Aliens — Asylum seekers — Detention of migrant children — Family detained in detention centre — Conditions in detention centre — European Convention on Human Rights, 1950, Articles 3, 5 and 8 — Jurisprudence of European Court of Human Rights — Convention on the Rights of the Child, 1989, Articles 3 and 37 — Whether detention of migrant children and their parents illegal — Whether Norway violating international obligations and Constitution of Norway — Whether damages appropriate

Human rights — Prohibition of torture and inhuman or degrading treatment or punishment — Whether detention of children and their parents illegal — Jurisprudence of European Court of Human Rights — Age of children — Length and conditions of detention — Whether violation of Article 3 of European Convention on Human Rights, 1950

Human rights — Right to freedom and security — Whether detention of children and their parents illegal — Jurisprudence of European Court of Human Rights — Whether detention of family measure of last resort with no possible alternative — Whether violation of Article 5(1) of European Convention on Human Rights, 1950

Human rights — Right to respect for private and family life — Whether detention of children and their parents illegal — Jurisprudence of European Court of Human Rights — Whether detention justified — Whether compelling societal needs — Whether proportionate — Whether violation of Article 8 of European Convention on Human Rights, 1950

Human rights — Rights of the child — Whether detention of children illegal — Convention on the Rights of the Child, 1989, Articles 3 and 37 — Interpretation of Article 3 — Best interests of the child — Prohibition of torture and inhuman or degrading treatment or punishment — Whether measure strictly necessary — Whether violation of Articles 3 and 37 of Convention on the Rights of the Child, 1989

Relationship of international law and municipal law — Treaties — European Convention on Human Rights, 1950, Articles 3, 5 and 8 — Convention on the Rights of the Child, 1989, Articles 3 and 37 — Constitution of Norway — Jurisprudence of European Court of Human Rights — 2015 report by UN Special Rapporteur on Torture — Whether detention of migrant children and their parents illegal — Whether damages appropriate — The law of Norway

Huseini *v.* Ministry of Justice and Public Security[1]

Norway, Borgarting Court of Appeal. 31 *May* 2017

(Bull, Racin Fosmark and Vogt-Lorentzen, *Justices of Appeal*)

Summary: *The facts*:—The appellants, an Afghan family, had applied for asylum in Norway. Their applications were denied on 18 April 2013. On 30 July 2014, the National Police Immigration Service decided to apprehend the family with a view to deporting them. When the family was apprehended, at a dawn raid on Sunday 10 August 2014 at Agder Asylum Centre, the family's fifteen-year-old son was away visiting a friend. The rest of the family, including four children aged between seven and fourteen years, were taken to Trandum Detention Centre near Oslo Airport, Gardermoen, where they were detained. The detention lasted for twenty days, until 30 August 2014, when the family was deported to Kabul.

The appellants instituted legal proceedings against the respondent, the Ministry of Justice and Public Security, arguing that their detention was in breach of the Norwegian Constitution, Articles 3,[2] 5(1)[3] and 8[4] of the European Convention on Human Rights, 1950 ("the ECHR"), and Articles 3 and 37(a) and (b) of the Convention on the Rights of the Child, 1989 ("the CRC").[5] The Oslo High Court found for the respondent. The appellants appealed.

Held (unanimously):—The appeal was allowed. The appellants' detention was illegal by reason of the disproportionality of the impugned measures, as less intrusive measures had not been properly considered, and the unsatisfactory conditions at the detention centre.

(1) There had been a violation of Article 3 of the ECHR in relation to the children but not in relation to the parents. The coercive factors inherent in a place of detention were particularly important to a child. Despite measures to limit the harm caused, the conditions at the detention centre had the effect of

[1] The appellants, Asma Huseini, Naqibullah Husseini, Zahra Huseini, Zakera Huseini, Asibullah Huseini and Hamidullah Husseini, were represented by Professor Mads Andenas. The respondent was represented by Ms Tonje Skjeie. In light of the importance of the proceedings, the United Nations Special Rapporteur on Torture, Juan E. Méndez, and the United Nations Special Rapporteur on Arbitrary Detention, Seong-Phil Hong, intervened, and were represented by Dr Eirik Bjorge. The Norwegian Bar Association also intervened and was represented by Mr Bendik Falch-Koslung.

[2] For the text of Article 3 of the ECHR, see para. 2 of the judgment.

[3] For the text of Article 5(1) of the ECHR, see para. 17 of the judgment.

[4] Article 8 of the ECHR provided that: "1. Everyone has the right to respect for his family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

[5] For the text of Articles 3 and 37 of the CRC, see paras. 29 and 34 of the judgment respectively.

inducing anxiety in the children. The confinement was prison-like in nature. The environment was reported as unsatisfactory for the children, who were in a particularly vulnerable situation and had been locked in for as long as twenty days. There was, however, no basis for establishing a violation of Article 3 in relation to the parents[6] (paras. 11-16).

(2) There had been a violation of Article 5 of the ECHR in relation to the children but not in relation to the parents. Although Article 5(1)(f) was sufficient to take measures for the purpose of deportation or extradition, in the case of a child accompanying parents the domestic authorities had to verify that the detention of the family was a measure of last resort with no possible alternative (paras. 17-20).

(3) There had been a violation of Article 8 of the ECHR in relation to the children and parents. There had been no investigation of less intrusive measures. Imprisonment for twenty consecutive days could not be justified on grounds of compelling societal needs. Detention for such a long period was not proportionate to the purpose of detention given that there was no danger of evasion (paras. 21-8).

(4) There had been a violation of Articles 3 and 37 of the CRC in relation to the children.

(a) Article 3(1) was to be interpreted as meaning that the best interests of the child were a fundamental—but not the only, and not always the crucial—consideration. In determining the best interests of the children, all of the acts concerning detention had to be weighed in the balance (paras. 29-33).

(b) There had been a violation of Article 37(a) of the CRC since that Article corresponded with Article 3 of the ECHR, of which a violation had been found. Article 37(b) of the CRC had also been violated since there was no strict necessity for the measure, which was neither of last resort nor for the shortest period of time (paras. 34-7).

(5) There had also been a violation of the equivalent provisions of the Norwegian Constitution, Articles 93(2) and 94(1) (para. 38).

(6) The members of the family were awarded damages. Each of the children was awarded 40,000 NOK. Each of the parents was awarded 25,000 NOK (para. 40).

The following is the text of the relevant parts of the judgment of the Court, delivered by all the members of the Court:[7]

. . .

[6] The Court of Appeal considered five judgments of the European Court of Human Rights of 12 July 2016, including *AB and Others* v. *France* (Application No 11593/12) reported at 181 ILR 404, above.

[7] The parts of the judgment concerning only or mostly domestic law are not published in the *International Law Reports.* Paragraph numbers have been inserted by the editors.

5.4 Was the imprisonment of the family a violation of the ECHR?

5.4.1 Introduction

[1] The conditions for detention of children accompanied by their parents were pronounced on by the European Court of Human Rights in five judgments handed down on 12 July 2016, each of them in relation to applications directed against France. The judgments dealt with Article 3, Article 5(1), and Article 8 ECHR. They concerned families with children, including single parents with children, who were required to leave France and were placed in administrative detention centres. Four families were located in the detention centre at Toulouse-Cornebarrieu, by an airport, while the last family was located in the centre at Metz-Queuleu. The Court of Appeal considers that the five judgments provide a useful guide to the key factors to be emphasized in deciding whether the imprisonment of families violates their rights under the ECHR.

. . .

5.4.2 Judgments by the European Court of Human Rights on Article 3 ECHR

[2] Article 3 on the prohibition of torture provides that: "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

[3] The court will first turn to the analysis in the European Court's judgment of 12 July 2016 in *AB and Others* v. *France* (App No 11593/12) . . . In its assessment of whether Article 3 was breached, the European Court began by observing that it had found such breaches in previous cases, and that it had done so where three factors were present: the low age of the child, the length of the detention, and the fact that the facilities at issue were unsatisfactory for children. In its analysis in paragraph 110, the European Court pointed to the authorities' obligation to protect the child even when the child is accompanied by its parents; furthermore the Court pointed out that: "the child's extreme vulnerability is the decisive factor and takes precedence over considerations relating to the child's status as illegal immigrant . . . Children . . . have specific needs, resulting in particular from their age and dependence."

[4] The child was in custody with his parents for eighteen days. The following is cited as the further grounds for breach of Article 3 (paragraphs 112-15):

112. As regards the physical conditions of the detention, the Court observes that the Toulouse-Cornebarrieu centre is one of the facilities that is "authorised" to receive families under a decree of 30 May 2005 . . . It can be seen from the inspection reports on this centre . . . that the authorities were careful to separate families from the other detainees, to provide them with specially fitted rooms and to make available material that was tailored to childcare. Moreover, the NGOs have acknowledged that, unlike the situation in *Popov* (cited above), the physical conditions in the centre were not problematic.

113. The Court would observe, however, that the Toulouse-Cornebarrieu detention centre, being situated right next to the runways of Toulouse-Blagnac airport, is exposed to particularly high noise levels which have resulted in the land being classified as an "area unsuitable for building" . . . It points out that children, for whom periods of outdoor leisure activities are necessary, are thus particularly affected by the excessive noise. The Court further finds, without having to rely on the medical certificate produced by the applicants, that the constraints inherent in a place of detention, which are particularly arduous for a young child, together with the centre's conditions of organisation, must have caused the applicants' child some anxiety. The boy, who could not be left alone, was obliged to attend, with his parents, all the meetings required by their situation, together with the various judicial and administrative hearings. While being transferred for that purpose he would mix with armed police officers in uniform. In addition, he was constantly subjected to the announcements made through the centre's loudspeakers. Lastly, he witnessed the mental distress sustained by his parents, in a place of confinement that did not allow him to distance himself.

114. The Court is of the view that such conditions, even though they necessarily represent a significant source of stress and anxiety for a small child, are not sufficient, where the confinement is for a short duration, depending on the circumstances of the case, to attain the threshold of severity required to engage Article 3. It is convinced, however, that in the case of a longer period, the repetition and accumulation of such mental and emotional aggression would necessarily have harmful consequences for a young child, exceeding the above-mentioned threshold. Accordingly, the passage of time is of primary significance in this connection for the application of this Article. The Court concludes that the permissible short duration has been exceeded in the present case, which concerns the detention of a four-year-old child lasting for eighteen days in the conditions set out above.

115. Therefore, in view of the age of the applicants' child, and the length and conditions of his confinement in the Toulouse-Cornebarrieu detention centre, the Court finds that the authorities subjected this child to treatment which exceeded the threshold of severity required to engage Article 3 of the Convention. There has accordingly been a violation of that Article in respect of the applicants' child.

[5] The judgment of the European Court of 12 July 2016 in *RC and Others* v. *France* (App No 68264/14) concerned two parents and their fifteen-month-old child. The parents had been in France for four

years and had overstayed by five months when they were arrested, with a view to being removed on the same day. They were detained when they refused to board the flight, and they were placed at the Toulouse-Cornebarrieu detention centre. After a stay there for nine days, the family was assigned an overnight residence requirement in a hotel for a duration of six months. The European Court's reasoning is similar to that in *AB and Others* v. *France*.

[6] The reasoning in the European Court's judgment of 12 July in *RM and MM* v. *France* (App No 33201/11) is similar to what is cited above from *AB and Others* paragraphs 112-15 concerning the breach of Article 3 ECHR in relation to the children of the family. The family in *RM and MM* had been detained at the Tolouse-Cornebarrieu detention centre. The difference is that in this case the child was seven months old, and the period of detention did not last longer than approximately seven days. Even a period this short was held to amount to a breach; it was not found to be too short to fall within the ambit of Article 3 . . . In its reasoning the European Court did not point to the fact that there had been armed police officers present, frequent announcements on the loudspeaker system and that the parents had suffered psychologically. Nothing in the reasoning in *RM and MM* suggests that these conditions were accorded any weight in the Court's conclusion.

[7] The European Court's judgment of 12 July 2016 in *RC and VC* v. *France* (App No 76491/14) concerned the apprehension of an alien and her two-year-old child. This family, too, had been detained at the Toulouse-Cornebarrieu detention centre. The mother had two weeks previously been sentenced in a criminal court case to expulsion with a ban on re-entry, where she was also sentenced to prison. She had been living in France for approximately two and a half years, part of the period in detention. After ten days at the detention centre she was given an overnight residence requirement at a hotel for a period of a maximum of forty-five days. Eight days after she and the child left the centre, she was repatriated. The closing paragraph, which contains the assessment of whether Article 3 was breached, is identical to paragraph 115 in *AB and Others* cited above. The other paragraphs cited above are also drafted in similar terms. Thus, in this case too, the factors mentioned in paragraph 113, concerning amongst other things armed police offices and frequent announcements on the loudspeaker system, are not mentioned.

[8] The European Court's judgment of 12 July 2016 in *AM and Others* v. *France* (App No 24587/12) concerned a woman and two children who were arrested and placed in administrative detention at a detention centre at Metz-Queuleu. The children were approximately

two and a half and four months old respectively. The woman had come to France six months previously and applied for asylum, but she had come from Poland, where her asylum application had not been decided. Approximately three months before her arrest she was told to return to Poland. The day after the arrest she refused to board a flight to Poland, and her detention continued. Seven days after the arrest the European Court asked the French authorities to find an alternative to administrative detention for the family. On the evening of the next day the woman was told that she had been given a specific residence in the department of Moselle, and she chose to leave the centre the next day, nine days after her arrest.

[9] In its assessment, the European Court stated that the authorities had initially attempted to execute the deportation order as quickly as possible. However, the Court was convinced that the accumulation of mental and emotional stress over a short period of time necessarily led to harmful effects that exceeded the minimum severity requirement to determine breach of Article 3 of the ECHR . . . In paragraph 50 of the judgment in *AM and Others* the Court says:

> The Court notes, however, on the basis of the information made available to it, that the inner part of the family zone is separated from the adult male zone only with a fence, which makes it possible to see everything going on there. The Court further observes that the applicants have been exposed to a sound environment that was relatively anxiety-provoking, since they were made to listen to announcements all day over loudspeakers with a loud noise level.

[10] If these judgments are read in context, the sentence which appears in the middle of paragraph 113 in the judgment of *AB and Others* emerges as the central one. The coercive factors inherent in a place of detention are particularly important to a child and the organizational circumstances of the detention centre necessarily have the effect of causing anxiety. This is of course a statement that must be considered based on how the conditions for children were at the two centres. However, the more concrete circumstances of the individual centres seem to be given more limited weight, although they are described in detail in the judgments. The Court of Appeal bases this assumption on the fact that the conclusion and the final reasoning were similar in both the first four cases and the last one. The centre at Metz-Queuleu seems to have been significantly less unsuitable for children than the Toulouse-Cornebarrieu centre. At the former centre there was no mention of disadvantages of particularly high aircraft noise or armed police in uniform involved in relocations. The Court of Appeal, however, also notes the statement in the conclusion of paragraph 112 of the

judgment in *AB and Others*, that physical conditions were not problematic. For the cases concerning Toulouse-Cornebarrieu, the emphasis is not just on the disadvantages contributing to making the site unsuitable for children; it is in the first instance the fact of the more basic prison-like conditions that was decisive.

. . .

5.4.3 Whether the detention of the appellants breached Article 3 of the ECHR

[11] It is difficult to see that the conditions were in significant terms better for the appellants than for the parties to the cases against France. The Court of Appeal does not ignore the fact that the physical conditions have been somewhat better at Trandum than at the French detention centres. At Trandum the living space, which contained a bedroom and a lavatory, was just commodious enough to contain the beds and to accommodate persons moving within the confines of the room. In the bedroom there were two beds, as well as a bunk bed that accommodated two or more people. The surface area of the two rooms is not specified, but is estimated to be in the range of twenty square metres. In addition, there is a significantly larger common living room. There was seating, some toys, a television set and simple kitchen facilities. There was access to food that the family members could help themselves to outside of ordinary meal times. The inmates of the family unit were also given access to an outdoor area directly outside. There were some simple furnishings designed for children, and the area was larger than the common living space inside. The area was enclosed by tall planks, making visibility limited. It was possible, however, to see towards the end of the eastern runway at Gardermoen Airport, which lay very close, a few hundred metres away. On landing at this end of the runway, the planes felt close to the rooftops. The detention centre building is, as a result of its proximity to the airport, in a prohibition zone for new construction of housing.

[12] It emerged from the witness statements of the former and current head of the family unit that the children had access to a gymnasium for part of the day, where there were opportunities for ball games and similar activities. An effort was made to limit the disadvantages of detention . . . The activities organized for the family included going for walks and eating ice-cream, bowling, going out for pizza, and playing outside; the former head of the family unit, Lindseth, explained that the employees at Trandum then usually went in civilian dress and carried handcuffs, hidden under their clothes. The Trandum records

during the imprisonment period of the two parents, in which the children are mentioned, do not contain reports of particular dramatic situations during the stay. From these journals, reference is made to the fact that on the fourth day the family said they wanted to be locked in later due to bad air in the cell, and because it was too early to end the activities that would otherwise have been available to them. This was rejected, but a small hatch in the door was kept open to allow for better air to enter. The door itself in the family bedroom was locked from 9.00 p.m. until 8.00 a.m.

. . .

[13] Although the measures were put in place in order to limit the harm caused to the family, the Court of Appeal concludes that, despite these measures, the detention at Trandum was similar to the conditions described at the detention centres in France. Crucially, the conditions at Trandum were, in common with the conditions in France, such that they had an anxiety-inducing effect on children. First of all, the detention aspect was prominent. At night, for approximately eleven hours, they were confined to the bedroom with the adjoining bathroom, the door being locked. Through the door from the living room there was a view of the bedroom through a hatch in the upper part of the door. It was designed in the way that most people would imagine prison cell doors to look, including that it could be closed and opened only from the outside. The family was not necessarily locked up continuously throughout the night. If the family felt there was a need for assistance from the staff at the centre, the family could call on them, and the staff would be on hand shortly. The eldest daughter described this state of being locked in as the worst thing about her stay at the detention centre, as it made her feel guilty of a crime. In her witness statement, she also emphasized that they were surrounded by police at all times. The explanations given by her father and the former head of unit, Lindseth, support the explanation that the state of being locked in was experienced very negatively; furthermore, that the employees with which the family came into contact had uniforms that were not different to those worn by police. None of the staff were armed; but they all carried large key chains reminding one of the fact that one was to be locked in. When the children went to and from the gymnasium, they were conducted through long institution-like corridors leading to the gymnasium, and on both sides they had to go through several doors that the staff unlocked and locked. Furthermore, the imprisonment was emphasized by the view from the living room. In essence, it was suggested that the curtains, despite it being the middle of summer, should be closed at all times. The family was perceived to be free to

draw the curtains: but then they looked at two large courtyards right outside, both of which were fenced off by several-metre-high barbed-wire barriers. One of these two courtyards was the area for adult inmates. The prison-like nature of the confinement was further emphasized by the fact that entry to Trandum was associated with being patted down. The children were not made to undress. But they were checked and patted down with their clothes on; the clothes were scanned with metal detectors; and their pockets were examined.

[14] Moreover, it emerged from Lindseth's statement that the mother cried frequently and was despondent, and that the children supported her very much, such as by holding her hand. According to Lindseth's explanation, the eldest daughter showed herself to be angry, whereas the other three appeared silent. This circumstance also reflects the fact that their previous arrest reminded them that their stay in Norway was coming towards the end and that a sudden change of environment was expected. This was probably a circumstance that greatly contributed to their misery. In the view of the Court of Appeal, this situation also meant that the children were in a particularly vulnerable situation and made even more acute the enforcement of the principle that imprisonment constitutes the last resort for carrying out the transport of children and families with children.

. . .

[15] The description given above shows, in the Court of Appeal's view, that the circumstances also made the children feel a sense of guilt for what had happened. The stay at Trandum must have been characterized by similar aircraft noise as at Toulouse-Cornebarrieu. The children were not offered any school attendance at the beginning of the school year. In its assessment, the Court of Appeal has also considered that the Ombudsman prepared a report, after visiting the police immigration at Trandum on 19-21 May 2015. The report was sent to the Police Immigration Unit on 8 December 2015. Making reference to the fact that the environment in the detention centre is characterized by stress and turmoil among many of the adults detained, as well as incidents and riots, the report concluded that the environment is not a satisfactory psychosocial environment for children.

[16] Considering that the appellants were locked in for as long as twenty days, the Court of Appeal has concluded that Article 3 ECHR has been breached in relation to the children. On the basis of the reasoning formulated in the judgments of the European Court, referred to above, there is no basis for establishing that the rights of the parents pursuant to Article 3 were violated.

5.4.4 Article 5(1) ECHR

[17] Article 5 of the ECHR applies to the right to freedom and security. Paragraph 1(f) of the provision is in the following terms:

> No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: . . . 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.

[18] As mentioned above, this question is also considered in all five of the cases concerning France . . . Here, too, it is appropriate to base the determination on *AB and Others*. In assessing whether Article 5(1) is breached (paragraphs 119-25), it is first demonstrated that Article 5(1)(f) is initially sufficient to take measures for the purpose of deportation or extradition. When, however, the decision concerns children, the deprivation of liberty must, in order to comply with the ECHR, be necessary to achieve the purpose, that is, the expulsion of the family . . . [T]he Court summarized in paragraph 123:

> In those circumstances, the Court finds that the presence in a detention centre of a child accompanying its parents will comply with Article 5 § 1(f) only where the national authorities can establish that this measure of last resort has been taken after actual verification that no other measure involving a lesser restriction of their freedom could be implemented.

[19] The foregoing paragraph from *AB and Others* was cast in similar terms in the four other cases concerning France. The concrete determination in the case of *AB and Others* was concluded as follows in paragraph 124:

> Accordingly, while having regard to the reasons given in the prefect's decision to place the applicants in a detention centre, the Court takes the view that the evidence before it is not sufficient for it to be satisfied that the domestic authorities had effectively verified that the administrative detention of the family was a measure of last resort with no possible alternative.

[20] In section 125, the court found a breach of Article 5(1) of the ECHR, but limited itself to determining this for the child.

. . .

5.4.7 In case of violation of Article 8 of the ECHR by the imprisonment of the accused parties

[21] The court of first instance found initially that imprisonment meant an infringement of the right to private and family life pursuant

to Article 8(1), but that the operation had a legitimate purpose pursuant to Article 8(2). The question is, as in the ECHR cases mentioned above, whether the detention was justified based on compelling societal needs and proportionality.

[22] By comparing the situation of the appellants with the decisions about imprisonment and those of the AB family and others, the Court of Appeal has found that several of the arguments used by the French authorities to support imprisonment must be perceived to have been absent in relation to the appellants. First, in the present case, it is not stated that the appellants are missing their identity documents or valid travel documents. Secondly, the appellants had stayed at an asylum centre in Lillesand for approximately a year until their arrest. Therefore it cannot be used as an argument for confinement and imprisonment that they lacked stable residence, which the French authorities had argued in the case of *AB and Others*. Furthermore, the allegation in the case of *AB and Others* was made because one of the parents was charged with theft. Apart from the fact that the appellants for a long time had failed to fulfil their duty to leave the kingdom, the facts that have been relied on before the court are all subsequent to the family's arrest.

[23] One count, however, on which the situation of the appellants was different from that of the family in *AB* is that the appellants urged their son who had not been arrested to hide. Other than that, the situation of the appellants cannot be considered to be different from that in which AB and the others found themselves.

[24] The situation of the two families in which the European Court did not rule on Article 8 of the ECHR was significantly different from the situation in which the appellants found themselves. In the view of the Court of Appeal, there were several factors for both of the two families that suggested that there were grounds for establishing alternatives to detention than what applied in relation to the appellants.

[25] In the judgment concerning RC and VC, it is emphasized that the parent had committed serious crime, which meant that she was imprisoned, and that her two-year-old child had been in prison since birth. Secondly, it was emphasized that the parent had travelled to and lived in France after handing care of the child to others.

[26] In the judgment *AM and Others* there were more similarities to the situation that existed for the appellants. However, there is the significant difference that the family members in those cases had lacked identity papers, and that they were in a precarious situation. In that case, it was also emphasized that a detention of eight days did not appear to be disproportionate, a duration of less than half the imprisonment period of the appellants.

[27] In assessing whether the rights of the appellants under Article 8 of the ECHR are infringed, the Court of Appeal finds that there is no sufficient basis for establishing that there is any such qualified danger of evasion as is discussed in paragraph 154 of *AB and Others*. In this regard the Court of Appeal points to the fact that it was not investigated and assessed whether less intrusive measures might have been applied to the appellants. Consequently, imprisonment for twenty consecutive days cannot be considered necessary for compelling societal needs. Since there was no qualified danger of evasion, detaining the appellants for such a long period was not proportionate in relation to the purpose.

[28] In making this determination, the Court of Appeal has taken into consideration the points outlined in Section 5.3.1 as to whether the detention was strictly necessary. In conclusion, the detention was, for all the appellants, a violation of Article 8 ECHR.

. . .

5.5 Was there a violation of the Convention on the Rights of the Child (CRC)?

[29] Article 3 CRC reads as follows:

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.

2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.

3. States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.

[30] Sitting *en banc*, the Supreme Court in Rt. 2012 p. 1985 pronounced on the relationship between the Immigration Act s. 38, which is not at issue in this case, and Article 3 CRC. The Court of Appeal has considered in particular what the majority of the Supreme Court observed in paragraphs 135-7. In paragraph 135, the Supreme Court determined that:

The wording of Article 3(1) shows that the best interests of the child should be a fundamental consideration, but it is not the only and not always the crucial consideration: Rt. 2009 p. 1261 paragraph 31 and Rt. 2010 p. 1313 paragraph 13. As the court observed in the statement in Rt. 2009 p. 1261 paragraph 32, the wording was chosen precisely because there should also be scope for other important considerations.

The Court of Appeal will use this interpretation of Article 3 as its basis.

[31] In the Court of Appeal's decision on detention of 18 August 2014 regarding the mother and the four children, Article 3(1) CRC is not included in the reasons, and the decision contains no general support of the reasons of the court of first instance. The court of first instance ruled that Article 3(1) would not be violated. Nevertheless, the Court of Appeal had the best interests of the children in its decision, as it stated in its reasons that it "agrees with the court of first instance that it will not be in the best interest of the children to be located outside Trandum, separated from their parents". It is apparent, however, from the reasoning of both the court of first instance and the Court of Appeal that the detention of the parents was taken for granted in the subsequent determination of the best interests of the children. Their reasons are broadly consistent with the view expressed briefly in the following passage from the police statement of 12 August 2014 in the police application to the court of first instance for the detention of the mother and children:

> Since the child is expected to be deported within a relatively short period of time, it will not be advisable to initiate any measures. The view of the child welfare service is generally that separating children from their parents in circumstances such as these is not to be recommended and seems far more stressful than staying in the detention centre.

[32] In line with the views expressed by the Court of Appeal in the discussion in Section 5.2.5 above, the Court of Appeal takes the view that these assessments of the best interests of children are based on too narrow an approach. The CRC concerns "all actions concerning children". The actions to be measured against the rule of Article 3 are both those acts concerning the overall decision to detain the whole family and each of the acts concerning the detention of each of the family members. It is thus clearly wrong to take as a given the detention of the parents. The question of their detention will be part of the decisions to be made. Similarly it is wrong to take as a given the detention of the parents, on the basis of the close relationship between the detention of the parents and of the children, as in the situation where children are to be deported with their parents, it must be correct to say that the

decisions about detention of each parent will be actions concerning the children and must thus be subject to the rule concerning the best interests of the child in Article 3(1).

[33] The Court of Appeal takes the view that neither the police, nor the court of first instance or the Court of Appeal have conducted the balancing necessary in pursuance of Article 3(1), and that the rights of the children under this provision have been violated.

[34] Article 37 CRC reads as follows:

States Parties shall ensure that:

(a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age;
(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.

[35] In the understanding of the Court of Appeal, the appellants have invoked Article 37(a) and (b). The Court of Appeal assumes that (a) corresponds to Article 3 ECHR. The court finds that (a) has been breached. The court reaches that conclusion on the basis of the same factors as were determinative in relation to Article 3 ECHR: see Section 5.4.3 above.

[36] The Court of Appeal has assessed above, in Section 5.3.1, whether the conditions in the domestic statute of "strict necessity" were fulfilled. The same factors as combined to mean that there was no "strict necessity" in relation to the domestic statute also mean that the threshold in Article 37(b) CRC, "a measure of last resort and for the shortest appropriate period of time", are not met. The Court of Appeal is not familiar with any sources of law which indicate that the

Convention should on this point be interpreted restrictively. Nor is there any indication that this provision should not include minors deprived of liberty who are accompanied by their parents.

[37] The Court of Appeal adds that, independently of each other, several non-binding statements have been made which point in the opposite direction. The appellants have, among other things, taken their stand on a statement from one of the interveners, UN Special Rapporteur Juan E. Méndez, who in his report to the UN Human Rights Council of 5 March 2015 (A/HRC/28/68), paragraph 80, *in fine*, observed that:

> The Special Rapporteur shares the view of the Inter-American Court of Human Rights that, when the child's best interests require keeping the family together, the imperative requirement not to deprive the child of liberty extends to the child's parents, and requires the authorities to choose alternative measures to detention for the entire family.

After an overall assessment, the Court of Appeal concludes that rights of the children under Article 37(b) CRC have also been breached.

. . .

5.7 Claims for compensation for non-material injury

[38] All the appellants have been subjected to violations of rights contained in human rights conventions and/or the Constitution. In respect of the children, there is a breach of several such provisions. On the basis of the evidence, it must be assumed that especially the children have been exposed to events that may have inflicted strains on their mental health. No concrete evidence has been adduced in this regard. For the Court of Appeal, therefore, the breach of the law and of the international obligations are the most important elements of the quantum calculations. This determination must perforce be discretionary. Nevertheless, the Court of Appeal has based itself on the level of compensation in the five judgments by the European Court against France, and has also placed some emphasis on the level laid down by the domestic regulation on the standard rates for redress for unjustified persecution. The compensation for each of the children is then set at NOK 40,000 and for each of the parents at NOK 25,000. The claim by the Ministry of Justice and Public Security that any compensation for non-material injury may be reduced due to the victims' own actions cannot be upheld.

. . .

[39] The judgment is unanimous.

CONCLUSION

[40] 1. The detention of Hamidullah Husseini, Asibullah Huseini, Asma Huseini and Zahra Huseini in August 2014 violated their rights under Article 93(2) and Article 94(1) of the Constitution; Article 3, Article 5(1) and Article 8 ECHR; Article 37(a) and (b) CRC.

2. The arrest of Zakera Huseini and Naqibullah Husseini in August 2014 violated their rights under Article 8 ECHR.

3. Within 2—two—weeks from the announcement of this judgment, the Ministry of Justice and Public Security shall disburse NOK 40,000—forty thousand kroner—to each of Hamidullah Husseini, Asibullah Huseini, Asma Huseini and Zahra Huseini and NOK 25,000—twenty-five thousand kroner—to each of Zakera Huseini and Naqibullah Husseini.

. . .

5. So far as concerns the costs in connection with the proceeding before the court of first instance, the Ministry of Justice and Public Security shall, within 2—two—weeks from the announcement of this judgment, pay NOK 477,760—four hundred and seventy-seven thousand seven hundred and sixty kroner—to Zakera Huseini, Naqibullah Husseini, Hamidullah Husseini, Asibullah Huseini, Asma Huseini, Zahra Huseini and Self-help for Immigrants and Refugees[8] jointly.

6. So far as concerns the costs in connection with the proceeding before the Court of Appeal, the Ministry of Justice and Public Security shall, within 2—two—weeks from the announcement of this judgment, pay NOK 140,000—one hundred and forty thousand kroner—to Juan Méndez and Seong-Phil Hong jointly and NOK 240,750—two hundred and forty thousand seven hundred and fifty kroner—to the Norwegian Bar Association.

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[8] A non-governmental organization that intervened in the court of first instance.