repeatedly denied the Ombudsperson access to information regarding police treatment. UNHCR, the Council of Europe and Members of the European Parliament called on Croatia to investigate allegations of collective expulsions of migrants and of excessive use of force by law enforcement officers, which have been witnessed for more than two years.

...

Access to asylum in Croatia remained restricted. According to the Jesuit Refugee Service, police officers said to asylum-seekers at the border that they had no time to take asylum requests and instructed them to proceed towards Bregana (border crossing between Croatia and Slovenia). The lack of translators, as well as the lack of defined standards for translators working in counselling and psychotherapy, remained concerns, according to an interview with the Society for Psychological Assistance."

The relevant part of the FRA report "Migration: Key fundamental rights concerns – Quarterly bulletin 1" issued in February 2019 concerning Croatia reads:

"Asylum requests are being ignored and people, including children, continue to be pushed back from Croatia, NGOs and individuals reported to the Ombudsperson's Office. According to Save the Children, the largest number of pushbacks involving

children in 2018 was reported at the border between Serbia and Croatia ... News about police violence against refugees appears on a daily basis. A Guardian video showed asylum-seekers from Algeria, Syria and Pakistan being brutally beaten and sent back after being captured by the Croatian police while attempting to cross the Bosnia-Croatia border. The NGO No Name Kitchen reports regularly about police violence. The Centre for Peace Studies has filed criminal charges against unidentified Croatian police officers for unlawful acts against refugees and migrants at Croatia's border with Bosnia and Herzegovina. Border Violence Monitoring – a Serbian non-profit database – published video footage of pushbacks of migrants including children and has collected more than 150 push-back reports from the Bosnian-Croatian border.

...

The Croatian Law Centre reported that there are no alternatives to detention in Croatia and access to detention centres for NGOs and lawyers remains limited. According to the new By-law on the Rules Regarding Detention in the Reception Centre for Foreigners to the Ministry of Interior, lawyers need to announce their visit two days in advance (same as regular visitors) and police officials are present throughout the visit."

B. Croatian Ombudswoman's letters to the State authorities

1. Letter of 23 January 2018 to the State Attorney of the Republic of Croatia

104. On 23 January 2018 the Croatian Ombudswoman sent a letter to the State Attorney of the Republic of Croatia regarding the event of 21 November 2017 during which the first and second applicant's daughter, MAD.H., was hit by a train, as well as regarding the general practice of the Croatian police in respect of migrants entering Croatia from Serbia.

On the first point she submitted that she had conducted an inquiry after receiving a complaint from the first applicant lodged through the Serbian branch of Médecins sans Frontières. She noted that the applicants and the police officers had reported differently on the sequence of events which had led to the first and second applicants' daughter's death. The Ombudswoman noted, however, that there had been no thermographic camera recordings of the event. She noted that in previous cases in which she had sought to obtain such recordings, the thermographic camera recordings had also not been available owing to technical problems. She submitted that a criminal investigation should be conducted. She suggested that the contacts between the applicants and the police before the train had hit MAD.H. on 21 November 2017 be established by inspecting the signals from their mobile telephones and the police car GPS.

On the second point she noted that the results of her inquiries conducted in 2016 and 2017 had shown reasonable suspicion that the practice of the police officers on the border with Serbia, and in particular the fact that they were returning irregular migrants to Serbia without conducting proceedings

under the Aliens Act and the International and Temporary Protection Act, had not been adequately investigated.

The Ombudswoman reported on an order of the Police Directorate of 15 February 2017 concerning migrants who had been caught deep into Croatian territory. All police administrations had been instructed to escort irregular migrants, regardless of where they had been encountered, to the border police administration, which would take over the proceedings and examine the circumstances of their entry and stay. She reported that between 15 February and 24 November 2017 summary proceedings had been conducted in respect of 1,116 persons. Every summary proceedings case file inspected had contained the same expressions, for example that the person in question had not had visible injuries and had not complained about his or her condition of health, that he or she spoke Arabic and English, that an interpreter had not been available and so the person had been interviewed in English, and that the person had not requested asylum. The latter circumstance raised serious doubts that such summary proceedings had gone into the individual circumstances of the persons in question.

2. Letter of 6 April 2018 to the Minister of the Interior and the Head of Police

105. On 6 April 2018 the Croatian Ombudswoman sent a letter to the Minister of the Interior and the Head of Police concerning the restriction of the first applicant's and her children's freedom of movement. She noted from the case file that the procedure had been conducted in English, which the first applicant did not understand, and that the interpreter had not signed the note on information concerning legal aid.

She asked about the action taken to verify the applicants' identity and nationality, which was the reason for their placement in the Tovarnik Centre, in particular because in situations concerning the return of aliens the police deemed it sufficient that the persons submit a "Statement on identity for foreigners without identification documents".

3. Letter of 18 April 2018 to the Minister of the Interior, the Minister of Health and the Head of Police

106. On 18 April 2018 the Croatian Ombudswoman sent a letter to the Minister of the Interior, the Minister of Health (*Ministar zdravstva Republike Hrvatske*) and the Head of Police concerning the visit by her representatives to the Tovarnik Centre on 26 March 2018. The Croatian Ombudswoman noted that, apart from the police officers who guarded the Tovarnik Centre, it lacked personnel to conduct activities with the persons placed there, especially with the children. She warned that there were no staff to provide food in and clean the Centre. The food had been ordered

from local restaurants, and on the day of the visit all the persons held in the Tovarnik Centre, including two-year-old children, had been served with pizza, which was inappropriate nourishment for persons of their age.

The Croatian Ombudswoman reported having received contradictory information concerning the possibility of the persons placed in the Tovarnik Centre to use outdoor facilities and rooms for daily activities. She warned that vulnerable persons, particularly children, should be granted constant access to fresh air, the library and open areas. She proposed providing the persons placed in the Centre with clothes and shoes, rather than leaving it to the NGOs to meet this need. She noted that medical assistance was not provided in the Tovarnik Centre, whereas according to the standards of the CPT, a medical officer should have been present in the Centre on a daily basis. She further asked to be informed about the reasons why lawyers and NGOs had allegedly been denied the opportunity to visit the Tovarnik Centre.

The Croatian Ombudswoman noted that on the day of the visit it had been established that the persons placed in the Tovarnik Centre had had their mobile phones taken away from them and returned to them only occasionally. At the same time there had been no telephone available in the Centre for detainees to use to contact the outside world, or at least certain pre-designated persons or institutions.

Finally, she warned the Ministry of the Interior not to use media coverage of the fact that she had been allowed to visit the Tovarnik Centre as proof that the police had been treating migrants well, because the inadequacy of the material conditions in the Centre had only come to light when her report had been published.

C. Croatian Children's Ombudswoman's letters to the State authorities

107. On 10 April 2018 the Croatian Children's Ombudswoman sent a letter to the Head of Police concerning the conditions under which families with children were being held in the Tovarnik Centre. She submitted that after visiting the Tovarnik Centre, her representative had concluded that it was inadequate for accommodating families with children, in that it entailed a limitation of freedom of movement, was not adequately equipped and there were no experts to provide psychosocial support. The Children's Ombudswoman recommended that measures to ensure adequate conditions of placement for children be urgently taken, in accordance with the relevant international obligations.

108. In her letter to the Head of Police of 28 May 2018, the Croatian Children's Ombudswoman stated that after visiting the Tovarnik Centre again on 2 May 2018 and talking with the families placed there, including the applicants, she had established that the conditions had improved: the

rooms were clean, the external door were locked at midnight, all the persons placed in the Centre could use the entire space, including the playground for children and the sports courts. The children had been given toys and books in Farsi, a television showing children programmes and a table football game. There was a special room for changing nappies and children's clothes, and the parents had been given baby food. However, she noted that most of the children had been unhappy because there was no possibility of schooling and there were no activities to structure their time. The children complained about bad food and the lack of fruit, vegetables and cooked meals. Some had health issues such as infections and allergies, and also psychological difficulties such as nightmares, phobias and sleep disorders. Although the persons held in the Centre had been provided with medical and dental care, as well as psychological support through weekly visits by the medical staff, social workers and a psychologist, the latter had been inefficient since there had been no interpreter present during the consultations.

The Children's Ombudswoman recommended the transfer of families with children to appropriate accommodation in which the children could benefit from such facilities as pedagogical support and instruction in the Croatian language, and where they would be able to express themselves and benefit from medical and psychological and legal support with the help of an interpreter.

She concluded that although the conditions in the Tovarnik Centre had improved, they were not appropriate for the long-term accommodation of persons. No reasons had been given for the fact that such families as the applicants were being kept there for several months. Verification of the persons' identities and their illegal crossing of the border could not justify long-term detention and restriction of freedom of movement for such vulnerable groups as families with children.

D. Letter of 20 September 2018 from the Council of Europe Commissioner for Human Rights

109. On 20 September 2018 the Commissioner for Human Rights wrote to the Croatian Prime Minister, expressing concern regarding the reports from expert refugee and migrant organisations that provide consistent and substantiated information about a large number of collective expulsions from Croatia to Serbia and to Bosnia and Herzegovina of irregular migrants, including potential asylum-seekers. According to UNHCR, Croatia had allegedly collectively expelled 2,500 migrants since the beginning of 2018. Among them, 1,500 had reported having been denied access to asylum procedures, while 700 of those persons had reported violence and theft by law enforcement officers during summary expulsions. Concerns in this context had also been expressed by the Croatian Ombudswoman. The

Croatian authorities were invited to initiate and carry out prompt, effective and independent investigations into all recorded cases of collective expulsions and of allegations of violence against migrants and to ensure that anyone who intended to make an asylum application was given access to a fair and effective procedure.

E. Report of the fact-finding mission to Croatia by the Special Representative of the Secretary General on Migration and Refugees

110. On 23 April 2019 the Special Representative on Migration and Refugees published a report on his fact-finding mission to Croatia from 26-30 November 2018. He noted that Croatia, which was responsible for a European Union external border on the Balkan route, had registered an increase in arrivals, with a total of 7,388 people registered in the first eleven months of 2018. However, the number of those remaining in the country was much lower: 352 asylum-seekers were accommodated in open reception centres in Croatia in November 2018. He further noted that in its attempts to thwart the unauthorised crossing of the European Union's external border, and in view of preparations for entering the border-free Schengen area, since mid-2017 Croatia had been focusing on policies and measures to deter access to its territory and to return irregular migrants mainly to neighbouring countries, and that the implementation of these policies and measures had coincided with the emergence of reports of pushbacks, sometimes accompanied by violence, of migrants and refugees attempting to cross the border to Croatia.

During his interviews in Croatia, the Special Representative heard witness statements concerning repeated attempts to enter Croatia and injuries caused by physical violence, dog bites, and gunshot wounds. UNHCR and other international organisations had reported alleged incidents of ill-treatment of asylum-seekers and refugees by the Croatian Border Police, resulting in physical injuries. Several videos allegedly recorded in September-October 2018 showed instances of summary returns.

The Special Representative noted that since 2016, the Ministry of the Interior had received 193 complaints concerning allegations of ill-treatment at the border and of confiscation and destruction of possessions. Police inquiries had been made into these complaints but no violations of the law by the police forces had been found. At the same time, the investigation into the allegations had been hampered by the lack of information to identify the alleged victims and pinpoint the locus of the alleged ill-treatment, as well as by the difficulty of cross-checking data once the alleged victims had left Croatia. The Special Representative had not been informed of any practical steps taken to investigate those allegations, for example whether inquiries

had been initiated by an authority independent from the police force or whether attempts had been made to identify or contact the alleged victims.

As regards access to the territory, the Special Representative noted with concern the intimidation perceived by NGOs working with refugees and migrants when their members and volunteers had been apprehended or convicted for having supported this group of people, which support was classified as assistance in the illegal crossing of the border.

The Croatian authorities had explained to the Special Representative that anyone who crossed the State border unlawfully was subject to an administrative procedure under the Aliens Act, with a view to their return. Once migrants were intercepted on Croatian territory, they were brought to the police station for identification and assessment of their needs in terms of protection. Refugees and migrants were asked, usually with the help of French or English interpretation, to fill in a form stating their identity and the circumstances of their illegal entry. If they expressed an intention to seek asylum, that fact was recorded in a database and the provisions of the International and Temporary Protection Act came into play. They were fingerprinted and redirected to reception or immigration detention centres. The Special Representative was told that many people preferred to withdraw their intention to seek asylum when informed of the role of fingerprinting under Eurodac, since they did not wish to stay in Croatia. In the absence of any intention to seek asylum, they were considered for voluntary removal or for immigration detention for the purposes of forced removal or taken immediately to the border to be handed over to the Bosnia and Herzegovina authorities under a readmission agreement.

Despite the fairly effective legal framework for affording protection, the Special Representative had heard reports of cases where asylum claims had been overlooked by the police or where people had been returned without having been taken to a police station in order to verify their need for international protection. He also heard testimonies on cases in which oral interpretation was provided in English in the course of procedures even though the person concerned had insufficient knowledge of that language; all documents were served only in Croatian and the person was unaware of the possibility of obtaining legal aid. The Special Representative warned that the lack of interpretation in languages spoken by foreigners in police stations where foreigners were held for illegally crossing the border prevented or delayed the identification of people in need of international protection and their access to asylum procedures.

The Special Representative noted that Croatia's border control policies were characterised by a deterrent approach to the admission of migrants and refugees in the country, at the Croatian-Bosnian border in particular. He warned that in the absence of a physical barrier, the considerable technical and human resources deployed for border control should not be used to create obstacles to asylum for those who might be in need of international

protection. The interception of migrants and refugees who were in Croatian territory but were then returned without the requisite administrative procedure raised questions as to the very essence of the right to seek asylum and respect for the principle of *non-refoulement.*

Several detainees in the Ježevo Centre to whom the Special Representative had spoken reported that they had not had access to a lawyer or an interpreter and had not been apprised of why they were in detention. They showed documents in Croatian (decisions ordering their expulsion and detention) and asked the Special Representative to translate and explain their content. The Special Representative was informed that upon arrival everyone had received a list providing information on how to access legal aid; however, the people he spoke to did not appear aware of their rights to have a lawyer and to appeal to a court against the detention decision. During the Special Representative's visit, he had noticed next to the pay telephones a paper on the wall with an NGO's contact details. He did not notice any other publicly displayed information on access to asylum and legal assistance.

The Special Representative noted that although the social welfare system was willing and able to accommodate unaccompanied children in their facilities, very few were detained in practice, but it was worrying that domestic legislation allowed for it. He pointed out that the situation of confinement of children should be addressed as a matter of urgency based on the principle that the best interests of the child should be the primary consideration, and that every effort should be made to avoid resorting to the deprivation of liberty of migrant and refugee children solely on grounds of their migration status. Developing effective alternatives to immigration detention should be a priority.

The Special Representative recommended the following:

> "a. Call on the authorities to ensure the respect for the principle of *non-refoulement* by those guarding the borders; assist the authorities in providing continued training to those guarding the borders, including involved riot police, so as to ensure that they carry out their duties in compliance with the country's human-rights obligations; and strengthen complaints mechanisms and the authorities' capacity to conduct swift and effective investigations into allegations of shortcomings in this respect;
>
> b. Support the authorities in drafting and implementing minimum standards for conditions of reception and services for women and children, to ensure compliance with European human rights standards;
>
> c. Assist the authorities in developing and implementing a system of alternatives to immigration detention for families and other vulnerable groups;
>
> ..."

F. Report on pushback policies and practice by the rapporteur of the Committee on Migration, Refugees and Displaced Persons of the Parliamentary Assembly of the Council of Europe

111. The rapporteur of the Parliamentary Assembly's Committee on Migration, Refugees and Displaced Persons published a report on her fact-finding mission to Croatia and Bosnia and Herzegovina from 26-29 March 2019.

The rapporteur was struck by the large discrepancies between the statements of the authorities and non-State actors like the Ombudswoman and NGOs. The authorities expressed mistrust of NGOs, seen as questioning unnecessarily the country's border management, accusing the Croatian police of mistreatment where cases were extremely rare, and in some cases encouraging border crossing by illegal migrants. On the other hand, the findings of the Ombudswoman and NGOs "were so consistent and substantiated" that the rapporteur "had to take them seriously and investigate".

In this context, the Deputy Ombudswoman of Croatia had told the rapporteur about the high number of complaints (over 200) she had lodged with the Ministry of the Interior about alleged pushbacks and collective expulsions from Croatia to Bosnia and Herzegovina but also from Croatia to Serbia. Only 1% of them had been declared admissible, which caused the Ombudswoman concerns about the level of independence with which the complaints are being dealt.

The rapporteur's meeting with the Deputy Ombudswoman of Croatia "corroborated, notably, the conclusions of the Council of Europe Human Rights Commissioner concerning increasing (administrative and other) obstacles facing human rights defenders and NGOs dealing with migrants in many parts of Europe". For instance, the National Preventive Mechanisms in place since June 2018 required advance written requests from the Ombudsperson's office to consult specific police records rather than holding database information available without restrictions. Lawyers and NGOs were seeing their access to persons in need of assistance reduced and their presence resented, if not hampered, by the authorities. According to the rapporteur, these restrictions illustrated that it had become more difficult to reach out to migrants in need of help or to monitor border practices, and that the democratic space was progressively shrinking.

The rapporteur had met with the NGOs Centre for Peace Studies and Are You Syrious, which provided legal assistance and other services to migrants. Lawyers funded by UNHCR visited camps for two hours per week. Between April and October 2017, NGOs had escorted 300 people to the Croatian border who had asked for their support, announcing their arrival to the police, but this had been stopped as it gave asylum-seekers

false hopes of receiving protection. These organisations had received many testimonies about pushbacks, a significant part accompanied by violence.

The rapporteur reported that all non-State actors she had interviewed had informed her about many other cases in which detected migrants had reported not being sent to a police station, but being immediately taken to the border or far inland within Bosnian territory, implying that no access to an asylum procedure was offered and official return procedures were circumvented. In some cases, this happened even with migrants who were found in the north of Croatia, sometimes after a formal readmission procedure applied by the Slovenian authorities. An element that appeared to be structural, especially in those informal procedures, was the brutal way pushbacks were carried out. Respondents referred to several documentaries in which the Croatian authorities had been shown mistreating groups of migrants, among them women and minors, while directing them to Bosnian territory. This was also confirmed by the mayor of the Bosnian city of Bihać, Mr Š.F., who claimed he had been confronted with special units of the Croatian authorities in the forests within Bosnian territory, forcing migrants to walk.

G. Report by Amnesty International "Pushed to the edge: Violence and abuse against refugees and migrants along the Balkans Route"

112. The Amnesty International report of 13 March 2019 was based on research carried out between June 2018 and January 2019. It found that systemic and deliberate pushbacks and collective expulsions – sometimes accompanied by violence and intimidation – were a regular occurrence at the border between Croatia and Bosnia and Herzegovina. Among the ninety-four refugees and migrants stranded in the temporary accommodation camps in Bihać and Velika Kladuša who were interviewed, nearly all confirmed that they had been returned from Croatia, often several times and after having been held in police stations deep inside Croatian territory, without due process and without access to asylum procedures. Many had made several unsuccessful attempts to reach Schengen borders only to encounter Croatian police who promptly returned them to Bosnia and Herzegovina without registering their asylum claims. Those intercepted in Croatian territory were told that "there was no asylum in Croatia", shouted at and frequently beaten and detained for hours without food or water, before being transported in overcrowded, windowless and poorly ventilated police vans and dropped off at the Bosnian border. One third of those interviewed had experienced violence at the hands of the Croatian police. Others reported how Croatian police took their shoes, warm clothes and sleeping bags and forced them to walk barefoot for kilometres through freezing rivers and streams towards the Bosnian border. These returns regularly took place at night and in remote areas outside of the regular

border crossings and without the presence of Bosnian border guards. Amnesty International reported that the accounts of returns cited above indicated that pushbacks and collective expulsions to Bosnia and Herzegovina of persons irregularly entering Croatia were widespread and were carried out summarily, without any of the guarantees required by international and EU law.

H. Judgment of the Federal Administrative Court of Switzerland of 12 July 2019

113. On 12 July 2019 the Federal Administrative Court of Switzerland suspended the transfer of a Syrian asylum-seeker to Croatia under Dublin Regulation 604/2013 because of the prevalence of summary returns at the Croatian border with Bosnia and Herzegovina. The court acknowledged the increasing number of reports that the Croatian authorities were denying access to asylum procedures and that large numbers of asylum-seekers were being returned to the border with Bosnia and Herzegovina, where they were forced to leave the country.

I. Report by the United Nations Special Rapporteur on the human rights of migrants

114. On 1 October 2019 the UN Special Rapporteur on the human rights of migrants, having visited Bosnia and Herzegovina between 24 September and 1 October 2019, reported having received reliable information about violent pushbacks of migrants and asylum-seekers by Croatian border police into the territory of Bosnia and Herzegovina. According to the testimonies he received, many migrants were forcibly escorted back to Bosnia and Herzegovina without going through any official procedure. The concrete tactics varied; however, common patterns included the capture of people on the move, confiscation of their property, especially communication equipment, beating with batons and chasing by dogs with the purpose of physically exhausting them and preventing them from attempting another crossing. The Special Rapporteur noted that abusive actions by the Croatian border police clearly violated the human rights of these individuals and in reality did not deter people on the move from advancing towards the European Union territory, but instead led to a flourishing network of smugglers and organised criminal activities, which required immediate attention and action by all countries in the region.

J. Statement of 21 October 2020 by the Council of Europe Commissioner for Human Rights

115. In her statement "Croatian authorities must stop pushbacks and border violence, and end impunity" published on 21 October 2020 following reports she had received of new allegations of collective expulsions of migrants, denial of access to asylum and extreme violence by Croatian law enforcement used in this context, the Commissioner stressed that these new and disturbing reports suggested that violence and dehumanising acts during pushbacks were increasing, and that it seemed that Croatian law enforcement officers continued to enjoy impunity for such serious human rights violations. The Commissioner was also concerned that the Croatian government's reaction had been to dismiss reports published by NGOs or resulting from investigative journalism. She reiterated her call for the Croatian authorities to stop pushbacks and border violence and eradicate impunity for serious human rights violations committed against migrants by law-enforcement officers. She called on the Croatian authorities to publish the report by the CPT on its rapid reaction visit to Croatia in August 2020 as soon as possible after its adoption.

VI. OTHER RELEVANT MATERIAL

116. On 6 January 2016 the Afghan Translation Service published an article "The Challenge of Translating Afghan Government Issued Documents". It was noted that the war had dispersed Afghans across continents where they have to prove their identity. There were numerous problems with the documents issued by the government in Afghanistan; they were all handwritten, none were digital and there was no uniformity between the government-issued citizenship ID documents. The challenge of authenticating such documents was an issue for the translating agencies.

THE LAW

I. PRELIMINARY REMARKS

117. In several letters submitted in connection with application no. 15670/18 between 17 July 2018 and 8 March 2019, the Government referred to the applicants' departure from Croatia and, while not requesting the striking-out of the case, referred to the case of *V.M. and Others v. Belgium* ((striking out) [GC], no. 60125/11, 17 November 2016).

118. The applicants' lawyer replied that she was in contact with the applicants through the fourth applicant, who had sent her Viber messages on 17 and 20 July 2018 confirming that they wished to pursue their case before the Court. On 22 March 2019 she submitted a written statement signed by

the first to fourth applicants on 20 March 2019, confirming that the family wished to pursue their case before the Court.

119. In a letter submitted in connection with application no. 43115/18, the Government objected that the authority form attached to the application was not signed by the applicants. In reply, the applicants' lawyer submitted authorisations signed on 2 June 2020 by the first to fourth applicants to act on behalf of the family in the case.

120. In view of these circumstances, the Court will first examine whether it is necessary to continue the examination of the applications in the light of the criteria set forth in Article 37 of the Convention (see *N.D. and N.T. v. Spain* [GC], nos. 8675/15 and 8697/15, § 71, 13 February 2020).

121. In the case of *V.M. and Others v. Belgium* (cited above), the Court specified, in the light of Article 37 § 1 (a), that an applicant's representative not only had to supply a power of attorney or written authority (Rule 45 § 3 of the Rules of Court), but that it was also important that contact between the applicant and his or her representative be maintained throughout the proceedings, both in order to learn more about the applicant's particular circumstances and to confirm the applicant's continuing interest in pursuing the examination of his or her application.

122. The Court considers that in the present case there is no reason to doubt the validity of the powers of attorney or the credibility of the information provided by the applicants' lawyer as to the truth of her contact with the applicants (compare *Asady and Others v. Slovakia*, no. 24917/15, §§ 37-42, 24 March 2020).

123. In any event, the Court considers that special circumstances relating to respect for human rights as defined in the Convention and the Protocols thereto require it to continue the examination of the applications in accordance with Article 37 § 1 *in fine* of the Convention. Indeed, the present case raises several important issues in terms of immigration control by the Croatian authorities. The participation of five third parties testifies to the public's interest in the case. The impact of this case thus goes beyond the particular situation of the applicants (see *N.D. and N.T. v. Spain*, cited above, § 78).

II. JOINDER OF THE APPLICATIONS

124. Having regard to the intertwined subject matter of the applications, the Court finds it appropriate to examine them jointly in a single judgment.

III. ALLEGED VIOLATION OF ARTICLE 2 OF THE CONVENTION

125. The applicants complained that the State had been responsible for the death of MAD.H., and that in the ensuing criminal investigation all the relevant facts concerning her death had not been properly established. They

relied on Article 2 of the Convention, the relevant part of which reads as follows:

"1. Everyone's right to life shall be protected by law ..."

126. The Court will first look into the manner in which the authorities investigated the applicants' allegations concerning the death of MAD.H. on 21 November 2017.

A. Procedural obligation under Article 2 of the Convention

1. Admissibility

(a) Compatibility *ratione loci* of the complaint

127. Although the Government made no plea as to the Court's competence *ratione loci* to examine the present complaint against Croatia in view of the fact that MAD.H. was hit by a train in the territory of Serbia (see paragraph 151 below), the Court will examine this question of its own motion.

128. In the case of *Güzelyurtlu and Others v. Cyprus and Turkey* ([GC], no. 36925/07, 29 January 2019), the Court set out the principles concerning the existence of a "jurisdictional link" for the purposes of Article 1 of the Convention in cases where the death occurred outside the territory of the Contracting State in respect of which the procedural obligation under Article 2 of the Convention was said to have arisen (ibid., §§ 188-90).

129. Applying those principles to the present case, the Court firstly observes that according to the criminal complaint lodged by the applicants, MAD.H.s' death had allegedly been caused by the actions of the Croatian police undertaken within Croatian territory (see paragraph 10 above). Accordingly, under their domestic law which applies the principle of ubiquity (see paragraph 77 above), regardless of the fact that the death of MAD.H. had occurred in the territory of Serbia, the Croatian authorities were under the obligation to conduct a criminal investigation in order to examine the liability of the Croatian police officers for her death, which they did (see paragraphs 10-27 above and compare *Güzelyurtlu and Others*, cited above, §§ 188, 191 and 196, and *Isaksson and Others v. Sweden*, (dec.), no. 29688/09 et al., §§ 51 and 55, 8 March 2016). Lastly, the Court observes that the Croatian Constitutional Court raised no questions as to its own jurisdiction to examine the compliance of the domestic authorities with their procedural obligation under Article 2 of the Convention concerning MAD.H.'s death (see paragraphs 24 and 27 above).

130. In these circumstances, the Court finds that there was a "jurisdictional link" between the applicants, with respect to their complaint under the procedural limb of Article 2 concerning MAD.H.'s death, and Croatia.

131. The Court therefore finds that the applicants' complaint against Croatia is compatible *ratione loci* with the provisions of the Convention.

(b) Non-exhaustion of domestic remedies

132. The Government submitted that the present case was similar to that of *M.M. v. Croatia* ((dec.), no. 4955/15 of 22 October 2019), where the Court had held that the applicant could have recourse to the Court only after the domestic proceedings directed towards rectifying any possible violation of Article 2 of the Convention had come to an end. Furthermore, they argued that the complaint was premature as the applicants had brought it to the Court before the Constitutional Court had had an opportunity to examine it.

133. The applicants submitted that they had exhausted the domestic remedies for their complaint.

134. In so far as the Government's reference to the case of *M.M. v. Croatia* (cited above) could be understood as an argument that the applicants had failed to exhaust domestic remedies in that they had never brought a civil action for damages against the State in relation to the events in issue, the Court notes that the said case concerned the applicant's allegation that the police had not taken all reasonable and adequate steps in order to prevent the killing of his wife and mother perpetrated by his son (ibid.). The present case, on the other hand, concerns the allegation that the Croatian police officers had put the first applicant and her children in a dangerous situation, which resulted in one of the children tragically dying.

135. In that connection, the Court reiterates that even in cases of non-intentional interferences with the right to life or physical integrity, there may be exceptional circumstances where an effective criminal investigation is necessary to satisfy the procedural obligation imposed by Article 2 (see *Lopes de Sousa Fernandes v. Portugal* [GC], no. 56080/13, § 215, 19 December 2017). Such circumstances can be present, for example, where a life was lost or put at risk because of the conduct of a public authority which goes beyond an error of judgment or carelessness, or where a life was lost in suspicious circumstances or because of the alleged voluntary and reckless disregard by a private individual of his or her legal duties under the relevant legislation (see *Nicolae Virgiliu Tănase v. Romania* [GC], no. 41720/13, § 160, 25 June 2019, and the cases cited therein). In *Öneryıldız v. Turkey* ([GC], no. 48939/99, § 93, ECHR 2004-XII), the Court held that where it was established that the negligence attributable to State officials or bodies had gone beyond an error of judgment or carelessness, in that the authorities in question, fully realising the likely consequences and disregarding the powers vested in them, had failed to take measures that were necessary and sufficient to avert the risks inherent in a dangerous activity, the fact that those responsible for endangering life had not been charged with a criminal offence or prosecuted could amount to a violation

of Article 2, irrespective of any other types of remedy which individuals could pursue on their own initiative.

136. In the present case, while it is not for the Court to assess the liability of police officers for the death of MAD.H., it notes that the police actions which allegedly immediately preceded her death might have involved a deliberate disregard of the relevant rules on access to asylum procedures (see paragraph 78 above, sections 33 and 59 of the International and Temporary Protection Act; see also Articles 6 and 8 of the relevant European Union Directive cited in paragraph 86 above, and Article 22 of the United Nations Convention on the Rights of the Child, paragraphs 89 and 90 above), or at the very least a disregard of the readmission agreement between Croatia and Serbia on the safe return of migrants unlawfully entering the country (see paragraph 80 above), despite the obvious risks involved in view that it was night-time in the winter and that there were several children present in the group aged one, two, six, nine and fourteen at the time (see, *mutatis mutandis*, *Sinim v. Turkey*, no. 9441/10, § 63, 6 June 2017, see also the third-party submissions outlined in paragraphs 144-147 below).

137. In these circumstances the Court considers that the procedural obligation imposed by Article 2 required that a criminal investigation be opened, also having regard to the fact that the situation could have given rise to criminal liability on the part of the police officers involved.

138. Accordingly, the applicants' complaint cannot be rejected on the grounds that they did not institute civil proceedings for damages against the State.

139. The Court further notes that the Constitutional Court twice examined the merits of the applicants' complaint concerning the ineffectiveness of the investigation into MAD.H.'s death and found that there had been no breach of Article 2 of the Convention in its procedural limb (see paragraphs 24 and 27 above). The Court has previously accepted that the last stage of a particular remedy may be reached after the application has been lodged but before its admissibility has been determined, as is the situation in the present case (see *Karoussiotis v. Portugal*, no. 23205/08, § 57, 1 February 2011, and *Şahin Alpay v. Turkey*, no. 16538/17, § 86, 20 March 2018).

140. The Court is therefore satisfied that the applicants brought their grievances before the domestic authorities, affording those authorities the opportunity of putting right the alleged violation of the Convention. It follows that the Government's objection must be dismissed.

(c) Conclusion

141. The Court notes that the complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes

that it is not inadmissible on any other grounds. It must therefore be declared admissible.

2. Merits

(a) The parties' arguments

(i) The applicants

142. The applicants contended that the Croatian authorities ought to have investigated MAD.H.'s death on their own initiative immediately after being apprised of the circumstances. The authorities ignored the evidence on the basis of which it had been possible to establish that the first applicant and her six children had entered Croatian territory, and that the police had apprehended and returned them to the border with Serbia. The applicants had not had an effective opportunity to participate in the investigation. Even though the investigation had been initiated following the criminal complaint lodged by their lawyer S.B.J. on their behalf, the investigating authorities had excluded S.B.J. from the investigation, and they had not been allowed to meet her until 7 May 2018.

(ii) The Government

143. The Government submitted that the investigation into the circumstances of MAD.H.'s death had complied with all the requirements of Article 2 of the Convention. Independent investigating authorities had promptly undertaken all actions with a view to verifying any causal link between the conduct of the Croatian border police officers and MAD.H.'s death. They gathered all documents, heard all witnesses and obtained documents from the Serbian authorities which had conducted an on-site inspection. The applicants' statements given in the investigation had been contradictory. Moreover, had they not left Croatia several months after lodging their criminal complaint, they could have contributed to the investigation by proposing evidence and pointing to possible failures. In their application to the Court the applicants had not pointed to a single piece of evidence which the authorities had failed to obtain. They were merely dissatisfied with the outcome of the investigation.

(b) The third-party interveners

(i) The Centre for Peace Studies

144. The Centre for Peace Studies submitted that, since 2016, Croatian authorities had been conducting collective expulsions of migrants without any identification or registration of the persons intercepted, access to a lawyer and interpreter or access to asylum procedure. A large majority of reported cases involved persons being ordered to cross the border to Serbia

and Bosnia and Herzegovina, thus being forced to swim through rivers and pass through mountains or exposed to other dangerous situations. In 2019 the Croatian Ombudsperson for Children had received several complaints concerning unlawful expulsions of children at the borders with Serbia and Bosnia and Herzegovina. These expulsions were in breach of the children's right to seek asylum, and in complete denial of their best interests as extremely vulnerable persons. There had been no effective investigation into allegations of illegal practices of the Croatian police against migrants.

(ii) The Belgrade Centre for Human Rights

145. The Belgrade Centre for Human Rights referred to its joint report with the International Aid Network entitled "Documenting abuse and collective expulsions of refugees and migrants", containing testimonies of collective expulsions and ill-treatment by Croatian officials in 2017. Most of the migrants interviewed had told similar stories: after crossing into Croatian territory though fields or forests, they had been spotted by Croatian officials, put into vans, transported to a place where they had been beaten, and later been pushed back to Serbia. Several persons reported that they had been taken near the railway line and told to return to Serbia by following the train tracks. Another field mission undertaken in 2019 had confirmed that such practices had continued in 2019.

(iii) Rigardu e.V.

146. Rigardu e.V. referred to its report of July 2017 containing testimonies of violent pushbacks from Croatia to Serbia gathered during its field work in Šid, Serbia, from 31 May to 13 July 2017. The circumstances in which these pushbacks had been carried out – in the middle of the night, outside official border crossings, in dangerous terrains and without notification of the authorities of the country to which the migrants were being returned – demonstrated that Croatian officials were systematically putting migrants' lives in danger. There was a systemic lack of an adequate response by the Croatian authorities regarding allegations of illegal and violent pushbacks, despite numerous reports and evidence in that regard. When it came to deaths and severe injuries, the investigating authorities should not predominantly rely on statements of officials implicated in the incidents, and testimonies of migrants should not be easily discredited on account of the linguistic challenges and their limited opportunities to gather and provide evidence.

(iv) The Asylum Protection Center

147. The Asylum Protection Center submitted that, since 2016, numerous NGOs in the Western Balkans had reported widespread practices of unlawful and violent expulsions of migrants from Croatia to Serbia and

Bosnia and Herzegovina. Such returns were being conducted outside official border crossings and without any prior notification of the authorities of the country to which the migrants were being returned, and thus in breach of the readmission agreements. The police usually ordered migrants to follow railways or roads, or cross rivers, as a result of which many of them had sustained accidents and died.

(c) The Court's assessment

(i) General principles

148. The general principles applicable in a situation where an effective criminal investigation is necessary to satisfy the procedural obligation imposed by Article 2 (see paragraph 137 above) have been summarised in *Nicolae Virgiliu Tănase* (cited above, §§ 164-71).

(ii) Application of the above principles to the present case

149. The present case concerns the death of a six-year-old migrant child, MAD.H., who was hit by a train after allegedly being denied the opportunity to seek asylum by the Croatian police officers and ordered to return to Serbia by following the train tracks.

150. In such circumstances and having in mind the fundamental importance of the right to life guaranteed under Article 2 of the Convention, the Court must apply careful scrutiny when examining whether the particular investigation satisfied all the guarantees required by the Convention.

151. The Court notes that MAD.H. was hit by a train at around 8 p.m. on 21 November 2017 in the territory of Serbia, some 200 metres from the border with Croatia. Her death was heavily covered by the national and international media. The key elements in the ensuing investigation were establishing the exact whereabouts of, and contact between, the first applicant and her children and the Croatian police officers on that date, and verifying allegations of pushbacks and deterrent practices allegedly used by the Croatian authorities in the present case.

152. The domestic authorities concluded that the first applicant and her children had never entered Croatian territory and that the police officers had not had any direct contact with them prior to the train hitting the child in Serbia. In so doing they relied on the statements of the police officers on duty on 21 November 2017, which were deemed concurring, whereas the statements of the first, second and thirteenth applicants were deemed contradictory as regards the crucial facts (see paragraphs 19 and 21 above). In particular, the second applicant stated that he had been with the group at the material time, whereas according to the first applicant and the Serbian police reports, the second applicant had stayed in Serbia.

153. In the circumstances of the case, the Court does not see why the latter discrepancy was given such crucial importance. The authorities did not consider the possibility that it could have been the result of a translation error during the first and second applicants' hearing on 31 March 2018 (see paragraph 16 above), nor has it ever been disputed that the first applicant remained with the children throughout. It was also not disputed that the thirteenth applicant had been present, who on the night of the accident had told the Serbian authorities that he and his family had been walking in Croatian territory when the police had made them board a van, transported them to the border and told them to return to Serbia by following the train tracks (see paragraph 18 above).

154. On the other hand, the domestic authorities in no way addressed the change in the police officers' statements during the investigation. In particular, on 22 November 2017 the police officers submitted that they had not had any contact with the first applicant or her children before the train hit MAD.H, but had merely spotted them inside Serbian territory and had then heard a train passing (see paragraph 11 above), whereas on 9 February 2018 they submitted that they had gone to the border and had signalled to the applicants not to cross it (see paragraph 13 above).

155. Moreover, the police officers submitted that, after the train accident, they had transported the mother and the child to the railway station, while the rest of the group had stayed at the border (ibid.). This appears to be contrary to the statement of the doctor who intervened after the accident and who submitted that at the railway station she had seen a group of migrants in the police van, and next to it a man holding a child (see paragraph 11 above). The domestic authorities did not address this discrepancy either.

156. The Court further notes that no material evidence was obtained which could have confirmed beyond any doubt the applicants' and the Croatian police officers' exact whereabouts on the evening of 21 November 2017. The police had informed the Vukovar County State Attorney's Office that the recordings of the thermographic cameras could not be submitted because the storage system had been broken at the material time, whereas police officer D. stated that it had been broken for one year before the event (see paragraph 15 above).

157. The case file does not show whether the investigating authorities ever verified the allegation that the storage system had indeed been broken and that there had been no recordings of the impugned events, as proposed by the applicants (see paragraph 20 above). When the applicants' lawyer raised the issue of the "loss" of the recordings, she received a reply that she did not have a power of attorney to represent the applicants (see paragraph 17 above).

158. Furthermore, in January 2018 the Croatian Ombudswoman suggested that the contact between the applicants and the police be

established by inspecting the signals from their mobile telephones and the police car GPS (see paragraph 12 above). The applicants also proposed obtaining such GPS locations in order to prove that they had been in Croatian territory before the train accident (see paragraph 20 above). In the circumstances, this appeared to be an obvious item of material evidence which could have elucidated the sequence of events (compare *Sergey Shevchenko v. Ukraine*, no. 32478/02, §§ 72-73, 4 April 2006, and *Oğur v. Turkey* [GC], no. 21594/93, §§ 89-90, ECHR 1999-III). However, neither the Office for the Suppression of Corruption and Organised Crime, nor the Osijek County Court's investigating judge or the appeal panel addressed these proposals (see paragraphs 19 and 21 above).

159. The Court further notes that the investigating authorities did not address the Serbian authorities' finding that the Croatian authorities had forcefully returned the first applicant and her children to Serbia on 21 November 2017 in breach of the readmission agreement between the two countries (see paragraphs 20 and 25 above).

160. Moreover, even though the investigation into the circumstances of MAD.H.'s death was initiated following a criminal complaint lodged by the lawyer S.B.J. on the applicants' behalf, the investigating authorities did not inform her about the hearing of the first and second applicants on 31 March 2018 (see paragraph 16 above), where she could have helped clarify the alleged inconsistency in their statements.

161. The Court notes in that connection that, although doubts concerning the validity of her power of attorney may have arisen on 23 March 2018 (see paragraphs 49 above and 326 below), they were removed on 28 March 2018 (see paragraphs 58-59 above and 327 below), and at the latest on 31 March 2018 (see paragraphs 16 above and 328 below). Moreover, the authorities must have known that S.B.J. had meanwhile lodged a request for an interim measure with the Court on the applicants' behalf (see paragraph 67 above). Nevertheless, on 19 April 2018 the investigating authorities refused to provide S.B.J. with information regarding the investigation, or to take into account her proposals concerning material evidence (see paragraph 17 above), and the applicants were allowed to meet with her only on 7 May 2018 (see paragraphs 66 above and 329 below).

162. Having regard to the fact that the applicants are an Afghan family with no knowledge of the Croatian language or legal system and no contacts in Croatia, it is hard to imagine how they could have effectively participated in the investigation without the assistance of a lawyer. In these circumstances, the investigative authorities failed to ensure that the applicants, as MAD.H.'s next-of-kin, were involved in the procedure to the extent necessary to safeguard their legitimate interests (compare *Benzer and Others v. Turkey*, no. 23502/06, § 193, 12 November 2013, and *Mezhiyeva v. Russia*, no. 44297/06, § 75, 16 April 2015).

163. In view of the above-mentioned deficiencies, the Court concludes that the State authorities failed to conduct an effective investigation into the circumstances leading to MAD.H.'s death on 21 November 2017.

164. There has accordingly been a violation of Article 2 of the Convention under its procedural limb.

B. Substantive obligation under Article 2 of the Convention

165. On the basis of the material available in the case file, the Court considers that it is not in a position to reach any definitive findings under the Convention with regard to the alleged responsibility of the respondent State for the death of MAD.H. For that reason the Court has decided to confine its examination to an assessment of whether the domestic investigation was in compliance with the relevant standards under the procedural limb of Article 2 (see, *mutatis mutandis*, *Sakvarelidze v. Georgia*, no. 40394/10, § 50, 6 February 2020). In deciding not to make a separate assessment of the admissibility and merits of this part of the complaint, the Court has had particular regard to the continuing obligation of the domestic authorities under Article 2 of the Convention to carry out an effective investigation into alleged breaches of the substantive limb of that Article in order not to allow life-endangering offences to go unpunished (see *Žarković and Others v. Croatia* (dec.), no. 75187/12, § 23, 9 June 2015), and the possibility for the domestic authorities to resume the investigation into the applicants' allegations (compare *Kušić v. Croatia* (dec.), no. 71667/17, §§ 50 and 97, 10 December 2019), since the statutory limitation period for prosecution has not yet expired.

166. Accordingly, the Court shall not examine this complaint.

IV. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

167. The applicants complained that the conditions of their placement in the Tovarnik Centre had been in breach of Article 3 of the Convention, which reads as follows:

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

A. Admissibility

1. The parties' submissions

168. In their observations of 29 June 2018 in connection with application no. 11570/18, the Government contended that the complaint was premature because on 6 April 2018 the applicants had also brought it before the Constitutional Court.

169. The applicants replied that they had lodged their application with the Court on 16 April 2018 because they had been invited to do so following the issuing of the interim measure by the Court.

2. The Court's assessment

170. The Court notes that on 18 December 2018 the Constitutional Court examined the applicants' complaint concerning their placement in the Tovarnik Centre and found no violation of Article 3 of the Convention in that regard (see paragraph 45 above). On 11 July 2019 it conducted another review of the conditions of the applicants' placement in the Tovarnik Centre and found no breach of Article 3 of the Convention (see paragraph 46 above).

171. Accordingly, the Court concludes that the Constitutional Court was afforded an opportunity to examine the applicants' complaint and that the Government's objection must be dismissed.

172. The Court notes that the complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

(a) The applicants

173. The applicants submitted that in the Tovarnik Centre they had been kept in prison-like conditions. Initially, the rooms in which they had been placed had been locked all day long and they were able to see each other only during meals. The children had not been allowed to use the playroom, or any toys, colouring books or similar items shown by the Government in the photographs, and they were allowed to use the outdoor facilities for only one or two hours per day. Towards the end of their stay the regime had changed a little, but there had still been no means of structuring their time.

174. The applicants further submitted that in the Tovarnik Centre they had been visited by a psychologist, who had been unable to help them in any meaningful way because there was no interpreter present. The fourth and thirteenth applicants had borne the burden of interpreting for the rest of the family during the treatment. Even in those circumstances the psychologist had concluded that the applicants were in a poor psychological state. Most of the child applicants had developed psychosomatic disorders owing to exposure to stressful situations and unfavourable living conditions.

175. The applicants lastly submitted that they were in a state of fear and confusion because the authorities had placed them in the Tovarnik Centre

without providing them with any information concerning their situation. They had been given documents to sign in a language they did not understand and had been prevented from contacting their lawyer, S.B.J.

(b) The Government

176. The Government submitted that the conditions of the applicants' placement in the Tovarnik Centre had complied with the standards of the CPT and Article 3 of the Convention.

177. The Tovarnik Centre was a closed-type centre located in a small town, far away from any source of noise or pollution. There was no public address system in the Centre, as this could potentially scare small children, and there was practically no noise. The Centre was newly built, having opened on 1 April 2017, and its main purpose was to accommodate aliens and asylum-seekers whose freedom of movement had been restricted. It could accommodate sixty-two persons, and at the material time there had been twenty-six persons placed there (the fourteen applicants and another Afghan family of twelve). It was fully equipped to accommodate families with small children. There were bedrooms for families with children and a children's playroom equipped with toys and books. There was a restaurant, a room for socialising and a basketball, football and handball court outside the building, as well as a children's playground. As of 16 May 2018, the child applicants had been provided with various leisure and educational activities carried out by the Jesuit Refugee Service NGO.

178. The Government submitted photographs of the Tovarnik Centre showing the facility as newly built, dry, freshly painted, clean and furnished. The photographs showed that there were barriers in the hallways which could be locked and that the entire centre was surrounded by a wall. The photographs indicated that the applicants could open the windows in their rooms to let in air and light, the windows had bars on them and the doors to the rooms had a glass opening through which it was possible to see from the hallway into the room. There were also bars on the windows in the toilets, bathrooms and common rooms. The Centre was guarded by police officers who were posted outside the Centre, at the entrance and beside the doors to each floor but, according to the Government, the applicant children had not felt intimidated by them.

179. The Government submitted that the applicants had been placed in the Centre in three adjoining rooms. The doors to the rooms in which they had been placed had been open all the time. Initially the Government had submitted that the applicants had been allowed to use the outdoor facilities for two hours in the morning and two hours in the afternoon, but they subsequently rectified their statement, explaining that in fact they had been allowed to use the outdoor facilities and playground from 8 a.m. to 10 p.m.

180. Immediately after their arrival the applicants had been provided with clean clothes, underwear, toiletries and material required for childcare.

They had been provided with medical assistance on 42 occasions, mainly at their request, and had been regularly examined by a psychologist. The Government observed that the applicants had been in a situation of uncertainty ever since they had started their journey to Europe in 2016, and that their placement in the Tovarnik Centre had not particularly exacerbated their state.

181. During their stay in the Tovarnik Centre the applicants had been allowed to use their mobile phones. They had been in contact with the lawyers I.C. and S.B.J. and had been visited by various NGOs, UNHCR, the Red Cross, the Croatian Ombudswoman and the Croatian Children's Ombudswoman, none of whom had had any significant objections to their accommodation.

2. Third-party intervener - Hungarian Helsinki Committee

182. The Hungarian Helsinki Committee submitted that under the Court's case-law, the extreme vulnerability of children was a decisive factor, which took precedence over their status as illegal immigrants. States therefore had a duty, as part of their positive obligations under Article 3 of the Convention, to protect them and adopt appropriate measures to this end. Article 3 made no provision for exceptions, and States were required to pay extreme care and due consideration to the best interests of children in a migratory context, owing to their inherent vulnerability. Asylum-seeking children, whether accompanied or not, were likely to be a particularly underprivileged and vulnerable group in need of special protection. Careful assessment of the best interests of the child was therefore a prerequisite for the State in order to avoid breaching its positive obligations under Article 3. The installation of playgrounds, child-friendly rooms and colourful pictures on the walls could not satisfy those legal requirements. Detention, especially when accompanied by substandard conditions, could easily render the enjoyment of those rights illusory. No child could make use of her or his rights in an environment that was a constant source of anxiety and psychological disturbance and deteriorated the parental image in the eyes of the children, which was a particularly traumatic experience. Being confined to a guarded institution, where the level of surveillance was high and the whole of everyday life strictly controlled, could be perceived by children as a never-ending state of despair, which could in itself breach Article 3 of the Convention.

3. The Court's assessment

(a) General principles

183. The general principles applicable to the treatment of persons held in immigration detention were set out in the case of *Khlaifia and Others v. Italy* ([GC], no. 16483/12, §§ 158-67, 15 December 2016).

184. It should be noted that the confinement of minors raises particular issues in that regard, since children, whether accompanied or not, are considered extremely vulnerable and have specific needs related in particular to their age and lack of independence, but also to their asylum-seeker status (see *Popov v. France*, nos. 39472/07 and 39474/07, § 91, 19 January 2012; *A.B. and Others v. France*, no. 11593/12, § 110, 12 July 2016; and *R.R. and Others v. Hungary*, no. 36037/17, § 49, 2 March 2021). Article 22 § 1 of the United Nations Convention on the Rights of the Child encourages States to take appropriate measures to ensure that children seeking refugee status, whether or not accompanied by their parents or others, receive appropriate protection and humanitarian assistance (see paragraph 89 above, and see also *S.F. and Others v. Bulgaria*, no. 8138/16, § 79, 7 December 2017). Likewise, the European Union directives regulating the detention of migrants adopt the position that minors, whether or not they are accompanied, constitute a vulnerable category requiring the special attention of the authorities (see paragraph 87 above). Moreover, the Court already held that the extreme vulnerability of children – whether or not they were accompanied by their parents – was a decisive factor that took precedence over considerations relating to the child's status as an illegal immigrant (see *G.B. and Others v. Turkey*, no. 4633/15, § 101, 17 October 2019).

185. Accordingly, the reception conditions for children seeking asylum must be adapted to their age, to ensure that those conditions do not create for them "a situation of stress and anxiety, with particularly traumatic consequences" (see *Tarakhel v. Switzerland* [GC], no. 29217/12, § 119, ECHR 2014 (extracts)). Otherwise, the conditions in question would attain the threshold of severity required to come within the scope of the prohibition under Article 3 of the Convention (ibid.).

186. In recent years the Court has in several cases examined the conditions in which accompanied minors were held in immigration detention. In finding a violation of Article 3 of the Convention in those cases, the Court had regard to several elements such as the age of the children involved, the length of their detention, the material conditions in the detention facilities and their appropriateness for accommodating children, the particular vulnerability of children caused by previous stressful events and the effects of detention to the children's psychological condition (see *S.F. and Others*, cited above, §§ 79-83, and the cases referred to therein; see also *G.B. and Others*, cited above, §§ 102-17; and *R.R. and Others*, cited above, §§ 58-65).

(b) Application of these principles in the present case

(i) Preliminary remarks

187. The Court notes that the domestic courts, including the Constitutional Court, examined the conditions of the applicants' placement in the Tovarnik Centre and found that they were Article 3 compliant (see paragraphs 45-46 above).

188. In this connection, the Court's approach in examining the applicants' complaint must be guided by the principle, stemming from Article 1 of the Convention, according to which the primary responsibility for implementing and enforcing the guaranteed rights and freedoms is laid on the national authorities. The machinery of complaint to the Court is subsidiary to national systems safeguarding human rights. It is not the Court's task to substitute its own assessment of the facts for that of the domestic courts. The Court must be satisfied, however, that the assessment made by the authorities of the Contracting State is adequate and sufficiently supported by domestic materials, as well as by materials originating from other reliable and objective sources (see *Ilias and Ahmed v. Hungary* [GC], no. 47287/15, § 150, 21 November 2019).

189. The Court further notes that the applicants had no identity papers and that different information was given on their exact age. The fact that the fifth to fourteenth applicants were children born between 2003 and 2017 (see appended table) was broadly accepted.

190. As to the fourth applicant, the Court observes that in the proceedings concerning the applicants' placement in the Tovarnik Centre, the authorities treated her as an adult (see paragraph 29 above). However, it notes that at the court hearing she stated that she had turned eighteen in April 2018 (see paragraph 39 above), and that according to the Bulgarian authorities she was born on 16 April 2000 (see paragraph 34 above), which would mean that during the first twenty-five days of her stay in the Tovarnik Centre she was a minor. Having also regard to the presumption of minority in case of uncertainty about age (see paragraphs 92, 95 and 98 above), and the fact that the doctor who examined her on 21 March 2018 noted that she was seventeen years old (see paragraph 28 above), the Court finds it appropriate to examine the fourth applicant's Article 3 complaint together with the Article 3 complaints submitted by the other child applicants. Indeed, while it is true that the fourth applicant was not a young child but a person closer to adulthood, she would still fall within the international definition of minors, in respect of whom the considerations outlined in paragraph 186 above apply.

(ii) Examination of the complaint in respect of the applicant children

191. The Court notes that at the material time the eleven applicant children were aged one, two, three, eight, ten, fifteen and seventeen

(see appended table). They were held at the Tovarnik Centre from 21 March to 4 June 2018, that is to say, for two months and fourteen days.

192. The Court notes that the applicant children were accompanied by their parents throughout the said period. It finds, however, that this fact is not capable of exempting the authorities from their duty to protect children and take adequate measures as part of their positive obligations under Article 3 of the Convention (see *R.R. and Others*, cited above, § 59).

193. The Court observes that the material conditions in the Tovarnik Centre were satisfactory. From the photographs submitted by the Government, the facility appeared newly built, dry, freshly painted, clean and furnished. There was a children's playroom, a restaurant, a room for socialising, a basketball, football and handball court outside the building, as well as a children's playground (see paragraphs 177-178 above). There were no issues of overcrowding, excessive noise or lack of proper ventilation. The applicants were placed in rooms equipped to accommodate families with small children, they were given clean clothes, underwear, toiletries and material tailored to childcare, and were provided with medical and psychological assistance (see paragraphs 32 and 180 above, and contrast *Muskhadzhiyeva and Others v. Belgium*, no. 41442/07, § 59, 19 January 2010; *Popov*, §§ 93-97; *A.B. and Others*, § 113; *S.F. and Others*, §§ 84-88; *G.B. and Others*, §§ 102-17; and *R.R. and Others*, §§ 60-61, all cited above).

194. However, the Court cannot overlook the presence of elements in the Tovarnik Centre resembling a prison environment; it was surrounded by a wall, with police officers posted by its entrance and by the doors to each floor, and with barriers in the hallways and bars on the windows. Also, the doors to the applicants' rooms had a glass opening through which it was possible to see from the hallway into the room (see paragraph 178 above).

195. The Court finds worrying the Croatian Ombudswoman's remarks made, after her representatives had visited the applicants on 26 March 2018, that apart from the police officers who guarded the Centre, there had been no staff to carry out activities with the persons placed there, especially the children, or to provide food or cleaning and ensure daily medical assistance (see paragraph 106 above). It further takes into account the Croatian Children's Ombudswoman's remarks made, after visiting the Tovarnik Centre in April 2018, that the Centre had been inadequate for accommodating families with children, in that it had entailed a limitation of freedom of movement, had not been adequately equipped and there had been no experts to provide psychosocial support (see paragraph 107 above).

196. The Court further observes that the applicants consistently complained to the NGOs, the domestic authorities and the Court that during the initial part of their stay in the Tovarnik Centre they had been confined to their rooms and had been restricted in their access to indoor leisure activities and the outdoor facilities (see paragraphs 31, 35, 38-39 and 173 above). The

Government initially submitted that the applicants had been allowed to use the outdoor facilities for two hours in the morning and two hours in the afternoon, but they subsequently rectified their statement, explaining that in fact they had been allowed to use the outdoor facilities and playground from 8 a.m. to 10 p.m. (see paragraph 179 above). The Croatian Ombudswoman reported having received contradictory information in that regard (see paragraph 106 above).

197. The Court is unable to make any definitive findings on this particular issue based on the material before it. However, it finds it important to emphasise that the restriction of access to leisure activities, outdoor facilities and fresh air inevitably causes anxiety and is harmful for children's well-being and development (see Article 23 of the relevant European Union directive cited in paragraph 87 above, and see also paragraphs 96 and 102 above).

198. The Court further observes that the psychologist established on 28 March 2018 that the applicants were mourning the death of MAD.H. and that they had been experiencing fear of uncertainty. He recommended providing them with further psychological support and organising activities to occupy the children's time (see paragraph 32 above). The Government submitted that the applicant children had been provided with activities carried out by the Jesuit Refugee Service NGO as of 16 May 2018 (see paragraph 177 above), without submitting any proof to that effect. In any event, by 16 May 2018, the applicant children had already spent almost two months in the Tovarnik Centre without any organised activities to occupy their time (see *R.R. and Others*, cited above, § 61, where no activities were organised for the applicant children for period of a month and a half).

199. The Court is of the view that the detention of children in an institution with prison-type elements, where the material conditions were satisfactory, but where the level of police surveillance was high and there were no activities structuring the children's time, would perhaps not be sufficient to attain the threshold of severity required to engage Article 3 where the confinement was for a short duration, depending on the circumstances of the case. However, in the case of a protracted period, such an environment would necessarily have harmful consequences for children, exceeding the above-mentioned threshold. The Court reiterates that the passage of time is of primary significance in this connection for the application of Article 3 of the Convention (see *A.B. and Others*, § 114, and *R.R. and Others*, § 64, both cited above).

200. The Court notes in that regard that various international bodies, including the Council of Europe, are increasingly calling on States to expeditiously and completely cease or eradicate immigration detention of children, emphasising the negative impact such detention can have on children's physical and mental health and on their development, even when

they are detained for a short period of time or with their families (see *G.B. and Others*, cited above, §§ 67-79 and 151). The relevant European Union directive adopts the position that detention of minors should be "for the shortest period of time and all efforts shall be made to release the detained minors and place them in accommodation suitable for minors" (see paragraph 87 above). In the present case, the Court has found that the domestic authorities failed to act with the required expedition in order to limit, as far as possible, the detention of the eleven applicant children and their parents (see paragraphs 254 and 257 below).

201. The Court considers that the children's detention over a period of two months and fourteen days, in the conditions set out above, exceeded the permissible duration beyond which Article 3 of the Convention is engaged (see paragraph 199 above). Indeed, it was significantly longer than in the reference cases against France (fifteen days in *Popov*, cited above, § 92; eighteen days in *A.B. and Others*, cited above, § 111; and ten days in *R.C. and V.C. v. France*, no. 76491/14, § 36, 12 July 2016), and it must have been perceived by the applicant children as a never-ending situation. Bearing in mind that they were in a particularly vulnerable condition due to painful past events, as most of them had witnessed the tragic death of their six-year-old sister near the Croatian-Serbian border, the situation must have caused them accumulated psychological disturbance and anxiety.

202. The Court also takes note of the applicants' uncertainty as to whether they were in detention and whether legal safeguards against arbitrary detention applied, having regard to the fact that they were placed in the Tovarnik Centre on 21 March 2018 and received legal advice in that regard only on 12 April 2018 (see paragraph 35 above), and that they were not allowed to see their chosen lawyer S.B.J. until 7 May 2018 (see paragraph 66 above). Inevitably, this situation caused additional anxiety and degradation of the parental image in the eyes of the child applicants.

203. Accordingly, in view of the numerous children involved, some of whom were of a very young age, the children's particular vulnerability on account of painful past events, and the length of their detention in conditions set out above, which went beyond the shortest permissible duration due to the failure of the domestic authorities to act with the required expedition (see paragraphs 254 and 257 below), the Court finds that the situation subjected the applicant children to treatment which exceeded the threshold of severity required to engage Article 3 of the Convention.

204. There has accordingly been a violation of Article 3 of the Convention in respect of the fourth, fifth, sixth, seventh, eighth, ninth, tenth, eleventh, twelfth, thirteenth and fourteenth applicants.

(iii) Examination of the complaint in respect of the adult applicants

205. The Court has already held that it was unable to make any definitive findings on the applicants' complaint that during the first part of their stay they were allowed to spend only one or two hours per day in the outdoor facilities (see paragraph 197 above). However, it finds it useful to emphasise that the adult applicants were not persons suspected or convicted of a criminal offence, but migrants detained pending the verification of their identity and application for international protection. Accordingly, there should not have been any unreasonable restriction in their using the outdoor facilities (see the immigration detention standards developed by the CPT, paragraph 102 above).

206. The Court must further examine the available evidence to establish whether, as alleged by the adult applicants, they could be considered particularly vulnerable and, if so, whether the conditions in which they stayed in the Tovarnik Centre were incompatible with any such vulnerability to the extent that those conditions constituted inhuman and degrading treatment with specific regard to the adult applicants (see *Ilias and Ahmed*, cited above, § 191).

207. The Court notes that it is true that asylum-seekers may be considered vulnerable because of everything they might have been through during their migration and the traumatic experiences they are likely to have endured previously (ibid., § 192). The Court observes in this connection that the applicants left Afghanistan in 2016.

208. The Court is further mindful of the fact that the adult applicants were mourning the recent tragic death of the six-year-old MAD.H. near the Croatian-Serbian border. The Court observes that the authorities provided them with phycological support. They were visited by a psychologist on numerous occasions in the Tovarnik Centre (see paragraph 32 above, and contrast *R.R. and Others*, cited above, § 63, where there was no professional psychological assistance available for traumatised asylum-seekers).

209. The applicants complained that the psychologist who visited them could not help them in any meaningful way because there was no interpreter present. The Court observes in that connection that the applicants conversed with the psychologist with the help of the fourth applicant, who spoke English, and the thirteenth applicant, who spoke some Serbian (see paragraph 174 above). The possibility for a patient to be treated by staff who speak his or her language is not an established ingredient of the right enshrined in Article 3 of the Convention (see *Rooman v. Belgium* [GC], no. 18052/11, § 151, 31 January 2019).

210. In addition, whilst the detention of the adult applicants with their children could have created a feeling of powerlessness, 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

(see *Muskhadzhiyeva and Others,* cited above, § 66, and *Popov*, cited above, § 105).

211. The Court is thus unable to conclude that the otherwise acceptable conditions at the Tovarnik Centre for adult applicants were particularly ill-suited to their individual circumstances to such an extent as to amount to ill-treatment contrary to Article 3.

212. The Court also considers that even though the adult applicants must have been affected by the uncertainty as to whether they were in detention and whether legal safeguards against arbitrary detention applied (see paragraph 35 above), the fact that they were aware of the procedural developments in the asylum procedure through their legal aid lawyer I.C. (see paragraph 51 above), and that in March and April 2018 they were visited by the Croatian Ombudswoman and the Croatian Children's Ombudswoman (see paragraphs 106-107 above), must have limited the negative effect of that uncertainty (compare *Ilias and Ahmed*, cited above, § 193).

213. Accordingly, having due regard to all the circumstances of the present case, the Court is of the view that there has been no violation of Article 3 of the Convention in respect of the first, second and third applicants.

V. ALLEGED VIOLATIONS OF ARTICLE 5 OF THE CONVENTION

214. The applicants complained under Article 5 § 1 of the Convention that their placement in the Tovarnik Centre had been unlawful. Relying on Article 5 § 4, they also complained that they had not had at their disposal an effective procedure whereby they could have challenged the lawfulness of their placement there.

215. The relevant paragraphs of Article 5 of the Convention 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:
>
> ...
>
> (b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation 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."

A. Admissibility

1. The parties' submissions

216. In their observations of 29 June 2018 submitted in connection with application no. 15670/18, the Government maintained that the applicants' complaints were premature as the proceedings for reviewing the lawfulness of their detention were still pending before the domestic authorities. The applicants had at their disposal an appeal to the High Administrative Court and a constitutional complaint.

217. The applicants submitted that they had afforded the national authorities an opportunity to examine their complaints.

2. The Court's assessment

218. The Court notes that the applicants challenged before the Osijek Administrative Court the decisions restricting their freedom of movement (see paragraph 35 above). On 22 May 2018 that court partially dismissed and partially granted the third, seventh and eight applicants' administrative action (see paragraph 40 above), and entirely dismissed the remaining applicants' administrative actions (see paragraph 41 above). The applicants, save for the third, seventh and eighth applicants, appealed to the High Administrative Court, and that court dismissed their appeals (see paragraph 42 above). They lodged a constitutional complaint, and on 11 July 2019 the Constitutional Court found that their placement in the Tovarnik Centre had been in compliance with Article 5 § 1 (f) of the Convention, and that there had been no breach of Article 5 § 4 (see paragraph 46 above).

219. The Court notes that, meanwhile, on 6 April 2018, all the applicants lodged a complaint with the Constitutional Court in which they argued that their placement in the Tovarnik Centre had been in breach of Article 3 and Article 5 § 1 of the Convention (see paragraph 43 above). The Constitutional Court examined their complaint on 18 December 2018 (see paragraph 45 above).

220. In these circumstances, the Court concludes that the applicants afforded the domestic authorities an opportunity to examine their grievances and that the Government's objection must be dismissed.

221. The Court notes that these complaints are not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that they are not inadmissible on any other grounds. They must therefore be declared admissible.

B. Merits

1. Alleged violation of Article 5 § 1 of the Convention

(a) The parties' submissions

(i) The applicants

222. The applicants submitted that their detention in the Tovarnik Centre did not fall within any of the permissible grounds under Article 5 § 1.

223. They contended that under the domestic law, as soon as a person expressed an intention to seek international protection, and until the decision on his or her application became final, he or she had the right to stay in Croatia (see paragraph 78 above). Relying on *Suso Musa v. Malta* (no. 42337/12, § 97, 23 July 2013), the applicants argued that their detention between 21 March 2018, when they expressed their intention to seek international protection and 4 June 2018, when they were transferred to an open-type centre, could thus not have been undertaken for the purposes of preventing their "effecting an unauthorised entry into the country", given that there had been no "unauthorised entry".

224. The applicants further submitted that the purpose of their placement in the Tovarnik Centre had not been their identification or the verification of kinship between them. The authorities had only started verifying their identity weeks after they had been placed in detention. Moreover, they never explained why they had doubted that the child applicants were not related to the adult applicants. If there had been a real suspicion of child trafficking, the State would certainly have taken steps to protect them. The aim of their detention had rather been to return them to Serbia in order to prevent their involvement in the criminal investigation concerning the death of MAD.H. and to prevent them from publicly speaking about their pushbacks.

225. The applicants lastly submitted that they had left Croatia in July 2018 after they had learned that, regardless of their suffering, their applications for international protection in that country had not been accepted.

(ii) The Government

226. The Government maintained that the applicants had been placed in the Tovarnik Centre for the purposes of establishing their identity, given that they had had no identity papers, and for the purpose of protecting the numerous minor children in the group by verifying their relationship with the adults. Additionally, there had been a risk of flight and further illegal border crossings, given that on arriving in Croatia the applicants had stated that their final destination was "Europe" and the United Kingdom. The risk of flight had been confirmed by the fact that the applicants had several times

tried to leave Croatia unlawfully once they had been transferred to an open-type centre.

227. The Government contended that the restriction of the applicants' freedom of movement had been lawful and not arbitrary. It had been ordered in good faith, with the purpose of preventing the applicants' unlawful entry into the country. The conditions of their placement in the Tovarnik Centre had been adequate, and the duration of their placement had been reasonable. The circumstances of their case had been thoroughly examined by the domestic courts.

(b) Third-party intervener - Hungarian Helsinki Committee

228. The Hungarian Helsinki Committee stressed that when deciding on the restriction of liberty of children, their best interests had to be taken into account as a primary consideration. Even though international and European Union law did not prohibit the detention of children as such, they provided for this possibility only as a measure of last resort, in the absence of other viable alternatives, given that nobody should be held in detention on the sole grounds of being an asylum-seeker. They further submitted that domestic law allowing for the detention of asylum-seeking children was in breach of Article 5 § 1 of the Convention owing to the fact that detention as an institution, especially when other alternatives were available, was never in the best interests of the child and was therefore unnecessary and immensely disproportionate to the aim pursued.

(c) The Court's assessment

(i) Compatibility of the deprivation of liberty with Article 5 § 1 of the Convention - general principles

229. The Court reiterates that Article 5 enshrines a fundamental human right, namely the protection of the individual against arbitrary interference by the State with his or her right to liberty. Sub-paragraphs (a) to (f) of Article 5 § 1 contain an exhaustive list of permissible grounds on which individuals may be deprived of their liberty, and no deprivation of liberty will be lawful unless it falls within one of those grounds (see *Saadi v. the United Kingdom* [GC], no. 13229/03, § 43, ECHR 2008). One of the exceptions, contained in sub-paragraph (f), permits the State to control the liberty of aliens in an immigration context.

230. In *Saadi* (ibid., §§ 64-66) the Grand Chamber interpreted for the first time the meaning of the first limb of Article 5 § 1 (f), namely, "to prevent his effecting an unauthorised entry into the country". It considered that until a State had "authorised" entry to the country, any entry was "unauthorised" and the detention of a person who wished to effect entry and who needed but did not yet have authorisation to do so, could be imposed, without any distortion of language, to "prevent his effecting an unauthorised

entry". It did not accept that, as soon as an asylum-seeker had surrendered himself to the immigration authorities, he was seeking to effect an "authorised" entry, with the result that detention could not be justified under the first limb of Article 5 § 1 (f) (ibid., § 65). It considered that to interpret the first limb of Article 5 § 1 (f) as permitting detention only of a person who was shown to be trying to evade entry restrictions would be to place too narrow a construction on the terms of the provision and on the power of the State to exercise its undeniable right of control referred to above. Such an interpretation would, moreover, be inconsistent with Conclusion No. 44 of the Executive Committee of the United Nations High Commissioner for Refugees' Programme, the UNHCR's Guidelines and the Committee of Ministers' Recommendation (see *Saadi*, cited above, §§ 34-35 and 37), all of which envisaged the detention of asylum-seekers in certain circumstances, for example while identity checks were taking place or when elements on which the asylum claim was based had to be determined. However, detention had to be compatible with the overall purpose of Article 5, which was to safeguard the right to liberty and ensure that no-one should be dispossessed of his or her liberty in an arbitrary fashion (ibid., § 66).

231. In *Suso Musa* (cited above, § 97) the Court held that, where a State which had gone beyond its obligations in creating further rights or a more favourable position – a possibility open to it under Article 53 of the Convention – enacted legislation (of its own motion or pursuant to European Union law) explicitly authorising the entry or stay of immigrants pending an asylum application, an ensuing detention for the purpose of preventing an unauthorised entry could raise an issue as to the lawfulness of detention under Article 5 § 1 (f). The Court considered that the question as to when the first limb of Article 5 ceased to apply, because the individual had been granted formal authorisation to enter or stay, was largely dependent on national law (ibid.).

232. The Court further reiterates that detention is authorised under sub-paragraph (b) of Article 5 § 1 only to "secure the fulfilment" of the obligation prescribed by law. It follows that, at the very least, there must be an unfulfilled obligation incumbent on the person concerned, and the arrest and detention must be for the purpose of securing its fulfilment and must not be punitive in character. As soon as the relevant obligation has been fulfilled, the basis for detention under Article 5 § 1 (b) ceases to exist (see *O.M. v. Hungary*, no. 9912/15, § 42, 5 July 2016). Moreover, this obligation should not be given a wide interpretation. It has to be specific and concrete, and the arrest and detention must be truly necessary for the purpose of ensuring its fulfilment (see *Iliya Stefanov v. Bulgaria*, no. 65755/01, § 72, 22 May 2008).

233. Under the sub-paragraphs of Article 5 § 1, any deprivation of liberty must, in addition to falling within one of the exceptions set out in

sub-paragraphs (a) to (f), be "lawful". Where the "lawfulness" of detention is at issue, including the question whether "a procedure prescribed by law" has been followed, the Convention refers essentially to national law but also, where appropriate, to other applicable legal standards, including those which have their source in international law. In all cases it establishes the obligation to conform to the substantive and procedural rules of the laws concerned, but it also requires that any deprivation of liberty be compatible with the purpose of Article 5, namely to protect the individual from arbitrariness (see *Medvedyev and Others v. France* [GC], no. 3394/03, § 79, ECHR 2010).

234. Indeed, no detention which is arbitrary can be compatible with Article 5 § 1, and the notion of "arbitrariness" in that context extends beyond lack of conformity with national law: a deprivation of liberty may be lawful in terms of domestic law but still arbitrary and thus contrary to the Convention (see *Saadi*, cited above, § 67; see also *G.B. and Others*, cited above, § 146, and *Bilalova and Others v. Poland*, no. 23685/14, § 74, 26 March 2020).

235. To avoid being branded as arbitrary, detention under Article 5 § 1 (f) must be carried out in good faith; it must be closely connected to the ground of detention relied on by the Government; the place and conditions of detention should be appropriate, bearing in mind that "the measure is applicable not to those who have committed criminal offences but to aliens who, often fearing for their lives, have fled from their own country"; and the length of the detention should not exceed that reasonably required for the purpose pursued (see *Saadi*, cited above, § 74; see also *A. and Others v. the United Kingdom* [GC], no. 3455/05, § 164, ECHR 2009, and *Suso Musa*, cited above, § 93).

236. As to the detention of migrant children, the Court notes that various international bodies, including the Council of Europe, are increasingly calling on States to expeditiously and completely cease or eradicate the immigration detention of children (see *G.B. and Others,* cited above, §§ 67-79, and 151).

237. It emerges from the Court's established case-law on this issue that, as a matter of principle, the confinement of migrant children in a detention facility should be avoided, and that only placement for a short period in appropriate conditions could be considered compatible with Article 5 § 1 of the Convention, provided, however, that the national authorities can establish that they resorted to this measure only after having verified that no other measure involving a lesser restriction of freedom could be implemented (see *A.B. and Others*, § 123; *Bilalova and Others*, § 79; and *G.B. and Others*, § 151, all cited above).

238. The Court notes that the move in international law towards adopting alternative measures to the administrative detention of migrants appears to concern not only children, but also their parents (see *G.B. and*

Others, cited above, §§ 69, 72 and 168). The Court itself has acknowledged, albeit as part of its considerations under Article 8, 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 (ibid., and see also *Popov*, cited above, § 147).

239. Lastly, the Court has held that the detention of young children in unsuitable conditions in the context of Article 3, may on its own lead to a finding of a violation of Article 5 § 1, regardless of whether the children were accompanied by an adult or not (see *G.B. and Others*, § 151; see also *Muskhadzhiyeva and Others*, § 74, both cited above).

(ii) Application of the above principles to the present case

240. The applicants argued that their detention in the Tovarnik Centre did not fall within any of the permissible grounds under Article 5 § 1 (see paragraph 222 above).

241. In that connection, the Court first observes that contrary to the Constitutional Court's finding of 11 July 2019 (see paragraph 46 above), the applicants' detention could not have been covered by the second limb of Article 5 § 1 (f), because domestic law did not allow for deportation pending a decision on international protection and it is evident that no such proceedings were being conducted against the applicants (compare with *Ahmade v. Greece*, no. 50520/09, §§ 142-44, 25 September 2012).

242. The Court further notes that under the International and Temporary Protection Act, a person is considered an applicant for international protection from the moment he or she expresses an intention to seek international protection (see paragraph 78 above). Under sections 52(1), 53 and 54 of the Act, from the moment a person expresses an intention to seek international protection, until the moment the decision on the application for international protection becomes enforceable, such person has the right to stay in Croatia as well as the right to freedom of movement in that country. The Court notes that the freedom of movement may be restricted for the purposes set out in section 54(2) of the Act, such as the establishing of circumstances on which the application for international protection is based, in particular if it is deemed that there is a risk of flight, and establishing and verifying identity or citizenship.

243. The Court observes that the domestic law does not specify, nor did the Government argue, that any decision or other formal authorisation needed to be issued in order for a particular asylum-seeker to actually benefit from the right to stay in Croatia pending an application for international protection.

244. However, it may well be that what was intended was for the relevant domestic law to reflect international standards to the effect that an asylum-seeker may not be expelled pending the outcome of an asylum claim

(see for example, *S.D. v. Greece*, no. 53541/07, § 62, 11 June 2009), without necessarily requiring that an individual be granted formal authorisation to stay in or to enter the territory.

245. At this juncture, the Court would reiterate that Article 5 § 1 (b) could also potentially provide justification, in some specific circumstances, for the detention of asylum-seekers (see *O.M.,* cited above, § 48). The Court refers in that connection to the obligations of asylum-seekers under section 52 of the International and Temporary Protection Act, in so far as relevant to the present case, to submit to verification and establishing of identity and to stay on the territory of Croatia during the procedure for international protection (see paragraph 78 above).

246. However, the Court does not need to rule on whether the applicants' detention fell within one of the permissible grounds under Article 5 § 1, because in any event, for the reasons outlined below, it is of the view that their detention was not lawful.

247. The Court has already found under Article 3 of the Convention that the conditions in which the child applicants were held in the Tovarnik Centre were in breach of that Article (see paragraph 204 above). These circumstances may on their own have led the Court to find a violation of Article 5 § 1 in respect of the applicant children (see paragraph 239 above).

248. The Court will proceed with its analysis in respect of the entire applicant family.

249. In the present case, the police placed the applicants in detention on 21 March 2018 on the basis of section 54(2)(2) of the International and Temporary Protection Act for the purpose of verifying their identities (see paragraph 29 above). Apart from stating that the applicants were Afghan nationals who had expressed an intention to seek international protection and who did not have identification documents, there is no indication in the detention order that an assessment was carried out as to whether, in view of the numerous children involved, a less coercive alternative measure to detention was possible (compare *A.B. and Others*, cited above, § 124, and see the materials cited in paragraphs 87-88 and 91 above). The Court thus has serious doubts as to whether in the present case the authorities carried out such an assessment.

250. The Court further notes that, even though the applicants were detained on 21 March 2018 for the purpose of verifying their identities, it was only on 10 April 2018 that the authorities registered the applicants' fingerprints in the Eurodac system and sought information from Interpol Sofia and Interpol Belgrade with a view to checking their identity (see paragraph 34 above). The Court cannot but note that the foregoing occurred only after an inquiry by the Croatian Ombudswoman with the Ministry of the Interior (see paragraphs 33 and 105 above). By then, the applicants' application for international protection had already been dismissed by the Ministry of the Interior for over ten days (see paragraph 50

above). In the Court's view, this circumstance raises concerns as to the authorities' acting in good faith (see paragraph 235 above).

251. Furthermore, throughout the proceedings the authorities maintained, save for in respect of the third, seventh and eight applicants (see paragraph 256 below), that the applicants' placement in the Tovarnik Centre continued to be necessary as the mere submission of their personal identification information and fingerprinting had been insufficient to establish their identities, given that they had not been registered in the Schengen or Eurodac systems (see paragraph 40 above).

However, the Court observes that the Eurodac search conducted by the Croatian authorities revealed that the applicants had entered Bulgaria in 2016 (see paragraph 34 above) and that their asylum applications in Bulgaria had been rejected in 2017. Although their names in the Bulgarian system slightly differed from those in the Croatian system, mostly in the suffix of their last name, it was clear that those were the same persons (ibid.).

Furthermore, on 30 April 2018 the Croatian authorities received information on the applicants' stay in Serbia and on 17 May 2018 they received a copy of the citizenship certificate issued by the Afghan authorities for the first and second applicants (see paragraph 38 above).

Insisting, in these circumstances, that the applicants' detention continued to be justified by the need to establish their identity, could therefore raise further concerns as to the authorities' acting in good faith.

252. The Court further observes that on 10 May 2018 the domestic authorities additionally justified the applicant's detention by the flight risk they posed under section 54(2)(1) of the International and Temporary Protection Act (see paragraph 36 above).

253. Having regard to the fact that on 23 March 2018 the applicants submitted that they had spent around a year in Serbia without seeking asylum because there were no job opportunities and they wanted to live in Europe, and that they had failed to report that they had previously unsuccessfully sought asylum in Bulgaria (see paragraph 49 above), the Court has no cause to call into question the authorities' conclusion related to the flight risk (see section 54(4) of the International and Temporary Protection Act containing objective criteria defining the risk of flight, cited in paragraph 78 above). Indeed, having been transferred to an open-type centre in Croatia, the applicants repeatedly attempted to enter Slovenia unlawfully, eventually succeeded in doing so, and then left that country as well (see paragraph 47 above).

254. However, where the domestic authorities decided, on grounds provided for by law, to detain children and their parents for immigration-related purposes in exceptional circumstances, it goes without saying that the related administrative procedures, such as examining their application for international protection, ought to have been conducted with

particular vigilance and expedition in order to limit, as far as possible, the detention of the applicant family (see Articles 9 and 11 of the relevant European Union Directive cited in paragraph 87 above, and compare *Bilalova and Others*, cited above, § 81).

255. In that regard the Court notes that, even though the Ministry of the Interior dismissed the applicants' application for international protection on 28 March 2018, it took another three months for the Osijek Administrative Court to review their appeal in order for the decision to become enforceable (on 18 June and 2 July 2018; see paragraph 54 above).

256. In addition, the Court notes that in the case of the third, seventh and eighth applicants, on 22 May 2018 the Osijek Administrative Court held that precisely because their asylum claims had already been dismissed on 28 March 2018, their detention could not have continued to be justified by the need to establish their identity and the circumstances on which they had based their asylum request (see paragraph 40 above). Had the Osijek Administrative Court examined their case more speedily, it could have ordered their release much earlier than 22 May 2018.

257. Accordingly, the delays in the present case, related to the verification of applicants' identity and the examination of their application for international protection before the Osijek Administrative Court, seriously call into question the diligence shown by the authorities in conducting the proceedings. The authorities failed to comply with the requirement of expedition and failed to take all the necessary steps to limit, as far as possible, the detention of the applicant family (compare *Bilalova and Others*, cited above, § 81).

258. This situation was further compounded by the fact that the applicants were not afforded relevant procedural safeguards, as shown by the Osijek Administrative Court's finding that there was no evidence that they had been apprised of the decisions placing them in the Tovarnik Centre in a language they could understand (see paragraph 37 above and, *mutatis mutandis*, *Abdullahi Elmi and Aweys Abubakar v. Malta*, nos. 25794/13 and 28151/13, § 146, 22 November 2016). The Court notes in this regard that there have apparently been other cases in which migrants in Croatia had not been informed of the reasons for their detention because they had been given documents in Croatian which they could not understand, and had been unaware of their right to have a lawyer or to challenge the decision to detain them (see the relevant part of the fact-finding mission to Croatia by the Special Representative of the Secretary General on Migration and Refugees, cited in paragraph 110 above).

259. In conclusion, the Court considers that the applicants' detention was not in compliance with Article 5 § 1 of the Convention. Accordingly, there has been a violation of that provision.

2. Alleged violation of Article 5 § 4 of the Convention

260. The applicants submitted that the decisions of 21 March 2018 ordering their placement in the Tovarnik Centre had not been explained to them in a language they could understand, nor had they been informed that they could make use of remedies against it. They had managed to challenge them only in April 2018, after those decisions had been accidentally discovered in the case file by their legal aid lawyer appointed in another set of proceedings. They also submitted that the administrative court had reviewed the lawfulness of their detention as late as 22 May 2018, even though numerous children were involved.

261. Having regard to its findings under Article 5 § 1 above, in which it took into account the fact that there was no evidence that the applicants had been apprised in a language they could understand of the decisions placing them in the Tovarnik Centre (see paragraph 258 above), as well as the length of the proceedings before the Osijek Administrative Court for the review of their detention (see paragraph 256 above), the Court considers that it is not necessary to examine separately whether, in this case, there has also been a violation of Article 5 § 4.

VI. ALLEGED VIOLATION OF ARTICLE 4 OF PROTOCOL No. 4 TO THE CONVENTION

262. The applicants further complained that they had been subjected to collective expulsions without any individual assessment of their circumstances. They relied on Article 4 of Protocol No. 4 to the Convention, which provides:

> "Collective expulsion of aliens is prohibited."

A. Preliminary issue

1. The parties' submissions

(a) The applicants

263. The applicants submitted that before 21 March 2018, when they had been allowed to stay in Croatia pending the outcome of the proceedings for international protection, they had three times been summarily returned from Croatia to Serbia without any examination of their personal circumstances.

264. On 21 November 2017 the Croatian police had apprehended the first applicant and six of the children in Croatian territory, taken them to the border and told them to return to Serbia, ignoring their requests for asylum, after which MAD.H. died. On two further occasions on unspecified dates before 21 March 2018, the Croatian police had returned all of them to Serbia, ignoring their requests for asylum.

265. The applicants alleged that this reflected the general Croatian police practice towards migrants, as confirmed by numerous independent national and international reports. According to applicants, by denying the latter events, the State was trying to avoid responsibility for serious human rights violations.

(b) The Government

266. The Government maintained that on 21 November 2017 the applicants had not entered Croatian territory – that is to say, the first applicant had entered it only to ask for help for MAD.H., after which she had voluntarily returned to Serbia. On that day the applicants had not sought asylum. The Government had no evidence of any further attempts by the applicants to cross the border illegally in the period before 21 March 2018. Once the applicants had expressed their wish to seek international protection on 21 March 2018, the Croatian authorities had conducted the relevant procedure and had examined the particular circumstances of their case.

2. Third-party intervener - Hungarian Helsinki Committee

267. The Hungarian Helsinki Committee submitted that the authorities along the Western Balkan route regularly implemented measures potentially in breach of Article 4 of Protocol No. 4 in remote areas, at night-time, without conducting any kind of official procedure or handing over those being removed to the officials of the receiving State. Victims of such unofficial practices thus faced major challenges in providing substantive evidence to the Court to prove their allegations. The Hungarian Helsinki Committee suggested that in such situations establishing the applicants' victim status could be dealt with in the same way as that of applicants in cases of forced disappearance, institutional discrimination, or in certain Article 18 cases. Where the lack of documents proving that the applicants were indeed under the jurisdiction of the respondent State could be ascribed to the practice of the State's authorities, the State should not be able to hide behind this pretext. It would be against the principle of the rule of law and of the Contracting Parties' obligation to respect the rights set out in the Convention to dismiss the right to seek justice from the Court of persons whose Convention rights were violated in a manner that deliberately impeded their access to proceedings before the Court.

3. The Court's assessment

268. According to the Court's case-law, the distribution of the burden of proof and the level of persuasion necessary for reaching a particular conclusion are intrinsically linked to the specificity of the facts, the nature of the allegation made and the Convention right at stake (see, among other authorities, *El-Masri v. the former Yugoslav Republic of Macedonia* [GC],

no. 39630/09, § 151, ECHR 2012). In the context of expulsion of migrants, the Court has previously stated that where the absence of identification and personalised treatment by the authorities of the respondent State was at the very core of an applicant's complaint, it was essential to ascertain whether the applicant has furnished prima facie evidence in support of his or her version of events. If that is the case, the burden of proof should shift to the Government (see *N.D. and N.T.*, cited above, § 85).

269. The Court observes that the applicants' description of the events of 21 November 2017 was specific and consistent throughout the whole period following the death of MAD.H. At the same time, there is no material evidence to confirm that the applicants entered Croatia on 21 November 2017 and were returned to the border with Serbia by the Croatian police. The alleged return occurred at night-time in the winter, without them being handed over to the officials of that country, and without any kind of official procedure.

270. The Court acknowledges in that connection a large number of reports by civil-society organisations, national human rights structures and international organisations concerning summary returns of persons clandestinely entering Croatia to the borders with Serbia and Bosnia and Herzegovina, where they are forced to leave the country (compare *M.K. and Others v. Poland*, nos. 40503/17 and 2 others, § 174, 23 July 2020). These materials include, *inter alia*, reports by the Special Representative of the Secretary General of the Council of Europe on Migration and Refugees, the rapporteur of the Committee on Migration, Refugees and Displaced Persons of the Parliamentary Assembly of the Council of Europe, and the United Nations Special Rapporteur on the human rights of migrants (see paragraphs 103-115, and see the third-party submissions outlined in paragraphs 144-147 above). The summary returns are allegedly being conducted outside official border crossings and without any prior notification of the authorities of the country to which the migrants are being returned.

271. In this connection, as the Court has often noted in its case-law, footage of video surveillance may be critical evidence for establishing the circumstances of the relevant events (see *Magnitskiy and Others v. Russia*, nos. 32631/09 and 53799/12, § 269, 27 August 2019, with further references). The Court notes that the Tovarnik-Šid area where the applicants had allegedly entered Croatia was under constant surveillance, including by stationary and thermographic cameras, owing to the frequent attempts by migrants to illegally cross the border there (see paragraph 8 above).

272. The Court has already found that the domestic criminal investigation did not comply with the requirements of Article 2 of the Convention (see paragraph 164 above), *inter alia*, because the investigative authorities never verified the police allegation that there were no recordings of the impugned events, and that they had failed to inspect the signals from

their mobile telephones and the police car GPS in order to establish the applicants' whereabouts and their contact with the Croatian police before the train had hit MAD.H.

273. Having regard to the above considerations, the Court is of the view that, in the particular circumstances of the present case, there was prima facie evidence in favour of the applicants' version of events, and that the burden of proving that the applicants had not entered Croatia and had not been summarily returned to Serbia prior to the train hitting MAD.H. rested on the authorities (see paragraph 268 above). However, the Government have not submitted a single argument capable of refuting the above prima facie evidence provided by the applicant.

274. The Court will thus consider it to be truthful that on 21 November 2017 the Croatian police officers returned the first applicant and her six children (the ninth, tenth, twelfth, thirteenth and fourteenth applicants and MAD.H.) to Serbia without considering their individual situation (compare *N.D. and N.T.*, cited above, § 88).

275. As to the applicants' submissions that all of them had entered Croatia on two further occasions and had sought asylum, but that the Croatian police officers had summarily returned them to Serbia, the Court notes that they are unsubstantiated as to any relevant circumstances. The applicants have accordingly failed to present prima facie evidence in support of those allegations.

B. Admissibility

276. In order to determine whether Article 4 of Protocol No. 4 is applicable, the Court must seek to establish whether the Croatian authorities subjected the first applicant and five of the child applicants to "expulsion" within the meaning of that provision.

277. The Court refers to the general principles summarised in *M.K. and Others* (cited above, §§ 197-200) and reiterates that it has interpreted the term "expulsion" in the generic meaning in current use ("to drive away from a place") (see *Khlaifia and Others*, cited above, § 243, and *Hirsi Jamaa and Others v. Italy* [GC], no. 27765/09, § 174, ECHR 2012), as referring to any forcible removal of an alien from a State's territory, irrespective of the lawfulness of the person's stay, the length of time he or she has spent in the territory, the location in which he or she was apprehended, his or her status as a migrant or an asylum-seeker and his or her conduct when crossing the border (see *N.D. and N.T.*, cited above, § 185). It has also applied Article 4 of Protocol No. 4 to aliens who were apprehended in an attempt to cross a national border by land and were immediately removed from the State's territory by border guards (ibid., § 187).

278. Turning to the present case, the Court observes that the first applicant and her six children clandestinely entered Croatia outside an

official border crossing point. They were intercepted some hours later while resting in a field. They were then transported by the police to the border and were told to return to Serbia, which they did.

279. Referring to the principles established in its case-law (see paragraph 277 above), the Court finds that the fact that the first applicant and her six children entered Croatia irregularly and were apprehended within hours of crossing the border and possibly in its vicinity do not preclude the applicability of Article 4 of Protocol No. 4.

280. Having regard to the foregoing, the Court considers that the first applicant and the five child applicants (the ninth, tenth, twelfth, thirteenth and fourteenth applicants) were subjected to expulsion within the meaning of Article 4 of Protocol No. 4.

281. Since this complaint is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention, it must be declared admissible.

C. Merits

1. The parties' arguments

(a) The applicants

282. The applicants contended that their case should be distinguished from *N.D. and N.T.* (cited above), because they were a family with children and they had been subjected to expulsion after they had been apprehended in the territory of Croatia by the Croatian police, who had ignored their request for asylum. They had not used force or endangered public safety during the border crossing or during their stay in the territory of Croatia.

283. The applicants submitted that under the International and Temporary Protection Act, an intention to seek international protection could be expressed at a border crossing or, if the person was already in the territory of Croatia, at a police station or reception centre for foreigners. The family had expressed their intention to seek asylum to the first police officers they had encountered in Croatia, with the aim of securing access to the procedure in accordance with Croatian law. In each of their attempts to enter Croatia before 21 March 2018, the Croatian police had returned them to Serbia, despite their obligations under section 33(8) of the International and Temporary Protection Act.

284. The applicants explained that they had entered Croatia clandestinely because, without travel documents, it would not have been possible for them to leave Serbia and enter Croatia at official border crossing points between these two countries. Without travel documents, their attempt to leave Serbia and enter Croatia through the official border crossing would have been treated as a minor offence and would have been prevented.

285. The Croatian Embassy in Serbia did not accept applications for international protection, so the applicants had used the only available way of seeking international protection in Croatia: they had crossed the border unlawfully.

(b) The Government

286. The Government argued that the case of *N.D. and N.T.* (cited above) was applicable to the present case. The applicants had had genuine and effective access to an official border crossing point, which they had failed to use. The fact that they were a family with numerous children had been an even stronger reason for them to enter Croatia at an official border crossing. The applicants had not submitted any evidence that they had attempted to enter the country legally but had been prevented from doing so, seeing that at the material time the Croatian official border crossings had been open.

287. The Government argued that the applicants had had the possibility of entering Croatia legally regardless of the fact of not having any identification documents. In particular, they referred to section 36 of the Aliens Act and the Ordinance on the Treatment of Third-Country Nationals (see paragraph 79 above), arguing that persons who did not meet the requirements to enter Croatia legally, because of not having identification documents, could be granted entry on humanitarian grounds.

288. Accordingly, had the applicants arrived at an official border crossing and explained the reason for wishing to enter the country, the border officials would have taken their fingerprints and photographs and established their identity and the circumstances of their arriving in Croatia. They would have registered their intention to seek international protection and would have instructed them to report to a reception centre with a view to lodging a formal application for international protection. This manner of legal entry of foreigners into the country was effective, as proven by the fact that in 2019 the authorities had issued eighty decisions granting entry to Croatia on the basis of section 36 of the Aliens Act (see paragraph 83 above).

289. The Government further submitted that in 2017, 1,887 applications for international protection had been lodged in Croatia of which 211 were granted, and 816 applications had been lodged up until 20 September 2018, of which 157 had been successful. This confirmed that Croatia provided third-country nationals with access to international protection.

290. However, just like the applicants, 77% of the illegal migrants who, on entering Croatian territory, had expressed an intention to seek international protection had left Croatia before actually lodging an application for international protection or before the end of the proceedings. This was precisely what had happened in the present case, since the applicants had left Croatia in July 2018, before the proceedings concerning

their applications for international protection had ended. Statistics showed that migrants used Croatia as a country of transit on their way to western and northern Europe. In the majority of cases, those persons were economic migrants, just like the applicants, rather than refugees in need of international protection.

291. The Government further submitted that as a European Union Member State with the prospect of joining the Schengen Area in the near future, Croatia had the right to control the entry of aliens to its territory and had the obligation to protect the State borders from illegal crossings. Since mid-2017, the human and technical capacities of the border police had been increased and deterrents had been implemented more intensively than before because of increased migratory movements along the so-called Western Balkans migratory route. Deterrence, which was regulated by the Schengen Borders Code, involved measures and action to prevent illegal entries at the external border.

292. Various NGO and international reports regarding coercive measures allegedly being applied to migrants by Croatian police did not contain sufficiently concrete data to trigger criminal investigations. Since illegal migrants had been prevented from entering Croatia by police officers or had been returned, in accordance with another prescribed procedure, to the country from which they had illegally entered, they accused the Croatian police officers of violence, hoping that such accusations would help them to re-enter Croatia and continue their journey towards their countries of final destination.

2. The Court's assessment

(a) General principles

293. The Court refers to the principles concerning the "collective" nature of an expulsion summarised in *N.D. and N.T.* (cited above, §§ 193-201). It reiterates that the decisive criterion in order for an expulsion to be characterised as "collective" is the absence of "a reasonable and objective examination of the particular case of each individual alien of the group" (ibid., § 195). In line with this, in *Hirsi Jamaa and Others* (cited above, § 185) the Court found a violation of Article 4 of Protocol No. 4 because the applicants, who had been intercepted at high seas, were returned to Libya without the Italian authorities carrying out any identification or examination of their individual circumstances.

294. Exceptions to the above rule have been found in cases where the lack of an individual expulsion decision could be attributed to the applicant's own conduct (see *Berisha and Haljiti v. the former Yugoslav Republic of Macedonia* (dec.), no. 18670/03, 16 June 2005, and *Dritsas v. Italy* (dec), no. 2344/02, 1 February 2011). In the case of *N.D. and N.T.* (cited above, § 201), the Court considered that the exception excluding the

responsibility of a State under Article 4 of Protocol No. 4 should also apply to situations in which the conduct of persons who crossed a land border in an unauthorised manner, deliberately took advantage of their large numbers and used force, was such as to create a clearly disruptive situation which was difficult to control and endangered public safety. The Court added that in such situations, it should be taken into account whether the respondent State provided genuine and effective access to means of legal entry, in particular border procedures, and if it did, whether there were cogent reasons for the applicants not to make use of such means on account of objective facts for which the respondent State was responsible (ibid.).

(b) Application of the above principles to the present case

295. The Court notes the Government's argument that the applicants had engaged in "culpable conduct" by circumventing the legal procedures that existed for entry into Croatia. It will therefore examine firstly whether the possibilities which, in the Government's submission, were available to the applicants in order to enter Croatia lawfully, in particular with a view to claiming protection under Article 3, existed at the material time and, if so, whether they were genuinely and effectively accessible to them (see *N.D. and N.T.*, cited above, § 211).

296. The Government contended that persons without identification documents, such as the applicants, could have sought entry to Croatia on humanitarian grounds, under section 36 of the Aliens Act (see paragraph 79 above). They submitted that in 2019 the authorities had issued eighty decisions granting entry to Croatia on that basis, providing two such decisions to the Court (see paragraph 83 above).

297. The Court observes that the humanitarian grounds referred to in section 36(1) of the Aliens Act are defined as emergency medical assistance, human organ donation, natural disasters and unforeseen events involving close family members such as severe illness or death (see paragraph 82 above). It does not see how any of these grounds applied to the applicants' situation.

298. As for the two decisions submitted by the Government (see paragraph 83 above), the Court notes that one was issued to a Serbian national in possession of a valid passport on the grounds of unforeseen events involving close family members. The other decision was issued to a person born in Bosnia and Herzegovina on the grounds of urgent medical assistance. The Government did not submit any decision granting entry under section 36 of the Aliens Act for the purpose of seeking international protection.

299. Accordingly, the Court is not convinced that this legal avenue offered a possibility for the applicants to enter the country in order to claim protection under Article 3 of the Convention.

300. The Court further notes that under the International and Temporary Protection Act, an intention to seek international protection may be expressed at the border crossing, thus triggering the procedure for examination of the personal situation (see section 33(1) of that Act, cited in paragraph 78 above). However, apart from submitting the total number of applications for international protection made in Croatia (see paragraph 289 above), the Government did not supply, despite being expressly invited to do so, any specific information regarding the asylum procedures at the border with Serbia in 2017 or 2018, such as the location of the border crossing points, the modalities for lodging applications there, the availability of interpreters and legal assistance enabling asylum-seekers to be informed of their rights, and information showing that applications had actually been made at those border points (compare *N.D. and N.T.*, cited above, §§ 212-17).

301. In the absence of such information, the Court is unable to examine whether the legal avenue referred to was genuinely and effectively accessible to the applicants at the time.

302. Lastly, the Court notes that the Government have not argued that the applicants could have submitted an application for international protection in the Croatian embassy in Serbia. Thus, such a legal avenue should be regarded as not available in this case.

303. Accordingly, on the basis of the information before it, the Court is unable to establish whether at the material time the respondent State provided the applicants with genuine and effective access to procedures for legal entry into Croatia, in particular with a view to claiming protection under Article 3 (ibid., § 211).

304. In the light of the above considerations, the Court finds that the removal to Serbia of the first applicant and the five child applicants (the ninth, tenth, twelfth, thirteenth and fourteenth applicants) on 21 November 2017, was of a collective nature, in breach of Article 4 of Protocol No. 4 to the Convention. Accordingly, there has been a violation of that Article.

VII. ALLEGED VIOLATIONS OF ARTICLE 34 OF THE CONVENTION

305. The applicants further complained that by failing to comply with the interim measure indicated under Rule 39 of the Rules of Court, by preventing contact with their lawyer, by conducting a criminal investigation as regards the power of attorney which they had signed, and by interfering with their communication with their lawyer, the authorities had violated Article 34 of the Convention, which provides:

> "The Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols

thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right."

Rule 39 provides:

"1. The Chamber or, where appropriate, the President of the Section or a duty judge appointed pursuant to paragraph 4 of this Rule may, at the request of a party or of any other person concerned, or of their own motion, indicate to the parties any interim measure which they consider should be adopted in the interests of the parties or of the proper conduct of the proceedings.

2. Where it is considered appropriate, immediate notice of the measure adopted in a particular case may be given to the Committee of Ministers.

3. The Chamber or, where appropriate, the President of the Section or a duty judge appointed pursuant to paragraph 4 of this Rule may request information from the parties on any matter connected with the implementation of any interim measure indicated.

4. The President of the Court may appoint Vice-Presidents of Sections as duty judges to decide on requests for interim measures."

A. Failure to comply with the interim measure

1. The parties' submissions

306. The applicants submitted that the State had failed to comply with the Court's repeated request to transfer them from the Tovarnik Centre to an Article 3 compliant environment.

307. The Government contended that the State had not violated its obligation to comply with the interim measure issued by the Court since the conditions of the applicants' placement in the Tovarnik Centre had complied with the requirements of Article 3 of the Convention. They reiterated their arguments submitted under Article 3 of the Convention.

2. The Court's assessment

308. The Court notes that the applicants' complaint under Article 34 of the Convention concerns, in effect, the respondent State's obligations under Article 3 of the Convention. The question whether the respondent State in fact complied with the interim measure at issue is thus closely related to the examination of the complaints raised by the applicants under the latter Convention provision.

309. Given the nature of the interim measure applied in the present case, the parties' submissions and the Court's findings concerning the applicants' complaint under Article 3 of the Convention (see paragraphs 191-213 above), the Court takes the view that it has examined the main legal question raised in respect of their situation in the Tovarnik Centre and that it does not need to give a separate ruling on the complaint under Article 34 of the Convention (see, *Centre for Legal Resources on behalf of Valentin*

Câmpeanu v. Romania [GC], no. 47848/08, § 156, ECHR 2014, and *R.R. and Others*, cited above, § 107).

B. Alleged hindrance of the effective exercise of the applicants' right of individual application

1. Admissibility

310. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

2. Merits

(a) The parties' arguments

(i) The applicants

311. The applicants submitted that when they had entered Croatia on 21 March 2018 and been placed in the Tovarnik Centre, they had not been informed that S.B.J. had been trying to contact them. She had been denied the right to represent them on the grounds that the power of attorney signed in her favour by the applicants had not been valid, while the applicants were told that they were not allowed to have the same lawyer in the criminal investigation concerning the death of MAD.H. and the proceedings for international protection. The NGO that had wished to clarify the circumstances of the applicants' signing the power of attorney in favour of S.B.J. had not been allowed to visit them in the Tovarnik Centre. The State had allowed the Croatian Children's Ombudswoman to visit the applicants in the Tovarnik Centre and clarify whether they had authorised the lawyer S.B.J. to represent them only after the Court's intervention under Rule 39.

312. The applicants argued that the initiation of a criminal investigation in respect of S.B.J. on suspicion of having forged the first and second applicants' signatures on the power of attorney had been aimed at frightening her and preventing her from assisting the applicants with their case. That investigation had continued even after the first and second applicants had expressly confirmed to the investigating judge that they had signed the impugned power of attorney, and after the representative of an NGO who had been present during the signing had confirmed that fact.

313. The applicants lastly submitted that the telephone conversations between the fourth applicant and I.C. and the lawyer S.B.J. had been supervised by the police. The fourth applicant could not use her mobile phone freely while in the Tovarnik Centre, as it had been taken away from her from time to time.

(ii) The Government

314. The Government denied that the authorities had in any way interfered with the applicants' right to lodge an application with the Court. During the entire period of their stay in Croatia the applicants had enjoyed legal assistance by either I.C. or S.B.J. They had effective access to different procedures in Croatia for the protection of their rights, such as the proceedings for international protection and the proceedings to challenge their placement in the Tovarnik Centre. They were able to lodge an application with the Court and request interim measures.

315. The Government contended that the initiation of the investigation into the powers of attorney signed in favour of S.B.J. had been lawful and justified. Once the first applicant had stated on 23 March 2018 that the signature on the power of attorney had not been hers, the police had had grounds for suspecting the criminal offence of forging a document. A graphologist's expert report also indicated that the first and second applicants' signatures had been forgeries and S.B.J. had herself admitted that she had not been present when the applicants had signed the powers of attorney in Serbia, contrary to section 18 of the Lawyers' Ethics Code (see paragraph 84 above). S.B.J. had not had direct contact with the applicants, nor had she received clear instructions to commence the proceedings before the Court on their behalf. Consequently, the Croatian prosecuting authorities had clearly had an obligation to conduct the investigation, in order not only to protect the legal order, but also to protect the applicants.

316. The applicants had freely chosen I.C. to represent them in the international protection proceedings from the list of legal aid lawyers provided to them. That list had also included S.B.J., but the applicants had not chosen her, which proved that they did not have any real connection to her as they did not even recognise her name.

317. The Government lastly submitted that under the relevant domestic law, the authorities were obliged to allow NGOs and other human rights organisations access to (detention) centres only as regards aliens and asylum-seekers who were awaiting removal. The applicants had not been subjected to proceedings for forcible removal or deportation from Croatia.

(b) Third-party intervener - Hungarian Helsinki Committee

318. The Hungarian Helsinki Committee submitted that under the European Union directive concerning international protection, legal advisers had to have access to the applicant's file and to clients held in detention facilities or transit zones. The Parliamentary Assembly of the Council of Europe had acknowledged the need to provide legal aid to asylum-seekers in Europe, particularly in the case of accelerated asylum procedures and for those at border zones and in detention facilities. Under the Court's case-law,

denying a detained asylum-seeker access to a lawyer, interfering with the confidentiality of the lawyer-applicant conversation and initiating reprisal measures against the legal representatives could lead to a breach of Article 34 of the Convention. They further stressed that the right of detained asylum-seekers to have access to the relevant NGOs was of paramount importance, and that under the European Union directive regulating the detention of migrants, States had an explicit obligation to allow such access. Any limitation of this right on security grounds was only to be imposed in exceptional cases, based on a strict interpretation of the concept of national security. States were allowed a certain measure of discretion in evaluating threats to national security and deciding how to combat them. Nevertheless, the Court tended to require national bodies to verify that any threat had a reasonable basis in fact.

(c) The Court's assessment

(i) General principles

319. The Court reiterates that it is of the utmost importance for the effective operation of the system of individual petition instituted by Article 34 that applicants or potential applicants be able to communicate freely with the Court without being subjected to any form of pressure from the authorities to withdraw or modify their complaints (see *Ergi v. Turkey*, 28 July 1998, § 105, *Reports of Judgments and Decisions* 1998-IV, and *Shtukaturov v. Russia*, no. 44009/05, § 138, ECHR 2008).

320. The Court notes that an interference with the right of individual petition may take different forms.

321. Preventing applicants from meeting with their lawyers and communicating with them by telephone and correspondence with a view to pursuing their case before the Court has previously led the Court to find a violation of Article 34 of the Convention (see *Shtukaturov*, cited above, §§ 138-49, and *D.B. v. Turkey*, no. 33526/08, §§ 65-67, 13 July 2010).

322. The institution of criminal proceedings against a lawyer involved in the preparation of an application to the Commission has also been found to interfere with the applicant's right of petition (see *Şarli v. Turkey*, no. 24490/94, §§ 85-86, 22 May 2001). Indeed, the initiation of reprisal measures against legal representatives, even where no action is taken in the end, can amount to a violation, as the initiation of such measures could have a "chilling effect" on the exercise of the right of individual petition (see *McShane v. the United Kingdom*, no. 43290/98, § 151, 28 May 2002).

323. The Court has also held that the "general interest" requires that consultations with lawyers should be in conditions "which favour full and uninhibited discussion" (see *Campbell v. the United Kingdom*, 25 March 1992, §§ 46-48, Series A no. 233), and the police's failure to respect the confidentiality of lawyer-applicant discussions has been found in breach of

Article 34 of the Convention (see *Oferta Plus S.R.L. v. Moldova* no. 14385/04, §§ 145-56, 19 December 2006).

324. The Court has consistently held, albeit in the context of criminal proceedings, that the national authorities must have regard to the defendant's wishes as to his or her choice of legal representation, but may override those wishes when there are relevant and sufficient grounds for holding that this is necessary in the interests of justice (see *Dvorski v. Croatia* [GC], no. 25703/11, § 79, ECHR 2015, and the cases cited therein).

(ii) Application of the above principles in the present case

325. The Court observes that immediately after the applicants had been taken to Vrbanja Police Station on 21 March 2018, S.B.J. requested to meet with them and to take over their representation (see paragraph 56 above). She repeated her request the following day when she learned that the applicants had been placed in the Tovarnik Centre. The Court does not see why the authorities did not immediately inform the applicants that their lawyer was trying to contact them because, as mentioned by the Government, any doubts concerning the validity of the power of attorney signed by the first applicant could not have arisen until 23 March 2018, when the first applicant stated that the signature on the power of attorney was not hers (see paragraph 49 above). The fact that a person had been caught clandestinely crossing the Croatian-Serbian border could not serve as a basis for depriving that person of a lawyer's assistance.

326. The Court further observes that during the interview concerning her application for international protection the first applicant stated that the signature on the impugned power of attorney was not hers (see paragraph 49 above). The Court accepts that at that moment doubts could have arisen as to the validity of the power of attorney and that, having regard to the vulnerability of the first applicant and to the entirety of her statement that she had signed certain documents in Serbia, the authorities had reasonable grounds to verify the matter.

327. In this connection the Court observes that on 28 March 2018 the authorities received a detailed explanation of the circumstances of the first applicant's signing of the power of attorney in question from an employee of the Centre for Peace Studies NGO, who had been present during its signing in Serbia, and who had asked to meet the applicants in order to clarify the matter (see paragraph 58 and 59 above). However, his request was denied on security grounds. The domestic authorities and the Government did not submit any argument to show that the alleged security threat had any reasonable basis in fact (see, in this regard, Article 10 of the relevant European Union directive cited in paragraph 87 above).

328. The Court further observes that even though on 31 March 2018 the first and second applicants expressly confirmed to the investigating judge of

the Vukovar County Court that they had signed the power of attorney in favour of S.B.J., the criminal investigation continued and the Vukovar Criminal Police visited the law firm of S.B.J., asked her to hand over the original of the power of attorney, and later on interviewed her and her colleagues as regards the circumstances under which the power of attorney had been signed (see paragraph 62 above). The Court notes that the Croatian Bar Association warned the Head of Police that those actions had been in breach of the Lawyers Act and had impeded the independence of the legal profession as guaranteed by the Croatian Constitution (see paragraph 64 above).

329. At the same time, the authorities must have known that on 4 April 2018 S.B.J. had lodged a request for an interim measure under Rule 39 on the applicants' behalf, asking, *inter alia*, to be allowed to contact them (see paragraph 67 above). The Court notes that it took two exchanges of correspondence with the Government (on 6 and 25 April 2018) and almost one month for the State authorities to allow the Croatian Children's Ombudswoman to visit the applicants in the Tovarnik Centre and clarify their legal representation by S.B.J. (see paragraphs 68 and 73 above). On 2 May 2018 the applicants met with the Croatian Children's Ombudswoman and confirmed to her that they were aware that S.B.J. had instituted proceedings before the Court on their behalf, and that they wished to meet with her and be represented by her. Indeed, the Court notes that on 3 April 2018 S.B.J. informed the fourth applicant via Viber that she was requesting an interim measure from the Court and lodging a constitutional complaint with the Constitutional Court (see paragraph 61 above).

330. The Court notes that on 30 March 2018, nine days after they had been placed in detention, the applicants were asked to appoint a legal aid lawyer, unaware as they were that their chosen lawyer had been trying to contact them since 21 March 2018 (see, *mutatis mutandis*, *Dvorski*, cited above, § 93). Therefore, while the applicants formally chose I.C. as their legal aid lawyer in the proceedings concerning their application for international protection, that choice was not an informed one because they had had no knowledge that S.B.J., whom they had previously appointed to represent them, had been asking to meet them.

331. As to the Government's argument that S.B.J. was on the list of legal aid lawyers but that the applicants had not appointed her because they clearly had no real connection with her, the Court notes that the applicants are Afghan nationals, with no knowledge of the Croatian language. They had not met S.B.J. in person when signing the power of attorney but had appointed her on a recommendation from the NGOs. They were in a vulnerable situation, having lost their daughter and wanting that matter to be investigated. In those circumstances, the Court does not blame the applicants for not recognising S.B.J. on the list of names of legal aid lawyers. Indeed, it was for the State authorities to inform them that she had

been trying to contact them (compare, *mutatis mutandis*, *Dvorski*, cited above, §§ 87 and 93).

332. As to the Government's argument that the first and second applicants signed the power of attorney in favour of S.B.J. in the presence of NGO representatives without her being personally present, the Court recognises that in the migration context NGOs regularly work alongside lawyers and help them establish a connection with persons in need, since they have greater opportunities for contact with such persons (compare *Hirsi Jamaa and Others*, cited above, § 49).

333. It follows that the applicants, despite having appointed S.B.J. in December 2017 to represent them in all proceedings before the Croatian authorities, were left in detention without any legal assistance from 21 March to 2 April 2018, when the legal aid lawyer visited them in the Tovarnik Centre, and without the assistance of their chosen lawyer until 7 May 2018 (see paragraph 66 above). The Court has already held under Article 2 that owing to these circumstances, the applicants were unable to effectively participate in the criminal investigation into the death of MAD.H. (see paragraph 164 above).

334. Moreover, it was only owing to the persistence of the lawyer S.B.J. that the applicants' grievances were brought to the Court's attention. As noted above, the authorities could not have been unaware that she had lodged a Rule 39 request and an application with the Court on the applicants' behalf, and yet they continued to prevent contact between them until 7 May 2018. In such circumstances the authorities interfered with the applicants' rights under Article 34 of the Convention.

335. The Court takes the view that the authorities also interfered with the applicants' right of individual petition by putting undue pressure on S.B.J. in connection with the power of attorney signed in her favour by the first and second applicants (see, *mutatis mutandis*, *Oferta Plus S.R.L.*, cited above, § 137). The Court finds that proceeding with the criminal investigation even after the applicants had confirmed to the investigating judge that they had signed the impugned power of attorney could have had a chilling effect on the exercise of the right of individual petition by the applicants and their representative. In that context, it is irrelevant that ultimately no criminal indictment was apparently brought in that regard (see, *mutatis mutandis*, *McShane*, cited above, § 151).

336. The Court considers that, on the basis of the material before it, there are sufficiently strong grounds for deducing that the restriction of contact between the applicants and their chosen lawyer S.B.J., and the criminal investigation and pressure to which that lawyer was subjected were aimed at discouraging them from pursuing the present case before the Court. Accordingly, there has been a breach of Article 34 of the Convention.

337. Having regard to the above-mentioned findings, the Court sees no need to examine the applicants' complaint regarding the monitoring of conversations with their lawyer.

VIII. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

338. The applicants complained that their detention in the Tovarnik Centre had amounted to a violation of Article 8 of the Convention, and that they had been discriminated against on the basis of their status as migrant asylum-seekers, in breach of Article 14 of the Convention, taken in conjunction with Articles 3, 5 and 8 of the Convention and Article 4 of Protocol No. 4, and Article 1 of Protocol No. 12. The Government contested those allegations.

339. The Court considers that the main issues in the present case have been analysed and that in the circumstances it is not necessary to examine the complaints under Articles 8 and 14 of the Convention and Article 1 of Protocol No. 12 (see *Centre for Legal Resources on behalf of Valentin Câmpeanu,* cited above, § 156).

IX. APPLICATION OF ARTICLE 41 OF THE CONVENTION

340. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

341. In application no. 15670/18, the applicants claimed 350,000 euros (EUR) in respect of non-pecuniary damage. In application no. 43115/18, they claimed EUR 300,000 in respect of non-pecuniary damage.

342. The Government contested the applicants' claims as excessive and unsubstantiated.

343. The Court has found serious violations of several Convention provisions such as Articles 2, 3 and 5 and Article 4 of Protocol No. 4. It has also held the respondent State responsible for hindering the effective exercise of the applicants' right of individual application under Article 34 of the Convention. The Court considers that in view of the violations found, the applicants undeniably suffered non-pecuniary damage which cannot be made good by the mere finding of a violation. Ruling on an equitable basis, as required by Article 41 of the Convention, the Court awards them EUR 40,000 jointly, plus any tax that may be chargeable to them on that amount.

B. Costs and expenses

344. The applicants claimed 226,973.82 Croatian kunas (approximately EUR 30,000) for the costs and expenses incurred before the domestic courts and the Court.

345. The Government submitted that the applicants' claims were excessive and unsubstantiated.

346. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, as well as the amount paid to the applicants' representative in connection with the legal aid granted in the proceedings before the domestic authorities and before the Court, the Court considers it reasonable to award the sum of EUR 16,700 covering costs under all heads, plus any tax that may be chargeable to the applicants.

C. Default interest

347. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT,

1. *Decides*, unanimously, to join the applications;

2. *Declares*, unanimously, admissible the complaints concerning the lack of an effective investigation under Article 2 of the Convention, the conditions of the applicants' placement in the Tovarnik Centre under Article 3, the unlawfulness of their placement in the Tovarnik Centre under Article 5 § 1, the ineffectiveness of the procedure under Article 5 § 4, the summary expulsion of the first, ninth, tenth, twelfth, thirteenth and fourteenth applicants from Croatia on 21 November 2017 under Article 4 of Protocol No. 4, and the hindrance of the effective exercise of the applicants' right of individual application under Article 34 of the Convention, and inadmissible the complaint under Article 4 of Protocol No. 4 concerning the summary expulsion from Croatia of all the applicants on two occasions on unspecified dates;

3. *Holds*, unanimously, that there has been a violation of Article 2 of the Convention in its procedural aspect;

4. *Holds,* unanimously, that it is not necessary to examine the admissibility and merits of the complaint under the substantive aspect of Article 2 of the Convention;

5. *Holds*, by six votes to one, that there has been a violation of Article 3 of the Convention in respect of the applicant children (the fourth to fourteenth applicants);

6. *Holds*, unanimously, that there has been no violation of Article 3 in respect of the adult applicants (the first, second and third applicants);

7. *Holds*, unanimously, that there has been a violation of Article 5 § 1 of the Convention in respect of all the applicants;

8. *Holds*, unanimously, that it is not necessary to examine separately the complaint under Article 5 § 4 of the Convention;

9. *Holds*, unanimously, that there has been a violation of Article 4 of Protocol No. 4 to the Convention in respect of the first, ninth, tenth, twelfth, thirteenth and fourteenth applicants regarding the events of 21 November 2017;

10. *Holds*, unanimously, that it is not necessary to examine the admissibility and merits of the complaint under 34 of the Convention that the respondent State failed to comply with the interim measure indicated by the Court;

11. *Holds*, unanimously, that there has been a violation of Article 34 of the Convention in that the respondent State hindered the effective exercise of the applicants' right of individual application;

12. *Holds*, by six votes to one, that it is not necessary to examine the admissibility and merits of the complaints under Articles 8 and 14 of the Convention and Article 1 of Protocol No. 12;

13. *Holds*, unanimously,
    (a) that the respondent State is to pay the applicants, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts, to be converted into the currency of the respondent State at the rate applicable at the date of settlement:
        (i) EUR 40,000 (forty thousand euros) jointly, plus any tax that may be chargeable, in respect of non-pecuniary damage;

(ii) EUR 16,700 (sixteen thousand seven hundred euros), plus any tax that may be chargeable to the applicants, in respect of costs and expenses;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

14. *Dismisses*, unanimously, the remainder of the applicants' claim for just satisfaction.

Done in English, and notified in writing on 18 November 2021, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

{signature_p_2}

Liv Tigerstedt	Péter Paczolay
Deputy Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

(a) Concurring opinion of Judge Turković;

(b) Partly Dissenting and Partly Concurring opinion of Judge Wojtyczek.

P.P.C.
L.T.

CONCURRING OPINION OF JUDGE TURKOVIĆ

1. Irregular migration is one of the biggest challenges of today's society. Croatia, together with several other countries, is at the front line of this challenge, having regard to its geographical position in the European Union. Research indicates that Croatia is a transit State, meaning that most migrants do not wish to stay there, but clandestinely cross through that country in order to reach western Europe. This leads to a situation where numerous attempts are made to irregularly enter and cross Croatia, which understandably creates a range of difficulties for its authorities. However, duly taking into account Croatia's difficult position, I believe that it is possible to meet these challenges while at the same time complying with the Convention requirements. As explained in paragraph 123 of the judgment, the present case identified several important issues in terms of immigration control by Croatia. The participation of five third parties testifies to the public's interest in the case. The impact of this case thus goes beyond the particular situation of the applicants. The judgment also showed the important role of the national human rights structures, such as the Croatian Ombudswoman, the Croatian Children's Ombudswoman and NGOs, which should be viewed as partners in the authorities' efforts to deal with migration challenges. I believe that the judgment offers good guidance for the domestic authorities as to their future conduct. Lastly, these challenges concern the entire society and a common solution to the situation should be found within the European family, while respecting the human rights guaranteed by the Convention and its Protocols.

2. I am in full agreement with the present judgment. The purpose of this opinion is only to present some additional observations in relation to the Article 4 of Protocol No. 4 complaint in the interests of clarifying the importance of taking into consideration the best interests and vulnerability of children in the migration context. Indeed, the scope of Article 4 of Protocol No. 4 after the Grand Chamber case of *N.D. and N.T. v. Spain* ([GC], nos. 8675/15 and 8697/15, §§ 22, 166, 206 and 231, 13 February 2020) still needs further clarification as to whether the *N.D. and N.T.* exception should be interpreted and applied in a narrower or broader manner, whether a link with the principle of *non-refoulement* is required for a violation of Article 4 of Protocol No. 4 (see the joint dissenting opinion of Judges Lemmens, Keller and Schembri Orland in *Asady and Others v. Slovakia*, no. 24917/15, 24 March 2020) and whether the test, interpreted either in a narrower or a broader sense, should apply equally to children.

3. The present case concerns persons who crossed a land border in an unauthorised manner without using any force or presenting any danger to public security and who were apprehended by Croatian police officers after allegedly walking for several hours in Croatian territory, before being

pushed back into Serbian territory without being subjected to any identification or examination of their individual circumstances (compare and contrast *N.D. and N.T. v. Spain*, cited above). In analysing the complaint, the Court applied the test established in *N.D. and N.T. v. Spain*, and concluded that on the basis of the information provided by the Government, it was not possible to establish whether at the material time the respondent State had provided the applicants with genuine and effective access to procedures for legal entry into Croatia, in particular with a view to claiming protection under Article 3 (ibid., § 211). On that basis it found a violation of Article 4 of Protocol No. 4 to the Convention.

4. In my view, in the circumstances of the present case, the Court should have primarily taken into consideration the fact that the persons being summarily returned were a mother and her six children aged one, two, six, nine and fourteen at the time (see table appended to the judgment).

5. In that connection it is necessary to emphasise that, in compliance with obligations stemming from international law, States are required to take appropriate measures to ensure that a child seeking refugee status, whether unaccompanied or accompanied by his or her parents or by any other person, receives appropriate protection and humanitarian assistance (see Article 22 of the United Nations Convention on the Rights of the Child, cited in paragraph 89 89of the judgment). This obligation exists in respect of all children, regardless of their nationality and immigration status (see paragraph 90 of the judgment).

6. In addition, it is well established in the Court's case-law that in all decisions concerning children their best interests are of paramount importance (see, *mutatis mutandis*, *Vavřička and Others v. the Czech Republic* [GC], nos. 47621/13 and 5 others, § 287, 8 April 2021). This reflects the broad consensus on this matter, expressed notably in Article 3 of the United Nations Convention on the Rights of the Child, as well as in the relevant European Union directives cited in paragraphs 86-87 of the judgment. In the context of displaced children, the principle of the best interests of the child implies that there should be a clear and comprehensive assessment of the child's identity and particular vulnerabilities and protection needs (see paragraph 90 of the judgment). In the Court's view, where a child was accompanied by a relative or another adult the requirements of Article 4 of Protocol No. 4 could be met if that adult was in a position to submit, meaningfully and effectively, arguments against the expulsion on behalf of the child (see *Moustahi v. France*, no. 9347/14, § 135, 25 June 2020).

7. Having regard to the range of situations that may occur at the border, I am aware that the best interests of the child might conflict with other rights or interests such as, for example, protection of public order. However, potential conflicts between the best interests of a child and other interests in general have to be resolved on a case-by-case basis, carefully balancing the

interests of all parties and finding a suitable solution, bearing in mind that the right of the child to have his or her best interests taken as a primary consideration means that the child's interests have a high priority and are not simply one of several considerations. Therefore, greater weight must be attached to what serves the child best (see paragraph 91 above).

8. In the light of all these elements, in the present case, after apprehending the first applicant and her six children on 21 November 2017, the police were required, notwithstanding their illegal entry, to take the necessary measures to verify their identity and assess their specific situation and particular vulnerabilities, taking into account the children's best interests, and to refer them to the authorities in charge of evaluating their needs in terms of protection of their rights, thus ensuring that they were afforded procedural safeguards (see also section 33(8) of the International and Temporary Protection Act, cited in paragraph 78 of the judgment).

9. Contrary to the above requirements, before the first applicant and her six children were returned to Serbia, they were not given the opportunity to explain their personal circumstances and no assessment of their protection needs in the light of the children's best interests was carried out. The police failed to provide them with the special protection and assistance to which they were entitled as extremely vulnerable persons.

10. In my view, when finding a breach of Article 4 of Protocol No. 4 in the present case, the Court should have taken these considerations into account as well and should have taken the position that even if the respondent State had provided genuine and effective access to entry procedures (which in the present case the Government failed to prove) and even if the applicants (a mother with six minor children) had had no cogent reasons not to make use of such procedures, their collective expulsion, in the light of the best interests of the children and the applicants' vulnerability, would be contrary to Article 4 of Protocol No. 4 of the Convention, especially since they did not present any danger to security.

11. Furthermore, it is important to say, in particular in the light of numerous reports concerning summary returns of migrants from Croatia to Serbia and Bosnia and Herzegovina, that the State's obligations under Articles 3 and 13 of the Convention regarding the expulsion of asylum seekers (see *Ilias and Ahmed v. Hungary* [GC], no. 47287/15, §§ 124-41, 21 November 2019) remain intact. Accordingly, the domestic authorities' refusal to receive and process a person's asylum claim might be, depending upon the circumstances of each particular case, in breach of Articles 3 and 13 of the Convention irrespective of whether that person had entered the country illegally (see, for instance, *D v. Bulgaria*, no. 29447/17, 20 July 2021), or attempted to submit his or her asylum claim at a legal border crossing (see *M.K. and Others v. Poland*, nos. 40503/17 and 2 others, §§ 150-86, 23 July 2020).

12. Finally, I would like to emphasise once again that I firmly believe that complex migration-related challenges can and should be met in a human rights-compliant way, it being understood that this will take a common approach and shared efforts.

PARTLY DISSENTING AND PARTLY CONCURRING OPINION OF JUDGE WOJTYCZEK

I respectfully disagree with the majority's view that Article 3 of the Convention has been violated in the instant case. Moreover, I have some reservations concerning the reasoning under Article 4 of Protocol No. 4.

1. The question whether Article 3 has been violated in the instant case

1.1. When considering the question of compliance with the requirements of Article 3, the majority rely on the following cases: *Popov v. France*, nos. 39472/07 and 39474/07, 19 January 2012; *A.B. and Others v. France*, no. 11593/12, 12 July 2016; *Tarakhel v. Switzerland* [GC], no. 29217/12, ECHR 2014 (extracts); *S.F. and Others v. Bulgaria*, no. 8138/16, 7 December 2017; *G.B. and Others v. Turkey*, no. 4633/15, 17 October 2019; and *R.R. and Others v. Hungary*, no. 36037/17, 2 March 2021. In all these cases, the Court found a violation of Article 3 due to unsuitable conditions of detention. For instance, in *A.B. and Others v. France*, the unsuitable conditions for minors were linked to the noise coming from the nearby airport.

I further note in this context that, in the existing case-law, the question of detention of minors in suitable conditions has been assessed as an issue under Article 8 of the Convention (see, in particular, *Bistieva and Others v. Poland*, no. 75157/14, 10 April 2018).

1.2. In the instant case, the living conditions in the Tovarnik Centre were satisfactory. The applicants were given all the material required for everyday childcare and were provided with medical and psychological assistance. The majority lower the threshold of severity required to engage Article 3 and consider that the very fact of prolonged detention of minors in suitable conditions entails a violation of Article 3. I do not share this view. In my view, the question of the detention of minors should have been dealt with under Article 8 of the Convention, as in the previous case-law.

1.3. The enhanced protection of children in cases involving asylum seekers and illegal immigrants entails the following paradox. On the one hand, it is absolutely necessary to protect children in a particularly effective way because of their vulnerability. On the other hand, the protection offered to minors incites immigrants to bring children with them and use them in an instrumental manner for the purpose of obtaining better treatment from the immigration authorities.

2. The distribution of the burden of proof in the instant case

2.1. In *N.D. and N.T. v. Spain* ([GC], nos. 8675/15 and 8697/15, § 85, 13 February 2020), the Court expressed the following view concerning the

question of the burden of proof in a case concerning the applicants' participation in the storming of the border fences in Melilla on 13 August 2014:

> "According to the Court's case-law, the distribution of the burden of proof and the level of persuasion necessary for reaching a particular conclusion are intrinsically linked to the specificity of the facts, the nature of the allegation made and the Convention right at stake (see, among other authorities, *El Masri v. the former Yugoslav Republic of Macedonia* [GC], no. 39630/09, § 151). In this context it must be borne in mind that the absence of identification and personalised treatment by the authorities of the respondent State in the present case, which has contributed to the difficulty experienced by the applicants in adducing evidence of their involvement in the events in issue, is at the very core of the applicants' complaint. Accordingly, the Court will seek to ascertain whether the applicants have furnished prima facie evidence in support of their version of events. If that is the case, the burden of proof should shift to the Government (see, *mutatis mutandis*, *El-Masri*, cited above, § 152, and *Baka v. Hungary* [GC], no. 20261/12, § 149, 23 June 2016)."

2.2. Relying on this case-law, the Court stated the following in the instant case (see paragraph 268 of the judgment):

> "In the context of expulsion of migrants, the Court has previously stated that where the absence of identification and personalised treatment by the authorities of the respondent State was at the very core of an applicant's complaint, it was essential to ascertain whether the applicant has furnished prima facie evidence in support of his or her version of events. If that is the case, the burden of proof should shift to the Government (see *N.D. and N.T.*, cited above, § 85)."

2.3. In my view, principles governing the distribution of the burden of proof in a case about the storming of border fences should not be extended as such to other cases involving illegal crossing of a border. The burden of proof should be distributed between the two parties in a more equitable way. In some cases, it may be impossible for the Government to refute the applicants' version of events and especially their allegation that they have entered the territory of the respondent State. Depending upon the specific circumstances, the applicants may be required to furnish more than prima facie evidence in support of their version of events – or at least in support of part of their factual allegations – and may especially be required to furnish evidence showing that their version of events (or at least some factual allegations) is highly plausible.

2.4. In the instant case, the Court made the following factual findings:

> "273. Having regard to the above considerations, the Court is of the view that, in the particular circumstances of the present case, there was prima facie evidence in favour of the applicants' version of events, and that the burden of proving that the applicants had not entered Croatia and had not been summarily returned to Serbia prior to the train hitting MAD.H. rested on the authorities (see paragraph 268 above). However, the Government have not submitted a single argument capable of refuting the above prima facie evidence provided by the applicant.
>
> 274. The Court will thus consider it to be truthful that on 21 November 2017 the Croatian police officers returned the first applicant and her six children (the ninth,

> tenth, twelfth, thirteenth and fourteenth applicants and MAD.H.) to Serbia without considering their individual situation (compare *N.D. and N.T.*, cited above, § 88)."

In other words, the instant judgment under Article 4 of Protocol No. 4 is based upon the formal truth.

2.5. I note that, in the specific circumstances of the instant case, requiring the respondent Government to adduce evidence rebutting the applicants' main factual assertions does appear an excessive burden. At the same time, in the instant case, the applicants have furnished more than prima facie evidence. The available evidence shows that their version of events is highly plausible. There are stronger reasons to consider the applicants' version of events truthful than the mere fact that the Government have not submitted a single argument capable of refuting the above prima facie evidence provided by the applicants.

Conclusion

3. The international system of refugee protection was created after the Second World War. The past decade has brought new developments and new challenges, in particular with mass migrations. It is time to revisit the whole system and adapt treaties protecting refugees to the current challenges.

APPENDIX

List of applicants

No.	Applicant's Name	Year of birth as submitted by the applicants
1.	M.H.	1980
2.	R.H.	1979
3.	F.H.	1995
4.	N.H.	2000
5.	NA.H.	2003
6.	S.H.	2008
7.	MA.H.	2017
8.	MU.H.	2015
9.	A.H.	2016
10.	MUR.H.	2015
11.	SA.H.	2015
12.	RO.H.	2008
13.	RA.H.	2003
14.	L.H.	2003