



Migrant minors in detention: Practical needs and the limits set by the European Convention

Mattias Hjertstedt,^{*} Isak Nilsson,[†] and Jonas Hansson[‡]

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ABSTRACT

State officials report practical needs to put migrant minors in detention, and the European Convention on Human Rights sets legal limits on this practice. This article defines the scope of circumstances under which migrating minors may be detained by analyzing The European Court of Human Rights case law, using judgments in which the detention of migrant minors has been alleged a violation of Articles 3, 5.1, or 8. It also explores states' needs for detaining such children, using data from 19 interviews with Swedish police officers, and compares these views with the case law. Police interviewees primarily describe two needs to detain children: to make deportations of children smooth and dignified, and to prevent minors from committing crimes. The investigation finds that migrant minor detentions are rarely permissible according to the Convention—especially under Article 3—and that the permissible scope is too small to meet the expressed practical needs. The actors involved in the issue of detaining migrant minors might have different perspectives on the issue, but they must not lose sight of the fact that these children are categorized as some of the most vulnerable in society and that their rights must be protected.

Key Words Children; human rights; law; migration; police.

INTRODUCTION

Migrant children are considered an especially vulnerable group, “combining the special vulnerability of an alien with the general vulnerability of a child” (Turković, 2021, pp. 110–111). Hence, to place such children in detention—often regarded as one of the most severe forms of coercive measures (Bylund, 1993)—is an action that requires careful assessment. In addition, several international organizations, such as the United Nations Child Rights Committee (United Nations, 2023) and the Council of Europe (PACE, 2023), are demanding that governmental authorities put an end to immigration-related detention of children (compare Smyth, 2019).

Nevertheless, some European countries still detain migrant minors. For instance, in Sweden—often considered to be one of the freest and least rights-oppressive countries in the world (Freedom House, 2023)—immigration-related detention of children is expressly permitted in national statutory law (with no minimum age limit) (The Swedish Aliens Act

(2005:716),¹ and also occurs in practice (The Swedish Migration Agency, 2022).²

The European Court of Human Rights (the ECtHR or the Court), meanwhile, has not entirely condemned the use of immigration detention of children (Turković, 2021). In most cases, the ECtHR has found such detention a violation of Articles 3, 5.1, and/or 8 of the European Convention on Human Rights (Council of Europe, 1950), but not in all (see below).

This raises two questions: when is it in accordance with the European Convention to detain migrant minors,³ and are there important discrepancies between the court-announced

¹Chapter 10 Section 2 (expressly permitting detention of a “child”) and Chapter 1 Section 2 (defining “child” as a person under 18 years).

²However, migrant minor detention seems to be a rare phenomenon according to The Swedish Migration Agency, which registered only 4 sojourns for girls and 3 for boys during 2022; during 2021 only 1 sojourn (of a boy) was registered.

³In this article, the terms “child” and “minor” mean persons younger than 18 years.

Correspondence to: Mattias Hjertstedt, Assistant professor, Department of Law, Umeå University, SE-901 87 Umeå, Sweden. **E-mail:** mattias.hjertstedt@umu.se

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legal requirements and the needs of state officials carrying out such detentions in practice? The research regarding these questions is limited. For the practitioners—who decide on and carry out the detentions of children—it is fundamental to know in what situations detention is permissible. For the European Court—as well as the national legislator—it is an advantage to be aware of the practical needs when developing the jurisprudence or legislation. Thus, the study of these questions can be fruitful for both actors.

This article aims to explore states' needs for detaining minor children in comparison with the circumstances in which placing migrant children in detention have been held to violate the European Convention. A first objective is to highlight the views of state officials regarding practical needs for migrant child detentions by analyzing police officer interview data previously collected by the authors. A second objective is to define the scope of circumstances under which migrating minors may be legally detained by analyzing the ECtHR case law in which the detention of migrant minors was alleged a violation of Articles 3, 5.1, and/or 8. The third and final objective is to analyze the findings on state migration officials' expressed needs in practice and on the permissible scope in law for such detentions together, to reveal and evaluate discrepancies between the two.

The article is structured as follows. First, an overview of the previous research in the area of migrant minors in detention is given. Next, the methods used—a qualitative interview method and a traditional legal analysis—are described. Then the views of interviewed Swedish border police officers on the practical needs for migrant child detention are presented. In the following sections, the case law regarding Articles 3, 5.1, and 8, respectively, is described, and the scope for permissible detention determined. The final section includes deeper analysis of the case law and interview studies' results and of discrepancies we find between the permissible legal scope for detaining migrating minors and the reported needs for it in practice.

PREVIOUS RESEARCH

There is some previous research concerning migrant children, including studies from a human-rights perspective. One authority in this area is Bhabha (2014), who uses the concept of ambivalence to analyze child migration and human rights in a global age. This ambivalence is expressed by the fact that the state wants to both protect vulnerable children *and* protect the public from threatening outsiders, even if they are children (Bhabha, 2014). Similarly, Bhabha (2014, p. 13) claims that the concept of otherness is ambivalent in our (Western) society—it is “caught between an identification of the other as ‘human like me’ and a hostility or indifference toward the other as separate or dispensable or threatening.”

Research about migrant minors in detention is less comprehensive. Examples of areas that have been investigated are the variation in the practice of detention of unaccompanied minors in some European Union (EU) countries (Khrebetan-Hörhager & Kononenko, 2018), and the compliance of the Common European Asylum System with the right of the child to liberty expressed in human rights law—including the European Convention—when children are detained (Smyth, 2014).

Turković (2021) has recently published an overview of the ECtHR's case law concerning the detention of migrant minors, analyzed primarily by using the concepts of vulnerability and the best interests of the child. Inspired by other international instruments and EU law, Turković (2021) argues that the ECtHR should no longer accept the detention of children primarily on the basis of their immigration status.

The present study analyzes largely the same body of ECtHR case law in a complementary fashion.⁴ Focus is on the scope remaining for the legal detention of migrating minors, especially as related to the answers provided by Swedish police officer interviewees involved in migration law enforcement and differences between the two perspectives on this aspect of migration law. As mentioned above, it is fruitful for the practitioners to know the limits of detaining children and for the European Court to know what practical needs there are to put minors in detention. The intended contribution of this article to the already existing literature is to bridge the gap between these two perspectives of migration law.

METHODS

We used a qualitative interview method to study the needs to detain migrating children in law enforcement practice. In total, 19 individual interviews with Swedish border police officers were conducted by one of the authors. Border police are relevant societal actors to study regarding the question of practical needs, since the police—under Swedish migration law—are entitled to choose to use (and then are responsible for carrying out) migrant detentions (The Swedish Aliens Act (2005:716));⁵ in addition, the police have more generally—under certain conditions—the right to use force in Swedish society (The Swedish Police Law (1984:387)).⁶

Interview data from an initial 14 interviews have in part been reported in another published article, but for other purposes; there, the interview methodology is more thoroughly described (Hansson et al., 2015). An additional five border police officers were interviewed during 2019 and 2020 (via telephone due to the COVID-19 pandemic), in accordance with ethical guidelines (Swedish Research Council, 2022). An additional forthcoming article will describe some basic findings from these final five interviews (Hansson et al., 2023), but the topic of migrating minor detentions specifically is most thoroughly explored in this article. The interviews were recorded and transcribed.

All interviews were analyzed using a thematic analysis method, done in several steps. First, we read the interview transcripts several times to obtain a sense of the content. Text that explicitly contained information about the informant's views on the practical needs to detain children was marked. The marked sections of the text were divided into condensed meaning units, in other words summarized or labelled in one or several words, line by line, in order to identify the most relevant data for the purpose of this study and to get a general sense of the text's content. The selected condensed text, i.e., text that talked explicitly about practical needs to detain

⁴Searches were conducted in July 2023 to identify any new or missed case decisions not included in that study.

⁵Chapter 10, Section 12, 13, 17 and 19.

⁶Section 10.

children, was coded. We discussed the condensed meaning units and the codes during this analysis to theorize about the significance of the patterns (Braun & Clarke, 2006).

We used a traditional legal analysis of the case law of the ECtHR, meaning that the precise contents of this case law are interpreted to determine the state of the law. As to the collection of judgments from the ECtHR dealing with minors whom states have held in a manner that the Court considers “detention,” one methodological problem has been determining where the ECtHR draws the line between detentions and similar actions (ECHR, 2018, 2022c). As was mentioned, the investigation is limited to cases in which child detentions were alleged to violate Article 3, 5.1, and/or 8, deemed the most relevant articles for this study.⁷ The ambition has been to collect most cases that fulfil these criteria.

The research project—within which the article was written—was approved by the Swedish Ethical Review Authority (Dnr 2019-02439, regarding the five interviews during 2019 and 2020). Interviewees were informed—via e-mail and orally before the interview—of the purpose of the study and fully informed of their right not to participate and to withdraw at any time. Full confidentiality and anonymity of informants were maintained. Confidentiality was guaranteed by omitting the informants’ names and identities in the recorded and transcribed interviews.

POLICE VIEWS ON PRACTICAL NEEDS TO DETAIN MINORS

Reasons Detention of Certain Migrant Minors are Seen as Desirable

The legal possibility of taking children into detention before deportation was discussed when Swedish border police officers (N = 14) were interviewed, as reported in an earlier publication by one of the co-authors and others.⁸ Those researchers documented that these officers believe it is more dignified, and preferable, to take children into detention while obtaining travel documents for them and arranging their travel out of Sweden than to show up early in the morning at a temporary foster care placement to try to “catch” a child before he or she runs away from them.

The police officers’ collective experience has been that children often “disappear” as soon as they notice police arriving to collect them from the homes where they have been placed temporarily before authorities were ready to complete the children’s lawful removal from the country. Subsequently, the children often would come to the attention of state officials somewhere else in the country, and then be placed by social services into another care home. When the police then contact and inform such migrant minors of a new date for deportation, they again run away in the hopes of staying in the country.

Based on this experience in practice, interviewed police officers at two of the police authorities argued for the adoption of legislation making it possible to take children into a form of child-adapted detention, to make more deportations possible and make them more dignified. In addition, some police

officers suggested that, during this type of detention, the social workers together with police could prepare children for the deportation. The police officers emphasized that it would be possible for these professional adults to influence children to start cooperating with Swedish authorities, change their minds and return to their home countries voluntarily (Hansson et al., 2015); these suggestions were made, however, as the authors noted, “without reflecting upon how custody infringes upon the children’s human rights and how it would contribute to a criminalization of asylum-seekers” (Hansson et al., 2015, p. 106).

Further Insights from Swedish Officials Involved in Detaining Migrant Minors

In a forthcoming article, the authors found that some of the interviewed government officials reported that it is rare for minors to be taken into longer-term detention, but cases do exist. In addition, a minor may legally be taken into so-called short-term detention for 24 hours in connection with an enforcement, but they are in a guarded hotel and not locked up (The Swedish Aliens Act (2005:716)).⁹ According to the police officers (n = 5) in the study, detention is a factor that increases the likelihood of successful deportation. In addition, in this study the police officers argued for a child-adapted detention centre to take care of practical matters before the enforcement trip, instead of going early in the morning to enforce a deportation or take one parent into custody and separate the family.¹⁰

The perspectives of the police officers are more thoroughly developed in this article than in the forthcoming article. Several of the border police officers described how short-term detention makes it possible to, for example, deprive the foreigner of the freedom to evade a deportation or to assist with a desired visit to a foreign embassy. However, one of the police officers with vast experience of deportations said it is still logistical issues, depending on where the family is located in Sweden, that lead to most migrant minor detentions. For example, there might be long way to travel to the Arlanda International Airport (near Stockholm) when the family is scheduled for deportation. Further, the respondent argued that the time is limited to 24 hours for a short-term detention and that migrants cannot be locked in. This requires many police officers to watch them when they are staying at a hotel instead of using a family-friendly detention centre where the family could stay overnight while the police officers rest or prepare for the deportation trip. According to several police officers, the existing system requires many resources and much logistical organization from the different authorities involved.

One officer also said the following about what are called family-friendly detentions: “From a child’s perspective, I believe, that might even be better, if you dare to see through that it is about a lock-in, without talking about what form it takes.” Several border police officers discussed the possibility of a detention centre adapted to keep families and children, with educated staff members who were especially well-suited to care for children and their needs. The premises would be organized so that children could move within the building

⁷This means that Articles 5.4 and 13 are excluded.

⁸This section summarizes the findings of an earlier qualitative analysis of these interviews, as completed and published by Hansson, Ghazinour, & Wimelius (2015).

⁹Short-term detention is regulated in Chapter 9, Section 12.

¹⁰This section summarizes the findings of this forthcoming article by Hansson, Eriksson, Hjerstedt, & Ghazinour (2023).

while retaining the possibility of privacy and 24/7 access to the staff.

Thus, the police officers have argued for the possibility of taking minors into detention from a perspective of better enforcing the deportation and making deportation smooth for the child. One situation that was mentioned was a mother with her breastfeeding baby: “I do not think that this little baby will be affected or harmed by sitting in detention with her mother,” and “the alternative is that the enforcement of the deportation cannot be done.” Several of the respondents said that the strict regulation of detaining minors makes it difficult to enforce deportations. For instance, families can delay the deportation by separating the family so when the police come, the family is not united, causing an impediment to enforcement. In this situation, a possibility for detaining the family for some days while travel is arranged is preferable, instead of arranging the travel and trying to enforce the family’s deportation only to cancel the enforcement plans because the family is not united. Further, the respondent explained that they (the family) are to be deported together, and that the police do not separate a family.

Another phenomenon mentioned in one interview involves North African boys who have not applied for asylum and who instead “just drive around and commit crime.” The respondent said that it would be beneficial if the police could keep them in detention and then deport them to their country of origin instead of letting them continue to commit crimes that they may have been forced to commit. The respondent specifically mentioned these boys being victims of crime and that “it [detention] would be a free zone for them,” implying that this approach would create a safer environment for the children.

All of the police officers argued that detention would help them to enforce deportation. However, they were aware of the restrictive rules when it comes to depriving children of their liberty by using detention. They discussed the adverse consequences of being in detention. One police officer, in particular, reflected upon the lack of tools available to successfully enforce deportation. He said that police officers find other ways to enforce deportations. For example, one parent is taken into detention, thus separating the family, which increases the likelihood that the other family members will not flee before the deportation. Further, he said: “if we think about the best interests of the child, I’m not entirely sure that it’s the best [separating the family].”

In the following sections, the permissible scope for detaining minors according to the European Convention is investigated. Does the European Convention allow detention of migrant minors in the situations identified by the police interviewees above?

ARTICLE 3

Article 3 and Migrant Minors in Detention

In the ECtHR case law concerning migrant minors in detention, the applicants have alleged a violation of article 3 in almost all cases (see however, ECHR, 2010, 2018). The court has also found a violation in nearly all of these cases (see however, ECHR, 2019b, 2023c).

Article 3 consists of an absolute prohibition of torture, as well as “inhuman or degrading treatment or punishment.”

There are no exceptions to this prohibition. In order to fall within the scope of article 3, the ill-treatment must attain a minimum level of severity or, in other words, must exceed the “threshold of seriousness” (ECHR, 2006).

Concerning the threshold of seriousness, the ECtHR has emphasized various important circumstances, in particular three circumstances that the ECtHR highlights when assessing whether migrant detention of minors is compatible with the provisions of Article 3: the child’s young age, the length of the detention, and the unsuitability of the premises for the accommodation of children (ECHR, 2016b, 2021a, 2021c, 2022b; regarding length, ECHR 2022a). Other factors stressed by the Court are the general conditions of the detention (ECHR, 2012b, 2016a, 2019a, 2021d), whether the child is accompanied or not (ECHR, 2006, 2011b, 2016a, 2020b), while underlining that the presence of a parent does not exonerate the state from fulfilling their positive obligations towards the child (ECHR, 2023b), whether there had been alternatives to the detention (ECHR, 2006), whether the child had had “painful past events” and whether he or she has received legal advice (ECHR, 2021b).

The Scope of Permissible Detention of Migrant Minors

In interpreting Article 3, the Court has found violations of the rights it guarantees in nearly all cases of migrant minor detention.¹¹ In one case, however, it held that the conditions at a particular refugee centre where migrant minors were placed did not amount to an Article 3 violation, but it found a violation of Article 3 nonetheless, connected to the detention of migrant minors at a different place where they were held in police custody (ECHR, 2019b). Since the circumstances of that case clearly are distinguishable, particularly because of the open nature of the refugee centre,¹² we begin by discussing cases where the Court found a violation but simultaneously elaborated on when detention might not implicate Article 3’s protections.

In a series of five cases from 2016 against France, the Court found violations of Article 3 regarding the detention of migrant minors (ECHR, 2016b, 2016c, 2016d, 2016e, 2016f). In *R.C. and V.C. v. France* (ECHR, 2016c), a 2-year-old child was detained, with a parent, for 10 days. The detention centre was modified to house families, and non-governmental organizations underscored that the material condition at the facility was not at issue. Still, the Court noted that the detention centre was located in the vicinity of an airport and that there were significant levels of noise pollution, provoking anxiety in detainees. The Court stated that the length of the detention is of paramount importance to whether the threshold of

¹¹ When the Article 3 claims are admissible. For example, in *R.M. and others v. Poland* App no 11247/18 (ECHR, 2023c), the ECtHR found the complaints under Article 3 to be manifestly ill-founded. The Court highlighted that the material conditions at the detention facility had not been an issue in the case, that the children’s age, length of detention, and other factors connected to detention had already been handled in the friendly settlement under Article 8. Moreover, one of the children’s psychosomatic conditions worsened while in detention but had been closely monitored by health professionals.

¹² The facts of *H.A. and others v. Greece* distinguish themselves from the other cases in several respects underscored by the Court. An open facility was used, the children were older but also unaccompanied by their parents, and it occurred during a migration crisis. Due to the special circumstances of this case, the Court itself specified that its generalizability is limited.

Article 3 is reached. It went on to conclude that the detention of a 2-year-old, for 10 days, under the conditions described, amounted to a violation of Article 3 (ECHR, 2016c). Ten days was therefore not considered a brief period of time in relation to the child's age and the material conditions at the centre.

In a later case, *M.D. and A.D. and others v. France*, the majority found a violation of Article 3 in relation to a 4-month-old child detained for 11 days, together with her mother (ECHR, 2021a, see also 2023b). This centre was, as also had been true in *R.C. and V.C. v. France*, authorized to receive families. However, the Court highlighted that the applicants were exposed to serious noise pollution from an airport, which was increased by a system of announcement speakers at the detention centre, and noted that the conditions were not suitable for an infant and mother, stressing again that the length of detention is an even more decisive factor when the child is placed in an unsuitable facility (ECHR, 2021a).¹³ It concluded that detention of a 4-month-old child for 11 days in those conditions breached Article 3. It should be noted that 11 days was considered a long period of time under those conditions, even given that the detention was prolonged from 1 day in detention to 11 because of the mother's refusal to board a flight removing the family from France (ECHR, 2021a). The Court highlighted in that regard that even if the authorities take all reasonable measures to minimize the time in detention, the behaviour of the applicants causing delays does not exonerate the state from its obligations to the child guaranteed under Article 3 (ECHR, 2021a; see also 2023a, 2023b).

In *A.C. and M.C. v. France*, the Court underlined that, although age is only one of the three criteria that should be taken into account, it has previously, citing two cases, found violations when the child is an infant (ECHR, 2023a). Article 3 had been violated because of the very young age of the child (7.5 months), the conditions at the centre, and the period of 9 days in detention.

The conclusion that can be drawn from these cases is that even where material conditions are adapted overall to house families, detentions of 7, 10, or 11 days exceed the permissible brief detention period Article 3 may allow, at least for children 4 months to 4 years old.¹⁴ In relatively poor material conditions, a shorter period of time may amount to a violation of Article 3 (ECHR, 2017).¹⁵ States' discretion to detain migrant minors is minimal under Article 3.

ARTICLE 5.1

Article 5.1 and Migrant Minors in Detention

In almost all of the ECtHR case law concerning migrant minors in detention, applicants have alleged violations of

Article 5.1 (see however, ECHR, 2010, 2017, 2022b). In a majority of cases, however, the Court concluded that a violation of Article 5.1 had occurred (see, however, ECHR, 2012a, 2016 c, 2016 f).

The first section of Article 5 consists of both the rights protected and the prerequisites required for restricting those rights.¹⁶ According to the wording of that provision, it protects two rights: liberty and security of person. However, the focus of the Court in applying the article seems to be deprivations of liberty (Rainey et al., 2021).

If there is interference with the right to liberty protected in Article 5.1, two conditions must be fulfilled to avoid a violation of the Convention: (1) the restrictions of rights must be in accordance with the law, and (2) they must fall into one of the enumerated situations listed within Article 5.1, at sub-sections a–f. The requirement of lawfulness means that the restriction of the right must have support in law, the adjudication must follow legal procedural rules, and that the law must be of satisfactory quality (ECHR, 2021b, 2021c). In addition, a deprivation of liberty should be in keeping with the purpose of protecting the individual from arbitrariness; the ECtHR has even stated—in some cases—that the notion of arbitrariness goes beyond the demand for lawfulness (ECHR, 2021b; compare 2019a, 2020a). Regarding the prerequisite that an interference must fall into some enumerated category of situations, migrant minors kept in detention normally are assigned to category (f):¹⁷ a “lawful arrest or detention of a person to prevent his effecting an unauthorized entry into the country or of a person against whom action is being taken with a view to deportation or extradition.” The requirements of the demand for lawfulness—including its prohibition of arbitrariness—are often discussed by the Court.

The ECtHR emphasizes different circumstances of importance in its assessments under Article 5.1 (f). In some cases, the Court describes factors that are important when assessing whether detention is arbitrary: it has to be carried out in good faith,¹⁸ it has to be closely connected to the purpose of Article 5.1 (f), the place and conditions of the detention have to be appropriate, and the length of the detention should be reasonable (ECHR, 2011b, 2016a; compare ECHR 2011a, 2019b). The Court stressed more specifically the importance of ensuring that detention conditions are adapted to minors, since there must be a relationship between the grounds relied on to permit a deprivation of liberty and the place and conditions of detention (ECHR, 2006; compare ECHR 2012b). In several cases, the Court stated that the detention must be a last resort and that the member state has an obligation to explore the possibility of replacing detention with a less drastic measure (ECHR, 2011b, 2012b, 2016b, 2016c, 2016d, 2016f, 2019b, 2019c, 2021a). Another factor is the existence of procedural safeguards, such as information in a language that the migrant can understand (ECHR, 2021b).

¹⁶In section 5.2–5.5 there are some procedural safeguards, which will not be scrutinized in this study.

¹⁷More rarely, category (b) is discussed, see ECHR 2021 b.

¹⁸It can be questioned if it is good faith when the state did not consider whether it was a measure of last resort and did not consider the best interest of the child, (ECHR, 2011b, 2019b).

¹³The facility had made adjustments to house children, but the Court deemed it unsatisfactory for infants.

¹⁴Children in the five cases ranged in age from 4 months to 4 years, and detentions from 7 to 18 days.

¹⁵The case of *S.F. and others v. Bulgaria* (ECHR, 2017) concerned three children aged 1.5 to 16 years old who were kept at a border police detention centre for under 41 hours, accompanied by their parents. The material conditions were deemed unsuitable even for a short period of time because their cell was “[...] extremely run-down [...] dirty [...] with limited possibility for accessing the toilet [...]” There was also allegedly no food or drinks accessible for over 24 hours. Thus, the Court found a violation of Article 3.

The Scope of Permissible Detention of Migrant Minors

There were three cases—*A.M. and others v. France*; *R.C. and V.C. v. France*; *Mahmundi and others v. France* (ECHR, 2023b, 2016 c, 2012a)—where the Court found no violation of Article 5.1 (f) regarding minor migrants in detention (ECHR, 2023a). However, all of these included violations under Article 3. Hence, the scope of permissibility for detaining minors under Article 5.1 (f) is minimal, but wider than under Article 3 (Turković, 2021).

In *A.M. and others v. France*, two minors, the first aged 2.5 years old, and the second 4 months old, were detained together with a parent for 7 days. The Court stated that depriving a child of its liberty accompanied by a parent is only in accordance with Article 5.1 if it is a matter of last resort and the authorities have concretely verified that no other less intrusive option is available (ECHR, 2023b). Applying these principles to the facts of the case at hand, the Court concluded that the domestic authorities had ruled out less intrusive options because the applicants had refused to contact the border police to arrange the departure, they had insufficient identity documentation, and their housing situation was uncertain. Therefore, the Court concluded that the authorities had effectively investigated whether detention was a measure of last resort. It found no violation of Article 5.1 (f).

Similarly, the Court found that the detention of a 2-year-old together with a parent for 10 days was not arbitrary, concluding that the state had not violated the right protected by Article 5.1 (f). The Court noted that in *R.C. and V.C. v. France* in particular, the national authorities verified that no other means were available because the applicants were sentenced for serious crimes, displayed no willingness to return to their country of origin, and had an unknown address, and thus the detention was not arbitrary (ECHR, 2016c). Although these failures of the applicant comprised one of the relevant circumstances in these two cases found to affect the risk of absconding, the Court also held in *R.K. and others v. France* that it was not convinced that a refusal to board a removal flight was sufficient alone to constitute a risk of absconding making detention necessary rather than arbitrary (ECHR, 2016d).

Providing only brief reasoning for the decision, the Court held in *Mahmundi and others v. Greece* that the detention of accompanied migrant minors aged 2, 6, and 14 years old for 20 or 22 days was not considered arbitrary; regarding the criterion relating to the material conditions, it stated that it had already examined it under Article 3 and that no distinct question arises under Article 5.1 (ECHR, 2012a). It is a bit difficult to reconcile this with the statement in *G.B. and others v. Turkey* that a breach of Article 3 may on its own result in a violation of Article 5.1; the Court had found in that case a violation of Article 3 (ECHR, 2019a). The detention centre at issue on the island of Lesbos was overcrowded, with an intake of more than four times its capacity, and the *European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment* also noted that, when inspected 3 weeks after the applicants' release, the centre was unsanitary beyond description. Greece responded that it had subsequently closed the centre. Although a violation of Article 3 does not directly lead to a violation of Article 5.1 (f), the Court highlighted in *Mahmundi and others v. Greece* that it follows from its case law that the conditions of detention must be appropriate (ECHR, 2012a), and it is therefore puzzling that

it stated that no specific question arose under Article 5.1 and that it found no breach of that provision.¹⁹

The three cases where the Court found no violation of Article 5.1 (f) are exceptions and should be compared with the case of *M.D. and A.D. v. France*, decided in 2021 (ECHR, 2021a). After 2016, France adopted new legislation in response to the Court's judgments that it had violated the Convention when placing minors in detention.²⁰ Nevertheless, the ECtHR in the 2021 case found yet another violation of Article 3, connected to the 11-day detention of a 4-month-old accompanied by a parent. French authorities had deemed that house arrest was no longer possible before placing the family in detention because of the risk of absconding revealed by the applicant's statement refusing to board the planned expulsion flight. Still, taking into account the material conditions sufficient to breach Article 3, the authorities had not effectively verified that the detention constituted a measure of last resort; therefore, there was a violation of Article 5.1 concerning the child (ECHR, 2023b).²¹ When national authorities fail to consider less intrusive alternatives or limit the time to a strict minimum, Article 5.1 will be violated even if the conditions at the detention centre are satisfactory (ECHR, 2023c).

In sum, finding a violation of Article 3 does not necessarily lead to a breach of Article 5.1 (f). The detention of a minor for a brief time with the material conditions adapted thereafter, and with the authorities concretely validating that detention was a measure of last resort, may be in accordance with Article 5.1 (f) (Turković, 2021). Still, the judgment of *M.D. and A.D. v. France* highlights the restrictive approach of the Court regarding minors in detention (ECHR, 2021a).

ARTICLE 8

Article 8 and Migrant Minors in Detention

In the ECtHR case law concerning migrant minors in detention, very often Article 8 is not relied on by applicants. In some cases, the applicant alleged a violation of Article 8, but the Court considered it unnecessary to examine the complaint under Article 8, alone or in conjunction with other articles, due to its findings under other articles (such as Articles 3, 5.1, and 13). Regarding cases in which Article 8-based allegations have been examined by the Court, it found the member

¹⁹This case should be contrasted with an earlier case of *Rahimi v. Greece*, ECHR 2011b, where the Court found a violation of Article 5.1 (f) regarding the detention of an unaccompanied minor in the same detention centre on the island of Lesbos, highlighting that the authorities had in no way considered the best interest of the child and had not investigated whether placing the applicant in custody could properly be considered a measure of last resort. This was even more the case, the Court emphasized, since it already had found in the context of Article 3 that the material conditions at the detention centre with respect to hygiene and infrastructure were so bad that they undermined the very sense of human dignity. It therefore concluded that a breach of Article 5.1 (f) had occurred.

²⁰The new legislation includes an exhaustive list of situations in which minors accompanied by parents may be put in detention, requiring that such detention be used only as a measure of last resort and for the shortest time possible.

²¹See also ECHR 2023b, indicating that it might not be sufficient to only rule out house arrest as an alternative to detention.

states guilty of violating Article 8 in a majority of the cases (ECHR, 2006, 2012b, 2016b, 2016d, 2020b; see, however, ECHR, 2016c, 2016f).²²

Article 8 is divided into two parts: first it enumerates the protected rights (Article 8.1), then it clarifies under what conditions the rights can be restricted (Article 8.2). There are four rights listed in Article 8.1: rights to private life, family life, home, and correspondence. Regarding migrant minors in detention, the Court ruled that the detention of minors amounts to interference with both the parents' and the children's rights to *family life*, if the detention of a minor means that he or she is separated from his or her parent(s) (ECHR, 2006). When minors are accompanied by parents in detention, the Court concluded that a state's protection of a "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 (...) the detention of families accompanied by children and effectively preserve the right to family life..." (ECHR, "2012b, § 147). The Court found that there had been an interference with (and also a violation of) the right to family life with respect to both the adult and minor applicants (ECHR, 2012b; see also 2016b, 2016c, 2016f, 2018).

If the Court finds that interference with any of the rights protected by Article 8 has occurred, a state must satisfy each of three conditions set forth in Article 8.2 to avoid violating the Convention: (1) the restrictions of rights must have been "in accordance with the law," (2) "necessary in a democratic society," and (3) in pursuit of one or more of certain enumerated state interests. The requirement of lawfulness means that the restriction of the right must have support in law and that the law must be of satisfactory quality (ECHR, 2020b). As regards the prerequisite of necessary in a democratic society, this means that the interference must be both justified by a pressing social need (have a legitimate aim) and proportionate to the legitimate aim pursued (ECHR, 2006, 2012b). Finally, Article 8(2) requires that the measures in question pursue the interests of (a) national security, (b) public safety, (c) the economic well-being of the country, (d) the prevention of disorder or crime, (e) the protection of health and morals, or (f) the protection of the rights and freedoms of others. Of these three conditions, the requirement of necessity in a democratic society is often more difficult to assess, and this assessment normally requires that the Court balance the interests.

The ECtHR emphasizes different circumstances of importance when balancing the interests but does not expressly indicate that any are more important and should be weighed more heavily against the others. However, the age of the child, the time in detention, the conditions in detention, and whether the detention was adapted for children seem to be relevant to include in the balancing of interests (ECHR, 2006, 2012b, 2018). In addition, whether the child was unaccompanied and whether the separation of the family members was caused by the detention of the child seem to play a role in the Court's assessment, at least in one older judgment (ECHR, 2006).

²²See *Mubilanzila and Kaniki Mitunga v. Belgium*, 2006, § 87; *Popov v. France*, 2012, § 148; *A.B. and others v. France*, 2016, § 156; *R.K. and others v. France*, 2016, § 117; *Moustahi v. France*, 2020, § 115 (finding violations of Article 8). See however *A.M. and others v. France*, 2016, § 97; *R.C. and V.C. v. France*, 2016, § 83 (no violation of Article 8).

Furthermore, the existence of indications that the family might abscond might weigh in favour of a detention being justified (ECHR, 2012b, 2018). In some cases, the ECtHR also considered the detention to have been unnecessary, because there had been alternate measures the state could have used that were equally or more adequate (ECHR, 2006, 2018).

The Scope of Permissible Detention of Migrant Minors under Article 8

Two cases—*R.C. and V.C. v. France* and *A.M. and others v. France*—are identified where the Court found no violation of Article 8 regarding migrant minors (ECHR, 2016c, 2016f). These judgments were discussed above: the Court found violations of Article 3 but also that the detention measures at issue did not also breach Article 5.1 (f).

In the first of these two cases, the domestic authorities had ruled out resorting to less intrusive measures such as house arrest or electronic surveillance and the Court did not call that assessment into question (ECHR, 2016c). The parent had been sentenced to a 3-year prison term together with a 10-year exclusion from French territory. Since the expulsion delay had been caused by the receiving country's authorities' delay in issuing necessary documents, the Court concluded that it could not be attributed to the French authorities (ECHR, 2016c). The ECtHR found that under these circumstances the detention of a family for a period of 10 days was not disproportionate to the aim pursued and therefore Article 8 had not been violated.

In the second case—*A.M. and others v. France*, where anxiety-provoking speakers, a visible yard and other factors were held to violate Article 3 but not Article 5, with respect to a 7-day-long detention of two small children with their parent²³—the national authorities had evaluated the risk of absconding and alternative measures to detention, taking into consideration the refusal of the applicant to appear for a meeting with the border police arranging the departure, the absence of identity documents, and the applicants' precarious housing situation. The Court did not consider those circumstances insufficient to justify France's assessment that detention was a necessary, last-resort measure (ECHR, 2016f). Moreover, the Court held that domestic authorities took all necessary steps to carry out the expulsion as soon as possible, and that it was only the applicant's refusal to board the plane that prolonged the time spent in confinement (ECHR, 2016f). It was concluded that the detention was not disproportionate to the aim pursued, and accordingly, Article 8 had not been violated (ECHR, 2023b).

These two cases may be compared with *R.K. and others v. France*, belonging to the same series of five judgments against France from 2016. In that case, French authorities had mostly relied on the applicant's refusal to board the plane as support for the risk of absconding. The Court stated that it was not convinced that that element was sufficient to establish the risk of absconding and to eliminate other, less-intrusive options (ECHR, 2016d). Furthermore, the ECtHR highlighted that it clearly represented a lack of desire to be expelled but did not establish a desire to evade the authorities. The Court concluded that other measures could have been considered, such as hotel accommodation combined with regular

²³The children were 2.5 years and 4 months old.

attendance at a police station (ECHR, 2016d). Thus, the Court found a violation of Article 8.

Article 8 seems not to have been engaged with as often as Article 3 and Article 5.1. However, the cases that have interpreted it have required a properly established risk of absconding for interference not to constitute a violation. The refusal to board a plane alone is likely insufficient (ECHR, 2016d). The state must have ruled out other, less intrusive measures to detention such as house arrest, but also have done its utmost to limit the time in confinement. In *R.C. and V.C. v. France* and *A.M. and others v. France*, the Court expressed that a prolonged time in detention should not be attributed to the state accused of violating the Convention when the delay was caused by the receiving country or the applicant's refusal to board the plane (ECHR, 2016c, 2016f). This position should be contrasted with *M.D. and A.D. v. France*, where the Court held that although the state had taken all necessary steps to minimize the time in detention, the actions of the applicant causing delays did not free the state from its Article 3 obligations regarding the child (ECHR, 2021a).

To summarize, the choice to detain migrant minors was only deemed proportionate to the aim pursued in two of the cases. Still, the scope of their legal ability to detain migrant minors is wider under Article 8 than under Article 3.

DISCUSSION

The Practical Needs Expressed by Police Officers

The police interviewees mainly identify two situations when it could be necessary to detain migrant minors. First, they consider it better to have child-friendly detentions of short duration that make deportations of children smooth and dignified than officials coming early in the morning and enforcing a deportation or separating the family. In this situation, the police officers clearly address the well-being of the children (to have a smooth and dignified departure).

Second, the police officers consider it better to have child-friendly detentions that prevent minors from committing crimes than to let children continue to commit crimes. In this situation, the interviewees address both community safety (fewer crimes are committed) and the well-being of the children (children are less exploited).

The Scope of Permissible Detention under the European Convention

Articles 3, 5.1, and 8 are constructed in different ways: for example, there is an absolute prohibition on interfering with the rights protected in Article 3 if the required level of severity is attained, while the assessment of whether Article 8 has been violated includes a delicate balancing of interests. Nevertheless, the ECtHR relies on the same circumstances to decide whether there has been a violation or not. Regarding Article 3, the age of the child, the standard of the detention centre, and time spent in detention have been particularly stressed, while the age of the child and the time spent in detention have been used only as a last resort in cases citing Articles 5.1 and 8.

Article 3—which protects against torture at the hands of a state party—gives states the least legal room for detaining minors, judging by the fact that all cases identified resulted in a violation of the provision. This might partially be explained by the fact that Article 3 does not allow for a balancing of

interests.²⁴ Hence, when studying the question of the permissible scope for detaining minors, it is of particular importance to scrutinize the cases concerning Article 3. Judging by these cases, if the material conditions at the facility are adjusted for families and the time of detention is brief, a detention might not reach the threshold of Article 3, taking into consideration the age of the children. It is important to stress that the legal room for detaining migrant minors in accordance with the Convention is minimal, and that the ECtHR found at least one violation in all these cases, even though, in a few judgments, the Court concluded that certain human rights had not been violated.

The Practical Needs and the Scope of Permissibility

Is the scope of permissibility for detaining minors enough to meet the practical needs that the police experience, or vice versa?

The first consideration, according to the interviewees, is to make a smooth and dignified deportation by putting the minors in a child-friendly detention centre. Some police officers state that it can take more than 24 hours to execute a deportation, but it is expected to not take more than a few days. If this is the case, it is possible that there is legal room for states to detain children according to the European Convention, at least with respect to older minors, when the timeframe is very brief, and the detention centre is suitable to house children. However, the principle of last resort means that alternatives other than locking up must have been ruled out. Consequently, a detention in this situation might be reserved for migrants who are troublesome and try to escape.

The other need according to the police officers is to have the children in detention and then deport them to their country of origin instead of letting them continue to commit crimes that they may be forced to commit. The interviewees did not elaborate on this situation, but it seems as if this situation is intended to use detention as a tool to *prevent* certain boys from committing crime. However, *preventing* crimes is not one of the enumerated situations listed in Article 5.1, at subsections a–f; also, convicted or suspected criminals—even if they are older children—can be detained according to some of these subsections.²⁵ Regarding sub-section 5(f)—“... a person against whom action is being taken with a view to a deportation...”—it is reasonable to think that a lengthier time in detention is often needed in this situation and that there are often other alternatives available than to detain the minors. Under such circumstances, it is probably not in accordance with the European Convention to put migrant children in detention. However, in the studied case law of the ECtHR, it is unclear what role the migrant minors' criminality might play in the Court's assessment of the legality of detaining them.

Thus, the permissible scope is too small to meet all the practical needs expressed by Swedish police officers. However, it is important to stress that the necessity to detain children in the situations that the police interviewees mentioned has

²⁴This is also the case regarding Article 5.1, but the assessment of the arbitrariness contains elements of a balancing of interests.

²⁵Under Swedish law, it is, however, possible to put children who are suspected of having committed certain crimes in detention, if there are exceptional reasons; see The Swedish Law (1964:167) with Particular Regulations about Juvenile Offenders, Section 23.

not been examined more closely in this article. For instance, one might argue that it is more child-friendly to pick the children up early in the morning without many onlookers than to detain them overnight.

The Gap between the Legal Requirements and the Views of the Practitioners

Naturally, the ECtHR and the police practitioners have different starting points regarding the question of putting migrant minors into detention: the overall aim of the ECtHR is to protect individuals' human rights, while the police interviewees stress the perspective of enforcing a deportation. This could illustrate Bhabha's statement that the state's attitude towards migrant minors is ambivalent: the ECtHR wants to protect vulnerable children, while the police desires to protect the public from threatening outsiders (even if they are children).²⁶ In addition, the police and the Court sometimes make completely different evaluations of the significance of certain circumstances: regarding age, the position of the ECtHR is that the circumstances under which a state may use detention must be narrower for younger children, while one police interviewee claims that an infant will not be affected by sitting in detention with his or her mother.

However, in many respects, the ECtHR and the police officers have the same views. For instance, some police interviewees stress the restrictiveness of putting minors into detention, while the Court emphasizes detention as a last resort and only in a few cases found that the detention was in accordance with some of the Convention articles. Likewise, both the police officers and the ECtHR stress the importance of the conditions in detention and that family members not be separated.²⁷

Making comparisons between the Court and the interviewees is complicated by the concept of detention, i.e., what constitutes detention. When speaking about detention, it is natural to think about locked-up facilities. In the interviews, the police officers mention short-term detention—when the children are in a guarded hotel and not locked up—as an alternative to the more traditional, closed detention (The Swedish Aliens Act (2005:716)).²⁸ Similarly, the ECtHR in some cases concluded—regarding the principle of detention as a last resort—that other measures such as hotel accommodation and regular attendance at the police station should have been considered.

CONCLUSION

Can migrant minors put in detention ever be in accordance with human rights law? International organizations such as the United Nations Child Rights Committee answers “no” (United Nations, 2023), while the ECtHR rules “yes” but with very strict limitations in place. The diverging positions of the two organizations shows the fragmentation in this legal framework. In addition, there is a dissonance between the legal requirement and the practical needs identified by the police respondents.

²⁶Compare Chapter 2 above.

²⁷Regarding the separation of family members, see also, e.g., ECHR, 2016c.

²⁸In Swedish law, short-term detention is not even labelled as a detention, Chapter 9, Section 12.

Are there any lessons to be drawn from this study by the actors? The state officials must adhere to the limits set out by the Court, which have been explored in this article, so one immediate action that the Swedish border police might consider is to prioritize educational efforts regarding the scope of permissible detention of migrant minors. However, what is permissible when it comes to detaining migrant minors is not always easily foreseen, since the Court has found a violation of Article 3 in nearly all of the investigated cases while highlighting that the practice can be in accordance with the Convention. Thus, it would be useful if the Court clarified its stance as to where the line between permissible and not permissible detentions is to be drawn, keeping in mind that each case is unique. In addition, with a significant part of the relevant case law only existing in French, the question should be posed whether language barriers make it difficult for national actors, such as judges and police, to access the precedent set by the ECtHR, and in turn follow the limits set by the European Convention.

The actors involved in the issue of detaining migrant minors might have different perspectives on the issue, but they must not lose sight of the fact that these children are categorized as some of the most vulnerable in society and that their rights must be protected. This begs the question of whether the time has come for the ECtHR to close the door completely regarding the detention of migrant minors (Turković, 2021), whether the status quo should be favoured, or whether the Court should take into further consideration the needs of the practitioners on the ground. When answering that question, the best interests of the child need to be at the forefront of everybody's mind.

The vulnerability of detained migrant children also makes the subject of this article an important research field. For instance, it would be relevant to study the views of state officials other than Swedish border police, or the limits set by other human rights law instruments than the European Convention.

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CONFLICT OF INTEREST DISCLOSURES

The authors have no conflicts of interest to declare.

AUTHOR AFFILIATIONS

*Assistant professor, Department of Law, Umeå University, Umeå, Sweden; †Doctoral student, Department of Law, Umeå University, Umeå, Sweden; ‡Assistant professor, Police Education Unit, Umeå University, Umeå, Sweden.

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