

EUROPEAN COURT OF HUMAN RIGHTS

Application No. 38144/20

BETWEEN:

Deltuva

Applicant

v.

Lithuania

Respondent

WRITTEN SUBMISSIONS ON BEHALF OF THE INTERVENORS

The AIRE Centre (Advice on Individual Rights in Europe)
and
Children of Prisoners Europe (COPE)

pursuant to the Registrar's notification dated 3 February 2022 on the Court's permission to intervene under Rule
44 § 3 of the Rules of the European Court of Human Rights

24th February 2022

I. Introduction

1. On any given day, some 2.1 million children are separated from a parent in prison across Council of Europe member States. In addition to being separated from their parent in prison, children with an incarcerated parent frequently face difficult circumstances as a result of the imprisonment of their parent; research has shown that without intervention, they are at greater risk of economic difficulties, loss of housing, family breakdown, stigma and mental health problems. However, constant meaningful contact between children and an imprisoned parent reduces these risk factors for children and allows parents in prison to maintain agency in their parental role. Children should thus be allowed to maintain regular contact with their parent, and child-friendly protocols should be implemented to facilitate this contact, including protocols in prisons to support a child-friendly environment. Facilitating maintenance of the child parent relationship through instituting child-friendly, material changes can raise children's chances of living a healthy adult life.¹
2. In the light of this, this intervention seeks to underline that it is the rights of the children of imprisoned parents that are at stake as much, if not more than those of their parents, when restrictions are imposed on parent /child visits. Their rights and best interests must – in all matters concerning them – be a primary consideration as is required by the United Nations Convention on the Rights of the Child ('UNCRC') (see below paras 10 - 18) This is so irrespective of whether the children are themselves applicants in any given case (see below para 10).
3. The Council of Europe Strategy for the Rights of the Child (2016-2021), as adopted by the Committee of Ministers, highlights children of imprisoned parents as being in a particularly vulnerable situation.² This concern led to the adoption in 2018 (with the assistance of COPE, one of the present intervenors) of the Council of Europe's ('CoE') Recommendation CM/Rec(2018)5 of the Committee of Ministers to member States concerning children with imprisoned parents (see below paras 34 - 40). This recommendation was endorsed by the recent 2020 update in the European Prison Rules.³

II. Article 36 ECHR and Affected Children

4. The Court will be aware that in most complaints about restrictions on family visits or contact, only the prisoner has been the applicant before the Court.⁴ It is only very rarely that the spouse or children are applicants or co-applicants.
5. The Court will nevertheless be aware that even if the children are not applicants Article 36 § 2 provides that the President may, "*in the interests of the proper administration of justice*" invite "*any person concerned who is not the applicant to submit written comments...*". In addition to acceding to requests from suitable NGOs and other bodies to intervene – as in the case of the present intervenors – the Court has from time to time invited or permitted concerned family members to intervene (see e.g. *Neulinger and Shuruk v. Switzerland*⁵)
6. The intervenors also invite the Court to recall that it has in the past appointed an independent lawyer to represent children in cases where the child was already an applicant but represented by a parent in a

¹ Children of Prisoners Europe ('COPE'), Implementation Guidance Document: Council of Europe Recommendation CM/Rec(2018)5 of the Committee of Ministers to member States concerning children with imprisoned parents (2019), ('COPE Implementation Guidance Document'), available at: https://childrenofprisoners.eu/wp-content/uploads/2020/06/IGD_2019.pdf, page 4.

² Council of Europe Strategy for the Rights of the Child (2016-2021), available at: <https://rm.coe.int/168066cff8>.

³ Recommendation Rec(2006)2-rev of the Committee of Ministers to member States on the European Prison Rules (Adopted by the Committee of Ministers on 11 January 2006, at the 952nd meeting of the Ministers' Deputies and revised and amended by the Committee of Ministers on 1 July 2020 at the 1380th meeting of the Ministers' Deputies), available at: https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016809ee581.

⁴ In *H.S. v. the United Kingdom*, no. 16477/09, 5 October 2010, the spouse and children were applicants (as was the prisoner) but after some years of litigation, domestically and in Strasbourg, the imprisoned father was finally permitted to transfer to serve his sentence at home in the Netherlands. The Court however did not consider that the 5 years of unjustified separation from their father that the child applicants had endured merited the continued examination of their case and informed the applicants that the case would be closed.

⁵ *Neulinger and Shuruk v. Switzerland* [GC], no. 41615/07, § 8, 6 July 2010.

situation where a conflict of interest was perceived (see e.g. *A and B v. Croatia*,⁶ *AP and AM v Czech Republic, pending*⁷) in order to ensure that the child's views (or perspective) were independently presented to the Court.

7. Where this Court does not consider it necessary, appropriate or pragmatic under Article 36 § 2 to invite a concerned child to participate in the litigation pending before it, this Court will nevertheless always wish to ascertain whether the child's views or perspective – in addition to those of the affected adults – were heard by the domestic courts or decision making bodies as required by Articles 3 and 12 of the UNCRC.

III. Article 53 and the UNCRC

8. The Council of Europe is not, of course, a party to the UNCRC nor is it able to become one. The UN Declaration on the Rights of the Child was adopted in 1959 and the UNCRC was adopted in 1989. It is the world's most widely ratified human rights treaty. As all the parties to the ECHR have ratified the UNCRC, it has a particular legal force under the second limb of Article 53 ECHR.
9. Article 53 states: ***"Nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a party."*** Article 53 ECHR requires, as a matter of ECHR law, that the UNCRC is the prism through which the application of the ECHR to all cases concerning children must be examined, as to do otherwise could limit the rights ensured under the UNCRC. Reference will also be made in this intervention to the important guidance of the UN Committee on the Rights of the Child contained in the relevant General Comments⁸ ('GCs') and the recommendations of the 2011 Day of General Discussion on the children of incarcerated parents⁹ (to which one of the present intervenors, COPE, in its previous incarnation as Eurochips, contributed).
10. The key provision at the heart of the UNCRC is Article 3 which stipulates that the best interests of the child shall be a primary consideration in all actions concerning children.¹⁰ Article 3(1) UNCRC states that *"[i]n 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."* The UNCRC Committee notes: that this includes all acts conduct, proposals, services, procedures and other measures¹¹ and extends to omissions¹² such as e.g. the failure to adopt the appropriate and necessary legal and practical measures to facilitate children visiting incarcerated parents.¹³ Applying the provisions of the ECHR in light of the UNCRC is required under Article 53 ECHR read together with Article 3 UNCRC regardless of whether the affected children are themselves applicants in a particular case and personally claiming *themselves* to be victims of an ECHR violation.
11. This Court has found that the positive obligations imposed on Contracting States under Article 8 ECHR must be interpreted in light of Article 3 UNCRC and has consistently recognised that the principle of the

⁶ *A and B v. Croatia*, no. 7144/15, 20 June 2019.

⁷ *A.P. and A.M. v. the Czech Republic*, no. 22216/20, communicated on 15 January 2021 (pending).

⁸ https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=5&DocTypeID=11. Other General Comments such as No. 6 and No. 23 may be relevant *mutatis mutandis* for comparative purposes.

⁹ Committee on the Rights of the Child, Report and Recommendations of the Day of General Discussion on "children of incarcerated parents" ('CRC, Report and Recommendations of DGD 2011'), 30 September 2011, available at: <https://www.ohchr.org/Documents/HRBodies/CRC/Discussions/2011/DGD2011ReportAndRecommendations.pdf>.

¹⁰ UNCRC, Article 3 provides: 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.

¹¹ UN Committee on the Rights of the Child, General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (Article 3, para .1), 29 May 2013, CRC/C/GC/14 available at:

https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRC%2fGC%2f14&Lang=en, para 17.

¹² CRC/C/GC/14, para 18.

¹³ Cf. UN Committee on the Rights of the Child, General Comment No. 5 (2003) on general measures of implementation of the Convention on the Rights of the Child, 3 October 2003, CRC/GC/2005/5 available at: https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRC%2fGC%2f2003%2f5&Lang=en.

best interests of the child set out in Article 3 UNCRC, must be central to all decisions affecting/concerning children.¹⁴ The UNCRC Committee highlights in General Comment No. 14 that the best interests of the child is a threefold concept: (1) a fundamental interpretive legal principle; (2) a rule of procedure; and (3) a substantive right under international law on the rights of the child”.¹⁵ This guiding principle of the UNCRC requires that any decision affecting a child includes an evaluation of the possible impact of the decision on the child's best interests.¹⁶ In conformity with a Contracting State's obligations under international law and in accordance with Article 53 ECHR this Court will wish to ascertain whether, in any given case, the best interests of the child were a primary consideration, and transparently treated as such, in the manner indicated by Article 3 UNCRC and GC No. 14.

12. Article 12(1) UNCRC provides that: “States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely **in all matters affecting the child**, the views of the child being given due weight in accordance with the age and maturity of the child”. (emphasis added) Article 12 §1 UNCRC places a strict obligation on States to take the appropriate measures to implement this right fully for all children.¹⁷
13. Article 12 is of crucial importance when considering the participation of minors both in the relevant decision making processes and in domestic courts. The Committee on the Rights of the Child has emphasised that Articles 3 and 12 have a “complementary role”: “there can be no correct application of article 3 if the components of article 12 are not respected”.¹⁸ In addition, as General Comment No. 14 makes clear the full implementation of Article 12 UNCRC is essential to any assessment made under Article 3 UNCRC.¹⁹
14. Article 12(1) of the UNCRC imposes a positive obligation on States to ensure that a child who is capable of forming his or her own views has the right to express those views freely **in all matters affecting them**, and that those views are given due weight in accordance with the age and maturity of the child. This right has also been recognised by this Court on numerous occasions.²⁰ In the context of private and family life under Article 8 ECHR, the Court acknowledged in *M. and M. v. Croatia* a child's right to personal autonomy as a subject of rights which can be exercised through their right to be heard.²¹
15. As the UNCRC Committee points out, for the effective implementation of their rights it is insufficient simply to hear children expressing their views; when the child has the capacity to form and express those views they must be not only be heard but carefully examined and taken seriously.²²
16. In the context of prison visits, only if Article 3 UNCRC (read together with Article 12 UNCRC) is properly observed will it be possible to determine what the child's best interests are in the context of maintaining contact with the prisoner. This is the key consideration. In all cases the overarching – and expressly stated – principle must be that the views are considered and given the due weight to which they are entitled in order for the best interests of the child to be appropriately assessed and determined.

¹⁴ *Neulinger and Shuruk v. Switzerland* [GC], no. 41615/07, § 135, 6 July 2010.

¹⁵ CRC/C/GC/14, para 6 (a) - (c).

¹⁶ CRC/C/GC/14, para 6 (c).

¹⁷ UN Committee on the Rights of the Child, General Comment No. 12 (2009) on the right of the child to be heard, 20 July 2009, CRC/C/GC/12 available at: https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fGC%2f12&Lang=en, para 19.

¹⁸ CRC/C/GC/12, para. 74.

¹⁹ CRC/C/GC/14, para. 14.

²⁰ For example, see *M. and M. v. Croatia*, no. 10161/13, § 171, ECHR 2015 (extracts); *N.Ts. and Others v. Georgia*, no. 71776/12, § 72, 2 February 2016 and *Iglesias Casarrubios and Cantalapiedra Iglesias v. Spain*, no. 23298/12, § 21, 11 October 2016.

²¹ *M. and M. v. Croatia*, no. 10161/13, §171, ECHR 2015 (extracts).

²² See CRC/C/GC/12, para. 28; Council of Europe Committee of Ministers, Recommendation CM/Rec(2012)2 of the Committee of Ministers to member States on the participation of children and young people under the age of 18 (Adopted by the Committee of Ministers on 28 March 2012 at the 1138th meeting of the Ministers' Deputies).

17. Article 9(1) UNCRC requires Contracting States to ensure that a child shall not be separated from his or her parents “against their will”. The leading commentary on Article 9 notes that the phrase refers to the will of the child as well as to the will of the parents. Under Article 9(3) it is the **child’s right** to maintain contact and personal relations.
18. Article 9(3) UNCRC most importantly provides: “*States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child’s best interests.*” Article 9(3) thus makes clear that only if it is contrary to the child’s best interests contact should not be maintained.
19. Although imprisoned parents undeniably and importantly have corresponding rights to contact with their children, under Article 3 UNCRC (and thus under Article 53 ECHR) primary consideration must be given to the children’s rights and best interests when decisions about providing or restricting visiting opportunities are being contemplated or taken. Restrictions in relation to child visits should be considered specifically and separately from other restrictions, including restrictions on other family members, every time the continued detention and/or visitation restrictions are reviewed. The right to private and family life is similarly provided for under Article 16(1) UNCRC, which states that “*no child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation*”.

IV. The UNCRC 2011 Day of General Discussion (“DGD”) on Children of incarcerated Parents²³

20. In 2011 the UNCRC held a Day of General Discussion (DGD) on the children of Incarcerated parents. One of the present intervenors COPE (its previous incarnation as Eurochips) contributed to this exercise.
21. Following the DGD the Committee published a report with its recommendations which, *inter alia*, reiterated the right of a child left outside when their parent is incarcerated to maintain personal relations and direct contact with both parents on a regular basis in accordance with Article 9(3) UNCRC.²⁴ The Committee emphasised that: “*children have the right to regularly visit their parent(s), if this is in their best interests.*”²⁵ and urges States to “*ensure that security matters and policies on incarcerated parents take into account the rights of affected children. In this context, the Committee recommends that State parties ensure the right of children to regularly visit their incarcerated parent(s).*”²⁶
22. In the report the Committee emphasised the need to take into full account the rights of children to have their views taken into account in all decisions affecting them.

V. The Council of Europe European Prison Rules provisions on contact with the outside world

23. The CoE European prison Rules (EPR) are a non-binding instrument and do not thus fall within the scope of the second limb of Article 53 ECHR. They do however play a key role in the CoE’s provisions for the protection of human rights. Rule 2 of the EPR states: “*Persons deprived of their liberty retain all rights that are not lawfully taken away by the decision sentencing them or remanding them in custody*”.
24. Amongst those rights is the right to respect for family and private life guaranteed in Article 8 ECHR.
25. The Council of Europe has long concerned itself with the welfare of prisoners and of their families. To this end Rule 24.4 EPR specifically provides: “*The arrangements for visits shall be such as to allow prisoners to maintain and develop family relationships in as normal a manner as possible.*”

²³ The purpose of General Discussion Days is to foster a deeper understanding of the contents and implications of the Convention as they relate to specific articles or topics. Representatives of Governments, non-governmental organizations, United Nations human rights mechanisms, United Nations bodies and specialized agencies, national human rights institutions, the business sector, as well as individual experts and children are welcome to take part. <https://www.ohchr.org/EN/HRBodies/CRC/Pages/Discussion2020>.

²⁴ CRC, Report and Recommendations of DGD 2011, para 35.

²⁵ CRC, Report and Recommendations of DGD 2011, para 38.

²⁶ CRC, Report and Recommendations of DGD 2011, para 39.

26. The Rules recognise – as do the intervenors – that “*Communication and visits may be subject to restrictions and monitoring necessary for the requirements of continuing criminal investigations, maintenance of good order, safety and security, prevention of criminal offences and protection of victims of crime, but such restrictions, including specific restrictions ordered by a judicial authority, shall nevertheless allow an acceptable minimum level of contact.*”²⁷
27. The Rules thus foresee that interferences with the prisoner’s Article 8 rights may occur as a consequence of restrictions and monitoring of family visits but those interferences must be lawful and proportionate. **The intervenors submit that any restrictions should be time bound and should be reviewed whenever continued detention is reviewed to see whether the restrictions are still necessary and proportionate.**
28. **Recommendation Rec(2006)2-rev on the European Prison Rules**, revised and amended on 1 July 2020 endorsed CM/Rec(2018)5 concerning children with imprisoned parents and clarifies that: “*The European Prison Rules apply to persons who have been remanded in custody by a judicial authority or who have been deprived of their liberty following conviction.*”
29. Specifically in relation to untried prisoners, the Rules state: “*Unless there is a specific prohibition for a specified period by a judicial authority in an individual case, untried prisoners: a. shall receive visits and be allowed to communicate with family and other persons in the same way as convicted prisoners.*”²⁸

VI. Recommendation CM/Rec(2018)5 and the Council of Europe Strategy for the rights of the child 2016-2021

30. COPE’s work has always recognized and been based on the importance of childhood attachments and on the fact that disruptions in children’s relationships can affect them emotionally and psychologically into adulthood. The quality of early attachments is a key predictor of an individual’s social and emotional functioning later in life, with insecure or disorganised attachments placing children at much greater risk of negative life outcomes (R. A. Thompson, 2008²⁹). For children of parents in prison, key processes seminal to the development of secure attachments and other competencies involve, *inter alia*, ongoing contacts with incarcerated parents (Poehlmann, Dallaire et al, 2010³⁰). In addition to the trauma of the parent’s sudden disappearance following arrest, pre-trial detention of the parent is particularly unsettling for children because of the uncertainty of duration and outcome, lack of information on the parent’s whereabouts, and concern over the parent’s safety and well-being. These prolonged periods of uncertainty exacerbate children’s stress, worry, anxiety and depression, heightened by the fact that remand custody is frequently prolonged several times and constantly being extended. Remand detention is an insecure time of transition when the child is in need of support; children of pre-trial detainees “...find themselves most in need of seeing and experiencing that their father or mother is doing well” (Smith, P.S. 2014³¹). Studies have found that children with parents in prison often develop anxieties and fantasies vis a vis the parent, which are mitigated by physical prison visits that provide children with reassurance. (Cf for example, Boswell and Wedge, 2007³²). Studies also demonstrate that the trauma of a parent’s sudden disappearance and subsequent lack of contact can result in young children rejecting the parent at a later stage in their lives.(E. Christensen 1999³³) At the very least, supervised visits can be set up in lieu of a

²⁷ EPR, 24.2.

²⁸ EPR, 99a.

²⁹ Thompson, R. A. (2008). Early attachment and later development: Familiar questions, new answers. In J. Cassidy & P. R. Shaver (Eds.), *Handbook of attachment: Theory, research, and clinical applications* (pages 348–365). The Guilford Press.

³⁰ Poehlmann, J., Dallaire, D., Loper, A. B., & Shear, L. D. (2010). Children’s contact with their incarcerated parents: research findings and recommendations. *American Psychologist*, 65(6), page 576.

³¹ Smith P.S. (2014) Remand Imprisonment: A Stressful Phase of Transition. In: *When the Innocent are Punished*. Palgrave Studies in Prisons and Penology. Palgrave Macmillan, London. https://doi.org/10.1057/9781137414298_8.

³² Boswell, G. & Wedge, P. (2007). *Imprisoned Fathers and Their Children* (London: Jessica Kingsley Publishers), page 52.

³³ Christensen, E. (1999). Forældre i fængsel – en under- søgelse af børn og forældres erfaringer [Parents in Prison – A Study of Children’s and Parents’ Experiences] (Copenhagen: The Danish National Centre for Social Research, 1999), page 45.

total lack of contact. This takes place even in countries where there are serious concerns about restrictions on contact for children of remand prisoners, such as Sweden and Denmark, and involves the presence of a prison officer during the duration of the visit. In some jurisdictions such as Denmark, “visit friends” are used when the police do not have the time to supervise visits.³⁴

31. Council of Europe Strategy for the rights of the child (2016-2021) explicitly recognises that children with imprisoned parents are one of society’s most vulnerable and marginalised groups of children, and require protection against exclusion and discrimination.
32. Recommendation CM/Rec(2018)5 of 4 April 2018 concerning children with imprisoned parents set out for member States both basic principles and specific requirements in relation to these children. The first basic principle requires that “*Children with imprisoned parents shall be treated with respect for their human rights and with due regard for their particular situation and needs. These children shall be provided with the opportunity for their views to be heard, directly or indirectly, in relation to decisions that may affect them. Measures that ensure child protection, including respect for the child’s best interests, family life and privacy shall be integral to this, as shall be the measures which support the role of the imprisoned parent from the start of detention and after release.*”³⁵
33. In terms of imposing restrictive measures on a detained parent’s visitation rights Recommendation (2018)5 provides that: “*Enforcing restrictions on contact of an arrested or a remanded parent shall be done in such a way as to respect the children’s right to maintain contact with them.*”³⁶
34. The Recommendation (2018)5 also states: “*Children should normally be allowed to visit an imprisoned parent with a week following the parent’s detention and, on a regular and frequent basis, from then on.*”³⁷
35. Recommendation (2018)5 goes on to emphasise that: “*A child’s right to direct contact shall be respected, even in cases where disciplinary sanctions or measures are taken against the imprisoned parent. In cases where security requirements are so extreme as to necessitate non-contact visits, additional measures shall be taken to ensure that the child-parent bond is supported.*”³⁸
36. In cases where the current caregiver is not available to accompany a child’s visit, alternative solutions should be sought, such as accompanying by a qualified professional or representative of an organisation working in this field or another person as appropriate.³⁹
37. A caregiver’s inability or unwillingness to visit the imprisoned parent (due to circumstances of illness, divorce, family breakdown, etc.), should not infringe upon a child’s right to visit their parent. Children are entitled to contact in their own right and as such, a trained and child-sensitive third party, representing either the prison service, social service or NGO, should accompany a visiting child into the prison and through security procedures.⁴⁰
38. Member States should provide child-sensitive accompaniment to facilitate appropriate contact between a child and their incarcerated parent. Standard practices should be in place to facilitate communication between children, prison services, social services and NGOs.⁴¹ States should also seek out and develop

³⁴ Smith, P. S., & Jakobsen, J. (2014). Visiting in Prisons: Staff, Children, Conditions and Practice. In *When the Innocent are Punished*. Palgrave Macmillan, London, page 166.

³⁵ Council of Europe, Recommendation CM/Rec(2018)5 of the Committee of Ministers to member States concerning children with imprisoned parents (Adopted by the Committee of Ministers on 4 April 2018 at the 1312th meeting of the Ministers’ Deputies) (‘Recommendation CM/Rec(2018)’), available at: <https://rm.coe.int/cm-recommendation-2018-5-concerning-children-with-imprisoned-parents-e/16807b3438>, para 1.

³⁶ Recommendation CM/Rec(2018), para 9.

³⁷ Recommendation CM/Rec(2018), para 17.

³⁸ Recommendation CM/Rec(2018), para 31.

³⁹ COPE Implementation Guidance Document, page 24.

⁴⁰ COPE Implementation Guidance Document, page 24.

⁴¹ COPE Implementation Guidance Document, page 24.

channels of communication with NGOs that will provide child-sensitive people to accompany children into the prison and through security.⁴²

VII. Article 8 ECHR in relation to maintaining and facilitating contact between incarcerated parents and their children.

39. When the 1950 ECHR was drafted and adopted in the aftermath of WWII the concept of “children’s rights” was as yet undeveloped. There are thus no express provisions regarding the *rights* of children in the text of the original ECHR. The closest is to be found in Article 8 in the right to respect for family life. The Court (and the Commission before it) has however ruled on dozens of cases concerning children including ruling on their rights under other provisions of the ECHR.
40. Article 8 only permits interferences which are:
- (i) in accordance with a law which is precise and ascertainable so that an individual can regulate his conduct by it
 - (ii) pursue a legitimate aim
 - (iii) are necessary in a democratic society and proportionate to that aim
41. It therefore requires that there is an **accessible law** regulating prison family visits; whether that law makes a distinction between adults and children will determine whether it is sufficiently **precise**; the availability of procedures for challenging restrictions on visits will be necessary for the relevant law to be seen to have “inherent procedural safeguards” as will provisions made for the children affected to be heard and their views taken into account; the law should also provide for proportionality to be assessed and respected; the **legitimate aims** which permit restrictions on family visits are to be identified in law and practice. Article 8 further requires that the **proportionality to the identified legitimate aim** pursued is properly assessed.⁴³
42. It well recognised by the intervenors – and by this Court – that restrictions on prison visits – other than legal visits – may be necessary to ensure the unimpeded continuation of an effective investigation.⁴⁴ Where there are concerns about inappropriate or even illegal conduct during family visits relevant and proportionate restrictions may be imposed. Visitors may have to be subjected to searches and not be permitted physical contact if justifiable security concerns are made out.⁴⁵ In *Bogusław Krawczak v. Poland*⁴⁶ restrictions had been placed on family visits to the detained father. (The wife and children were not applicants) The restrictions were imposed as the wife was suspected of infringing prison security rules on one visit. Although, the applicant had in fact been allowed to see his family 46 times over two years, (on 20 occasions in a manner allowing for direct physical contact), and nearly all requests filed by the applicant’s family members had been allowed (§49) the minor son had only been able to visit his father 9 times and the daughter once. The Court considered that the **lack of coherence** in the state’s practice led to a finding of a violation of the “necessary in a democratic society” limb of Article 8 § 2 (§§115-121).
43. Whilst adult visitors may pose a risk to security or frustrate the ongoing investigation, it is difficult to see how restrictions on visits taking place could be proportionately imposed on a young child who was not accompanied by a suspect adult family member. States are under a positive obligation to ensure that arrangements are available for children to have visits – if strictly necessary separated by a glass partition and aurally supervised by guards. In some jurisdictions, when it has been determined that the prisoner’s spouse or partner may constitute a security risk, arrangements are nonetheless made for the child/children to visit under the supervision of a social worker or other security cleared adult entitled to give consent to the child/children being searched before and after the visit. Where older teenage children

⁴² COPE Implementation Guidance Document, page 24.

⁴³ See *mutatis mutandis* *Sejdic and Finci v. Bosnia and Herzegovina* [GC], nos. 27996/06 and 34836/06, ECHR 2009; *Glor v. Switzerland*, no. 13444/04, ECHR 2009; *Nada v. Switzerland* [GC], no. 10593/08, ECHR 2012.

⁴⁴ See amongst many others *Kučera v. Slovakia* no. 48666/99, 17 July 2007; *Trosin v. Ukraine*, no. 39758/05, 23 February 2012; *Mozer v. the Republic of Moldova and Russia* [GC], no. 11138/10, 23 February 2016.

⁴⁵ See again *Kučera v. Slovakia* no. 48666/99, 17 July 2007; *Ferla v. Poland*, no. 55470/00, 20 May 2008.

⁴⁶ *Bogusław Krawczak v. Poland*, no. 24205/06, 31 May 2011.

are concerned, particularly if those children already have a history of being in trouble with the law, it may, exceptionally, be necessary to restrict or deny in person contact visits to a remand prisoner if such visits might pose a risk to security or frustrate the ongoing investigation (as would the visits from a spouse or partner). However the right to **maintain personal relations** by other means (under Article 9(3) UNCRC discussed above) must still be facilitated unless it is not in the child's interests. In all such cases the child must be heard and their views given due weight in the decision making process.

44. In *Trosin v. Ukraine* the Court's assessment related to the restrictions on visits for a sentenced person. The Court held that there had been a violation of Article 8 as the State did not take the necessary measures to ensure that the applicant's private interests in meeting with his family was properly balanced against the relevant interest in restricting prisoners' contact with the outside world and the manner in which the visits were conducted were not justified.⁴⁷ The applicant was separated by a glass partition and the visits were held in the presence of a prison officer who listened to the conversations.
45. The Grand Chamber also found in *Mozer v. the Republic of Moldova and Russia*⁴⁸ that a violation of Article 8 occurred in the absence of a pertinent justification for the imposition of the restrictions and in particular for why the family visits had to be monitored so closely by the prison guards. The visits in question were from the prisoner's parents. No children were involved in that case but the principle applies *mutatis mutandis*.
46. The intervenors submit that rules (and practice) that fail to make a distinction between children and adults (*cf mutatis mutandis Thlimmenos v Greece*, 34369/97) and their visits to their imprisoned family members are a blunt instrument (see *mutatis mutandis Hirst v. the United Kingdom*⁴⁹). The facilitation of children's visits must be practical and effective not theoretical and illusory if it is not to fall foul of the Convention. A detainee's Article 8 rights require authorities to assist him in maintaining contact with his close family."⁵⁰
47. Whilst assessing the necessity of visiting rights restrictions, in *Khoroshenko v. Russia* the Grand Chamber found that member states do "not have a free hand in introducing restrictions in a general manner without affording any degree of flexibility for determining whether limitations in specific cases are appropriate or indeed necessary".⁵¹ Flexibility does not mean unrestricted discretion should be granted to penal authorities to grant or refuse prison visits. It was recently held in *Kungurov v. Russia* that such discretion would not meet the quality of law requirement of Article 8 (see above para 41).⁵² In *Trosin v. Ukraine* the Court makes clear that "States are expected to develop their proportionality assessment technique enabling the authorities to balance the competing individual and public interests and to take into account peculiarities of each individual case."⁵³ This Court has emphasised that "the extended prohibition of direct contact can be justified only where a genuine and continuing danger of that kind exists".⁵⁴
48. The intervenors submit that the principle of flexibility in *Khoroshenko* should also be applied to the manner in which restrictive measures are imposed on visiting rights, particularly with regard to children visiting a parent.
49. The Court must be persuaded that the interference with a prisoner's right to visits from family is indispensable for achieving a legitimate aim.⁵⁵ In *Kučera v. Slovakia* the Court considered it "questionable whether **relevant and sufficient grounds** existed for preventing the applicant from meeting his wife for such a long period...Reference was made to the suffering caused by the lengthy separation of

⁴⁷ *Trosin v. Ukraine*, no. 39758/05, §§ 45-47, 23 February 2012.

⁴⁸ *Mozer v. the Republic of Moldova and Russia* [GC], no. 11138/10, 23 February 2016.

⁴⁹ *Hirst v. the United Kingdom* (no. 2) [GC], no. 74025/01, §§ 76-82, ECHR 2005-IX.

⁵⁰ *Kučera v. Slovakia*, no. 48666/99, § 127, 17 July 2007.

⁵¹ *Khoroshenko v. Russia* [GC], no. 41418/04, §126, 30 June 2015.

⁵² *Kungurov v. Russia*, no. 70468/17, §18, 18 February 2020.

⁵³ *Trosin v. Ukraine*, no. 39758/05, § 42, 23 February 2012. (see also §§43-44)

⁵⁴ *Khoroshenko v. Russia*, [GC], no. 41418/04, §125, 30 June 2015; *Piechowicz v. Poland*, no. 20071/07, §§ 205-222, 17 April 2012; *Horych v. Poland*, no. 13621/08, §§ 117-132, 17 April 2012.

⁵⁵ *Kučera v. Slovakia*, no. 48666/99, § 130, 17 July 2007.

the applicant from his wife and also to the fact that the investigation into the offences in issue had practically ended.”⁵⁶ (Emphasis added) The Court found a violation of Article 8.

50. In *Horych v. Poland* the Court noted that restrictions on family visits of a detainee to special visit arrangements constitute an interference but were not in themselves contrary to Article 8.⁵⁷ However, the Court found that even if a detainee had not been arbitrarily denied visits from family members there was a violation of Article 8 in the absence of adequate arrangements to enable prisoners to be visited by their children.
51. The separate joint concurring opinion of two judges in *Khoroshenko v. Russia* noted that: “However, we do not consider regular family visits as a privilege that can be withdrawn, but as an Article 8 right of an inmate **and of his or her family**, (emphasis added) in order to maintain their family relationships. The lives of prisoners and their families are deeply affected by visitation policies, as is clearly seen in the present case, where the father-son relationship was completely lost over the years, due, at least in part, to the loss of any meaningful contact. Restrictions on visitation rights should have a rational basis. Deprivation of these rights should be related to legitimate penological interests and the protection of safety and security. The Russian Government did not provide the Court with any evidence that in the applicant’s particular case the automatic and severe limitation of visitation rights served any other purpose but to reinforce the punitive nature of the prison regime.”⁵⁸
52. The intervenors recognise that prison security will always carry an important weight and this Court has recognised that restrictions of prisoner’s contact with family is not of itself incompatible with the Convention.⁵⁹ Imprisonment may justifiably reduce the child’s contact arrangements, but should not nullify or impair the very essence of the child’s legal right to maintain contact. A failure by the authorities to take all the steps they could reasonably have been expected to take to facilitate ongoing contact will exacerbate the interference and will gravely impact the assessment of its proportionality.

VIII. Examples of Good Practice

53. The Ministry of Justice and HM Prison and Probation Service, Management of Security at Visits Policy Framework: Closed Estate, for England and Wales, states⁶⁰:

“5.72 Visitors must not be banned purely on the basis of an indication by a drug dog or on the basis of intelligence alone, unless that intelligence contains clear and persuasive evidence of trafficking or racketeering.

5.73 In exceptional circumstances, the Governor has discretion not to impose a ban. It will be appropriate to exercise this discretion in the following circumstances:

- If a ban would cause disproportionate harm to the prisoner’s or visitor’s right to a family life (protected by the European Convention on Human Rights (ECHR) Article 8)
- **If a ban would cause disproportionate harm to the rights of the prisoner’s child or children to access to a parent (UN Convention on the Rights of the Child, Article 9 (3))**
- If the prisoner is a young person and a ban would cause disproportionate harm to his or her right of access to a parent.
- For exceptional compassionate or other grounds.

...

5.75 Examples of a ban that might cause disproportionate harm to a child’s right of access to a parent might be if the banned visitor were the person who normally brought the prisoner’s children

⁵⁶ *Kučera v. Slovakia*, no. 48666/99, § 131, 17 July 2007.

⁵⁷ *Horych v. Poland*, no. 13621/08, and §123, 17 April 2012; See also *Hagyó v. Hungary*, no. 52624/10, §84, 23 April 2013.

⁵⁸ *Khoroshenko v. Russia* [GC], no. 41418/04, 30 June 2015, joint concurring opinion of Judges Pinto de Albuquerque and Turković, § 7.

⁵⁹ *Aliiev v. Ukraine*, no. 41220/98, § 187, 29 April 2003; *Kyriacou Tsiakkourmas and Others v. Turkey*, no. 13320/02, § 303, 2 June 2015; *Hagyó v. Hungary*, no. 52624/10, §84, 23 April 2013.

⁶⁰ Ministry of Justice and HM Prison and Probation Service, Management of security at visits Policy Framework: Closed estate, 8 April 2021, available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/977281/closed-estate-managemen-security-visits-policy-framework.pdf.

to visit, and there seemed little prospect of anyone else doing so. The Governor may find it useful in these circumstances to talk to Social Services, and to consider what other arrangements might be made to allow the children to visit without the offending person; if this is not possible and is not appropriate, the Governor should consider closed visits as an alternative.

5.76 To help maintain contact between prisoners and their children, a banned visitor who would otherwise qualify for assisted prison visits may nominate an escort for their child/children, subject to notifying the prison's family services function in writing. Only in the most exceptional circumstances should a visit between children and their parents be restricted." [Emphasis added]

54. Affiliates of the NGO Fédération Relais Enfants Parents, which functions throughout France, Belgium and Switzerland, organise prison visits wherein volunteers, working with support from child psychologists and social workers, accompany children throughout the visiting process;⁶¹ services in France are particularly called upon when the caregiver parent is unable or unwilling to accompany the child on the prison visit.⁶²
55. Swedish NGO Solrosen provides volunteers and professionals trained to accompany children to prison or on custody visits;⁶³ they are often involved in planning visits to parents in prison or parents in pre-trial detention, and always interview the caregiver, the imprisoned parent and the child to prepare for the visit.⁶⁴
56. Catalonia's Niños Sin Barreras accompanies children on visits when caretakers are not available; social workers from professional treatment teams are responsible for coordinating with Niños Sin Barreras.⁶⁵
57. Italy has outlined a standardised framework accompanying children's visits in Article 2 of their Memorandum of Understanding, which states that children under the age of 12 are provided with options for accompaniment to prison, if they cannot be accompanied by a parent or guardian.⁶⁶
58. In Denmark and other countries, social workers accompany children on supervised visits to their parents in pre-trial detention where the caregiver parent is unable or unwilling to accompany them.⁶⁷

IX. Conclusion

59. The intervenors invite the Court to examine all the matters which have been set out above and take them into consideration in their deliberations in this case.

This intervention was drafted by Nuala Mole (Founder and Senior Lawyer) and Samantha Sloan (Legal Project Assistant) of the AIRE Centre and Rachel Brett (President) and Liz Ayre (Executive Director) of COPE. Thanks to Ciaran King, European Litigation Officer of the AIRE Centre for his support.

⁶¹ COPE Implementation Guidance Document, page 25.

⁶² Ayre, E. (1996). *They Won't Take No for an Answer: The Relais Enfants-Parents*. Early Childhood Development: Practice and Reflections Number 11. The Hague: Bernard van Leer Foundation, pages 27–28; and Philbrick, K., Ayre, E. & Lynn, H. (2014). *Children of Imprisoned Parents: European Perspectives on Good Practice*. Paris, France: Children of Prisoners Europe, pages 88–89.

⁶³ COPE Implementation Guidance Document, page 25.

⁶⁴ Personal email exchange between Anna Ekberg of Solrosen and COPE staff, 26 March 2021.

⁶⁵ COPE Implementation Guidance Document, page 25.

⁶⁶ COPE Implementation Guidance Document, page 25; See Italian Memorandum of Understanding that was adopted in 2014, renewed in 2016 and most recently on 16 December 2021, available at: https://childrenofprisoners.eu/wp-content/uploads/2018/04/2018.03.02_2016-MOU-English-edits-FINAL.pdf.

⁶⁷ See for example Smith, P. S., & Jakobsen, J. (2014). Visiting in Prisons: Staff, Children, Conditions and Practice. In *When the Innocent are Punished*. Palgrave Macmillan, London, pages 166–167.