

The Constitutional Court of Bosnia and Herzegovina, sitting, in accordance with Article VI(3)(b) of the Constitution of Bosnia and Herzegovina, Article 57(2)(b) and Article 59(1) and (2) of the Rules of the Constitutional Court of Bosnia and Herzegovina – Revised Text (*Official Gazette of Bosnia and Herzegovina*, 94/14), in plenary and composed of the following judges:

Ms. Valerija Galić, President

Mr. Mirsad Ćeman, Vice-President

Mr. Zlatko M. Knežević, Vice-President

Ms. Helen Keller, Vice-President

Ms. Seada Palavrić,

Ms. Angelika Nussberger, and

Mr. Ledi Bianku

Having deliberated on an appeal lodged by **minor A.H.Q. / A.K.**, in the case no. **AP-267/23**, at its session held on 13 July 2023, adopted the following

DECISION ON ADMISSIBILITY AND MERITS

The appeal lodged by **minor A.H.Q./ A.K.** is hereby granted.

A violation of Article II(3)(d) of the Constitution of Bosnia and Herzegovina and Article 5, paragraph 1, subparagraph f) and paragraphs 2 and 4 of the European Convention for the Protection of Human Rights and Fundamental Freedoms is hereby established in respect of a supervision and placement in the institution for admission and accommodation of foreigners - Immigration Centre in Istočno Sarajevo based on the judgment of the Court of Bosnia and Herzegovina No. S1 3 U 044464 22 Uvp of 9 December 2022.

REASONING

I. Introduction

1. On 17 January 2023, minor A.H.Q. /A.K. (“the appellant”), a citizen of Syria, represented by the Association “Vaša prava BiH”, filed an appeal with the Constitutional Court of Bosnia and Herzegovina (“the Constitutional Court”) against the judgment of the Court of Bosnia and Herzegovina (“the Court of BiH”) No. S1 3 U 044464 22 Uvp of 9 December 2022.

II. Procedure before the Constitutional Court

2. Pursuant to Article 23 of the Rules of the Constitutional Court, on 25 January 2023 the Court of BiH, the Ministry of Security of Bosnia and Herzegovina (“the Ministry”), the Service for Foreigners’ Affairs of Bosnia and Herzegovina (“the Service”) and the Border Police of Bosnia and Herzegovina (“the Border Police”) were requested to submit their responses to the appeal. The aforementioned authorities submitted their responses to the appeal, which were forwarded to the appellant on 16 February 2023, for observations. On 24 February 2023, the appellant submitted his observations.

III. Facts of the Case

3. The facts of the case, as they appear from the appellant's allegations and the documents submitted to the Constitutional Court, may be summarized as follows.

Introductory remarks

4. On 4 November 2022, the appellant, together with five other persons in the same passenger motor vehicle, tried to cross the border at the Bijača International Border Crossing between Bosnia and Herzegovina ("BiH") and the Republic of Croatia ("the Croatia"). On that occasion, the appellant and other persons presented the identity cards of the Kingdom of Belgium to the Border Police, for inspection. Based on those documents, members of the Border Police identified the appellant as A. K, born on 12 December 2008. Three of the other five persons were identified as G. K. born in 1963, H. K. born in 1963 and M. K. born in 1997. After the border control, the appellant and the other persons went in the direction of the Croatia. However, members of the Ministry of Interiors of the Croatia (the MoI of the Croatia) found that the identity cards were forged and refused them entry into the Croatia. After that, the appellant and other persons were returned to the territory of Bosnia and Herzegovina.

5. At the proposal of the Border Police, the Service issued ruling number UP-1-18-23-07.3-89/22 of 5 November 2022 on the expulsion of N.N. person, who identified himself as G.K., without identification documents, from the territory of BiH. The decision ordered G. K. to take with her the minor child – appellant, without identification documents, and to leave the territory of Bosnia and Herzegovina within 10 days from the date of delivery of the final decision on expulsion, under the threat of enforcement measures. In the reasoning of the ruling, it was stated that G. K., when crossing the state border with the minor appellant, used a forged travel document, thereby violating the provisions of Article 106, subparagraph c) of the Law on Foreigners of Bosnia and Herzegovina ("Law on Foreigners").

Proceedings in which the contested ruling was issued

6. In ruling number UP-1-18.23.07.3-90/22 of 5 November 2022, the Service put N.N. person, who identified himself as G.K., a citizen of Turkey, without identification documents, and the minor appellant (marked as A.K.), under the supervision in an institution for the admission of foreigners, the Immigration Centre in East Sarajevo ("the Immigration Centre"). The supervision was ordered for there were reasonable grounds to believe that those persons, after the ruling on expulsion had been served on them, could flee, as well as there were doubts as to the veracity of their allegations concerning their identity, and due to the lack of means of subsistence. The ruling ordered that their placement in the Immigration Centre would be carried out on 5 November 2022 at

4:00 p.m., and that the duration of supervision was determined for the period between 5 November and 5 December 2022 to ensure the execution of the expulsion ruling. In addition, the ruling determined that the appeal should not stay the pending execution.

7. The reasoning of the ruling stated that there was no possibility of ordering a milder measure of supervision at the address of residence in BiH. Namely, the Service established that there were reasonable grounds for suspecting that the foreigner would flee or otherwise prevent the execution of the expulsion ruling and that he did not have secured accommodation before leaving Bosnia and Herzegovina. Accordingly, the Service concluded that the requirements under Article 118, paragraph 3, subparagraphs b) and c) of the Law on Foreigners were met to place the foreigner concerned under supervision in the Immigration Centre. In addition, the Service stated that the detention of G. K. and the minor appellant in the Immigration Centre was determined in accordance with Article 123, paragraph 3 of the Law on Foreigners. This was only as a last resort measure and for the shortest possible time of 30 days, in order to preserve the family union in accordance with Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (the “European Convention”), and the regulations of BiH related to the care of minors and their protection.

8. On 9 November 2022, G. K. and the appellant were interrogated in the presence of an Arabic interpreter in the Immigration Centre. According to the Service, the appellant stated that his name was A.H.Q, born on 1 January 2008 in Syria. He also stated that he was not related to G.K. and that he, using forged documents, had tried to reach Germany. It follows from G.K.’s statement that her name is actually M.K., that she was born and lived in Syria, that she tried to reach Germany by using forged documents, and that she is not related to the appellant. In view of the above, on the same day, on 9 November 2022, the Service filed a request with the PI Social Work Centre in East Novo Sarajevo (“the Social Work Centre”) to appoint a special guardian for the appellant. In the ruling of the Social Work Centre No. 05-552-1262/22 of 11 November 2022, a special guardianship was ordered as a measure to protect the appellant’s personality, rights and interests in the relevant proceedings. In addition, an employee of the Social Work Centre was appointed as his guardian.

9. In the further course of the proceedings, the Association “Vaša prava BiH”, as an authorised representative, represented the appellant and G.K. and filed legal remedies on their behalf. The appellant and G. K. lodged an appeal against the Service’s ruling to place them under supervision.

10. The Ministry dismissed the appeal of G.K. as unfounded and upheld the first-instance ruling. The reasoning states that it was undisputedly established that it concerned a foreigner who did not

have a valid passport or identification document to enter BiH and that the measure of expulsion was imposed on her. In addition, the Ministry assessed that the requirements under Article 118, paragraph 3, subparagraphs b) and c) of the Law on Foreigners were met to place the foreigners concerned under supervision in the Immigration Centre. Furthermore, the Ministry stated that on 9 November 2022, G. K. had been interrogated in the presence of an Arabic translator, and it concluded that the allegations in the appeal about the violation of the Law on Administrative Procedure were unfounded. Besides, the Ministry assessed that the allegations in the appeal that G. K. should have been ordered a milder measure were unfounded. In this connection, the Ministry stated that the first-instance authority considered the possibility of imposing a milder measure and found that there were no conditions for its application. Moreover, the Ministry indicated that the erroneous conclusion that G. K. was the mother of the minor appellant could not affect a different resolution of the administrative matter. Namely, according to the reasoning, the first-instance authority established that it concerned a foreigner without a valid passport or identification document for entering BiH, based on which the foreigner's identity could be established. In addition, the Ministry reasoned that the first-instance authority determined that the appellant was a N.N. person who identified himself as A.K. and who was accompanied by G.K. Furthermore, the Ministry indicated that the aforementioned stemmed from the evidence in the case-file, *i.e.* the Statement on personal data of the MoI of the Croatia, which had been made in the "Croatian/English/Kurdish-Kurmanji" language. A. K. was marked in the column "name of appellant", and G was marked in the column "name of mother". In view of the above, the Ministry decided as stated in the enacting clause of the ruling.

11. On 24 November 2022, the appellant and G.K. filed a lawsuit against the ruling of the Ministry, claiming that, *inter alia*, they had been interrogated in the presence of a translator in a language they understand, only on 9 November 2022, and that Article 5 of the European Convention was thus violated. They also pointed out that the minor appellant and asylum seeker was deprived of his liberty in the Immigration Centre, which is contrary to Articles 3 and 5 of the European Convention and the principle of the best interests of the child.

12. The Court of BiH (Administrative Disputes Division) dismissed the lawsuit by ruling number S1 3 U 044464 22 U of 30 November 2022, where it was noted that only G. K. had filed the lawsuit against the Ministry's ruling. The reasoning of the judgment stated, *inter alia*, that on 29 November 2022, the Court of BiH had interrogated the appellant and G. K. in accordance with Article 120, paragraph 7 of the Law on Foreigners. According to their statements, they are not related. In addition, the Court of BiH assessed that the ruling to place G.K. under supervision in the

Immigration Centre was correct and based on the provisions of Article 118, paragraph 3, subparagraphs b) and c) of the Law on Foreigners, which are mandatory in nature. Furthermore, the Court of BiH pointed out that Article 123 of the Law on Foreigners prescribes the protection of the rights of minors and other foreigners, and cited the provisions of paragraphs 2 and 3 of the mentioned Article. According to the assessment of the Court of BiH, there was no arbitrariness in the actions of the competent authorities in ordering the measure of supervision over the foreigner. Namely, the competent authority especially considered the fact that the appellant was accompanied by G. K. and ordered the supervision measure as a last resort measure and for the shortest possible period of 30 days. Therefore, the Court of BiH concluded that G. K.'s complaint about the violation of Article 5 of the European Convention was ill-founded because there were no indications that the authorities acted *mala fide* and that G. K. was arbitrarily "detained". Besides, the Court of BiH pointed out that the imposition of the supervision measure was justified because the matter concerned the foreigners whose identity could not be established with certainty, and that they had illegally entered the territory of BiH with forged documents, and that they illegally crossed the border between BiH and the Croatia.

13. In addition, the Court of BiH stated that the Service imposed the supervision measure without hearing G. K. but that she had been interrogated in the presence of an Arabic interpreter in the Immigration Centre on 9 November 2022 and that, on that occasion, she had been informed of her rights. Accordingly, the Court of BiH assessed that the four-day period between the day of the imposition of the measure and the day of the hearing of G. K. did not result from an arbitrary action by the competent authorities. Namely, the Court of BiH indicated that it was clear from the data in the case-file that on 4 November 2022, the Border Police "caught" G. K. with a group of persons, who used forged documents, and that the Border Police conducted the identification and registration procedure and that "it was during the weekend". In view of the above, the Court of BiH assessed that the Service interrogated G. K. immediately after the conditions for her hearing had been met. Consequently, the 5-day period between the day of the imposition of the measure and the day of the hearing of G. K. could not be ascribed to inefficient or untimely actions of the Service.

Contested decision

14. The appellant and G. K. filed a request for review of the mentioned judgment. The Court of BiH (Appellate Administrative Section) dismissed the request by judgment No. S1 3 U 044464 22 Uvp of 9 December 2022, finding that only G. K. had filed the request for review. In considering the request, the Court assessed that the legally prescribed conditions for imposing the measure of supervision on and placement of G. K. in the Immigration Centre were met. In addition, as to the

application of the provisions of Article 123, paragraphs 2 and 3 of the Law on Foreigners, the Court of BiH gave the same reasons as the first-instance panel. Furthermore, the Court of BiH pointed out that the Service considered the possibility of imposing a milder measure on G. K. and that it gave reasons why that was not possible. In addition, the Court of BiH highlighted that the allegations of G. K. that it was erroneously established that she was the appellant's mother, could not affect the different resolution of the administrative matter. This was so given that the first-instance authority found during the proceedings that this involves a foreigner having no valid passport or identification document for entry into BiH to be used to establish the identity of the foreigner. Moreover, the Court of BiH pointed out that only after the first-instance decision did the first-instance authority learn that G. K. was not the appellant's mother.

IV. Appeal

a) Allegations in the appeal

15. The appellant claims a violation of the right not to be subjected to torture or to inhuman or degrading treatment or punishment under Article II(3)(b) of the Constitution of Bosnia and Herzegovina and Article 3 of the European Convention. He also claims a violation of the right to liberty and security of person under Article II(3)(d) of the Constitution of Bosnia and Herzegovina and Article 5 of the European Convention and the right to respect for private life under Article II(3)(f) of the Constitution of Bosnia and Herzegovina and Article 8 of the European Convention. Specifically, the appellant points out that he was interrogated only on 9 November 2022, and that until then he was not informed in any way, for example by way of an information brochure, about the reasons for being deprived of his liberty. In addition, he was not given basic information about his rights. The appellant points out that for the aforementioned reason it was untimely established that he was an unaccompanied minor, and that it is contrary to the provisions of the Law on Foreigners, Article 5, paragraph 2 of the European Convention and the principle of the best interests of the child. In addition, the appellant points out that the Court of BiH, as to the three persons from Syria with whom he was detained and who were also interrogated on the same day, found a violation of Article 5 of the European Convention. In support to his claims, the appellant submitted the decisions of the Court of BiH and administrative authorities passed in the procedure for determining the supervision of the persons identified as M.K. and H.K. (see paragraph 4 of the present decision). The appellant points to the violation of Article 5, paragraph 1, subparagraph f) of the European Convention because he was deprived of liberty in an arbitrary manner, and emphasises that his particular vulnerability was not taken into account, nor was the application of

milder measures considered. The appellant states that it was not taken into account that the Immigration Centre was not suitable for the deprivation of liberty of the appellant for a long period. He contends that in that manner his rights under Articles 3 and 8 of the European Convention have been violated. In addition, the appellant indicates that the police escorted him to the Court of BiH for interrogation and that he was not allowed to use his cell phone in the Immigration Centre to contact his family in Syria. In this connection, the appellant refers to several decisions of the European Court of Human Rights. Furthermore, the appellant contends that Article 5, paragraph 4 of the European Convention of Human Rights has been violated. He claims that he did not receive the decision to place him under supervision, its content and the possibility of using legal remedies in a timely manner. Moreover, the appellant indicates that the Court of BiH did not comply with the statutory time limits for deciding on the lawsuit, even though it concerned a particularly vulnerable person who had already been deprived of liberty for two weeks at the time of filing the lawsuit. The appellant requests a sum of BAM 500 as compensation for non-pecuniary damage arising from the violation of the aforementioned rights.

b) Responses to the appeal

16. The Court of BiH considers that the contested decision contains a clear and sufficient reasoning. The Court of BiH claims that the alleged violations of rights pointed out in the appeal refer to the proceedings in which the measure of expelling the appellant from the territory of BiH was adopted. This is not the subject of the appeal.

17. The Ministry claims that the appellant's allegations that he should have been given a milder measure of supervision are ill-founded and suggests that the appeal should be dismissed. In this connection, the Ministry refers to the reasons given in the reasoning of the contested decision and the decisions of lower-level authorities. In addition, the Ministry states that the appellant, with the consent of the guardian, was placed in the Centre for the Admission and Accommodation of Asylum Seekers in Delijaš - Trnovo on 5 December 2022, that he filed an application for asylum on 12 January 2023, and that he left, of his own accord, the asylum centre on 16 January 2023. Furthermore, the Ministry underlines that the appellant did not inform the competent authority about the change of address within the statutory time limit and, consequently, the procedure on his asylum application was suspended on 1 February 2023.

18. The Service proposes that the appeal should be dismissed. In addition, the Service claims that the supervision measure was adopted in order to ensure the execution of the expulsion measure. In this connection, the Service reiterates the reasons given in the decision. Furthermore, the Service

points out that it was not possible immediately to secure a translator for the Turkish-Kurdish language, which G. K. and the appellant “claimed as the only language they spoke”. It also points out that it was subsequently established that the appellant’s name was A. H. Q., that he was a citizen of Syria, that he was unaccompanied and that he was an asylum seeker. Moreover, the Service indicates that the Immigration Centre is a specialized institution for the admission and accommodation of foreigners and that it meets all the requirements arising from the Constitution of Bosnia and Herzegovina and international standards for dealing with the users of those institutions. According to the Service, the Immigration Centre has separate pavilions for the accommodation of adult men, single women and families that stay in separate apartments. In addition, the Service claims that all the conditions for the stay of migrants are provided in the Centre: health care, food, hygiene, the right to free legal aid, communication with the competent authorities of the country of origin and the family. Moreover, the Service states that foreigners are allowed, after being placed in the Immigration Centre, to contact their families, to have access to a brochure in their native language that outlines the right to free legal assistance and the right to asylum.

19. The Border Police state that on 4 November 2022, at 9:41 a.m., at the Bijača International Border Crossing, “detailed border checks were carried out on six foreign citizens” who handed over their Belgian identity cards for inspection (appellant, M. K., G. K. H. K and two other persons), and after that they headed in the direction of the Croatia. In addition, the Border Police state that on 5 November 2022, they received a notification from the MoI of the Croatia that those persons were refused entry to the Croatia, because they presented forged identity cards for inspection. Furthermore, according to the Border Police, on 5 November 2022, at around 17:30hrs, police officers of the Border Police “took over the persons in question from the members of the MoI of the Republic of Croatia” and “shortly thereafter” handed them over to the Service for further action.

20. In the observations on the responses, the appellant claims that the ordinary courts and administrative authorities gave inadequate justifications for their omissions and violations of his rights under the Constitution of Bosnia and Herzegovina and the European Convention, which he referred to in the appeal. Those justifications were not based on the relevant regulations, and they did not even comment on some of his allegations. In addition, the appellant points out that there were different accommodation options for him, adapted to his vulnerability, in the Temporary Admission Centre in Ušivak, and the Asylum Centre in Delijaš. The appellant also asserts that the Service’s statement that he was allowed to contact his family and was given a brochure in his native language outlining the right of access to free legal assistance and the right of access to asylum is incorrect.

V. Relevant Law

21. The **Law on Foreigners** (*Official Gazette of Bosnia and Herzegovina*, 88/15 and 34/21), in the relevant part, reads:

*Section B. Placing a foreigner under supervision
Article 118, paragraph 3, subparagraphs b) and c)*

(Imposing supervision)

(3) A foreigner shall be placed under supervision by his/her detention in the Immigration Centre:

b) to ensure the execution of the decision on expulsion, or in other cases when he/she received the expulsion measure, if there are reasonable grounds to believe that an foreigner shall flee or otherwise prevent the execution of the decision; or

c) when there is doubt as to the veracity of the allegations of a foreigner concerning his/her identity, and he/she is pronounced the expulsion measure.

Article 120, paragraphs 6 and 7

(Decision on supervision and legal remedies)

(6) In case the Ministry does not revoke a decision on supervision in the Immigration Centre or decision on extension of supervision or decision on extraordinary extension of supervision in the Immigration Centre within three days, or does not reach a decision upon the appeal, the foreigner may initiate an administrative dispute before the Court of Bosnia and Herzegovina.

(7) Lawsuit shall be initiated before the Court of Bosnia and Herzegovina within three days upon expiry of the deadline under paragraph (6) herein. The Court of Bosnia and Herzegovina shall urgently process these cases and render a decision upon the lawsuit within three days from its initiation. The appeal shall not stay the execution.

Article 123

(Protection of rights of minor and other foreigners)

(...)

(2) Competent authorities in BiH are obliged to treat the minor foreigners with particular

attention and respect and in accordance with the Convention on the Rights of the Child as well as the BiH regulations on care of minors and their protection.

(3) Families with minors shall be detained in the Immigration Centre only as a last resort measure and for the shortest possible time.

(4) Minor foreigner who has illegally entered BiH and is not accompanied by a parent or guardian or legal representative or who remained without their presence upon entering BiH,

and whom the Service cannot immediately return to the country from which he/she arrived, or deliver him/her to the representatives of the country of his/her citizenship, shall be temporarily placed by the Service to the unit of the institution specialized for minors and inform the competent centre for social work which would, in accordance with the law, immediately appoint a temporary guardian. Unaccompanied minors shall be detained in the Immigration Centre exceptionally, only as a last resort measure and for the shortest possible time.

(...)

VI. Admissibility and Merits

22. The Constitutional Court establishes that the appeal meets the requirements prescribed by Article VI(3)(b) of the Constitution of Bosnia and Herzegovina and Article 18, paragraph 1 of the Rules of the Constitutional Court. In addition, it was filed within the given time limit and it also meets the other requirements of admissibility under Article 18, paragraph 3 of the Rules of the Constitutional Court. It is also not manifestly (*prima facie*) ill-founded within the meaning of Article 18, paragraph 4 of the Rules of the Constitutional Court.

23. The appellant contends that the contested decision is in violation of his rights under Article II(3)(b) of the Constitution of Bosnia and Herzegovina and Article 3 of the European Convention, Article II(3)(d) of the Constitution of Bosnia and Herzegovina. In addition, he contends that it is in violation of Article 5 of the European Convention and Article II(3)(f) of the Constitution of Bosnia and Herzegovina and Article 8 of the European Convention.

24. Taking into account the content of the appeal, the Constitutional Court will first consider the appellant's allegations of violation of rights under Article II(3)(d) of the Constitution of Bosnia and Herzegovina and Article 5 of the European Convention.

Right to liberty and security of person

25. Article II(3)(d) of the Constitution of Bosnia and Herzegovina, as relevant, reads:

All persons within the territory of Bosnia and Herzegovina shall enjoy the human rights and fundamental freedoms referred to in paragraph 2 above; these include:

(...)

d) The rights to liberty and security of person

26. Article 5 of the European Convention, as relevant, reads:

1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

(...)

(f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

2. Everyone who is arrested shall be informed promptly, in a language, which he understands, of the reasons for his arrest and of any charge against him.

(...)

4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

27. The Constitutional Court notes that the appellant is an unaccompanied minor, who, based on the contested decisions, was placed under supervision in the Immigration Centre, where he stayed between 5 November and 5 December 2022. In view of the above, the Constitutional Court holds that the contested decisions raise the issue of compliance with the guarantees of the right to liberty and security of person, referred to by the appellant (see, Constitutional Court, Decision on Admissibility and Merits *AP-4518/10* of 13 June 2012, paragraph 94, available at www.ustavisud.ba).

28. The Constitutional Court recalls that it has noted in several decisions that the right to liberty of person is one of the most important human rights, and that Article 5 of the European Convention provides protection that no one shall be deprived of liberty in an arbitrary manner. The Constitutional Court notes that the appellant considers that he was arbitrarily deprived of his liberty because he was not immediately informed, in a language he understood, about the reasons for being deprived of his liberty. In addition, the appellant complains that his exceptional vulnerability was not taken into account. It was not taken into account the fact that he was an unaccompanied minor, and that the application of milder measures was not considered. Furthermore, the appellant contends that the Court did not consider the lawfulness of the deprivation of liberty substantially and promptly. Accordingly, the appellant's allegations raise the issue of violation of Article 5, paragraph 1, subparagraph f) of the European Convention, and paragraphs 2 and 4 of the same Article.

29. The Constitutional Court notes that according to the case-law of the European Court of Human Rights, it is a fundamental principle that no detention which is arbitrary can be compatible with Article 5, paragraph 1, and the notion of "arbitrariness" in Article 5, paragraph 1 extends beyond lack of conformity with national law, so that a deprivation of liberty may be lawful in terms of domestic law but still arbitrary and thus contrary to the Convention (see, European Court of Human Rights, *Saadi v. the United Kingdom*, judgment of 29 January 2008, Application No. 13229/03, paragraph 67). In addition, to avoid being branded as arbitrary within the meaning of Article 5, paragraph 1, subparagraph f) of the European Convention, such detention must be carried out in good faith, it must be closely connected to the purpose of preventing unauthorised entry of the person to the country, the place and conditions of detention should be appropriate, bearing in mind that "the measure is applicable not to those who have committed criminal offences but to aliens who, often fearing for their lives, have fled from their own country", and the length of the detention should not exceed that reasonably required for the purpose pursued (*idem.*, paragraph 74).

30. In addition, the Constitutional Court notes that additional measures of protection against arbitrary deprivation of liberty are applied to children and other individuals who are in a vulnerable situation. The absence of active steps and delays in conducting a vulnerability assessment can be a factor that raises serious doubts as to the authorities' good faith (see, European Court of Human Rights, *Abdullahi Elmi and Aweys Abubakar v. Malta*, Judgment of 22 November 2016, Applications No. 25794/13 and 28151/13, paragraph 146). Furthermore, depriving an unaccompanied minor of liberty in order to guarantee his deportation will not be in accordance with Article 5, paragraph 1, subparagraph f) of the European Convention, if the aim pursued by the

deprivation of liberty can be achieved by less severe measures. This requires that domestic authorities consider the issue of the best interests of the minor and alternatives to deprivation of liberty in the light of the particular circumstances of the individual case (see, European Court of Human Rights, *Rahimi v. Greece*, Judgment of 5 April 2011, Application No. 8687/08, paragraphs 109-111). In its recent case law, the European Court of Human Rights also emphasises that different international bodies, including the Council of Europe, “increasingly call on States immediately and completely to stop or no longer hold children in admission centres for migrants”. It emerges from the European Court’s established case-law on this issue that, as a matter of principle, the confinement of migrant children in a detention facility should be avoided, and that only placement for a short period in appropriate conditions could be considered compatible with Article 5, paragraph 1 of the Convention, provided, however, that the national authorities can establish that they resorted to this measure only after having verified that no other measure involving a lesser restriction of freedom could be implemented (see, European Court of Human Rights, *M.H. and Others v. Croatia*, Judgment of 18 November 2021, Applications No. 15670/18 and 43115/18, paragraph 237).

31. Furthermore, the Constitutional Court points out that according to the case-law of the European Court of Human Rights, the issue whether the period between the moment of deprivation of liberty and the notification of the reasons for detention was sufficiently short, as required by Article 5, paragraph 2 of the European Convention, is to be assessed in each case according to its special features (see, European Court of Human Rights, *Khlaifia and Others v. Italy*, Judgment of 15 December 2016, Application No. 16483/12, paragraph 115). Moreover, the Constitutional Court notes that the European Court of Human Rights found a violation of Article 5, paragraph 2 of the European Convention because the applicant was presented with the reasons why he was deprived of liberty only after 76 hours (*op.cit.*, Judgment *Saadi v. United Kingdom*, paragraphs 84 and 85). In addition, the European Court of Human Rights found a violation of Article 5, paragraph 2 of the European Convention because the document on the reasons for deprivation of liberty for deportation was served on the applicant on the fourth day of his detention (see, European Court of Human Rights, *Nowak v. Ukraine*, Judgment of 31 March 2011, Application No. 60846/10, paragraphs 64-66).

32. The Constitutional Court notes that Article 5, paragraph 4 also secures to persons arrested or detained the right to have the lawfulness of their detention decided “speedily” by a court and to have their release ordered if the detention is not lawful (see, European Court of Human Rights, *Khlaifia and Others v. Italy* (GC), Judgment of 15 December 2016, Application No. 16483/12,

paragraph 131). In situations where in exceptional circumstances the national authorities, nevertheless, decide to detain a child and his or her parents for immigration-related purposes, the lawfulness of such detention should be examined with particular expedition at all levels (see, European Court of Human Rights, *G.B. and Others v. Turkey*, Judgment of 17 October 2019, paragraphs 167 and 186). In addition, the Constitutional Court notes that the European Court of Human Rights found a violation of Article 5, paragraph 4 of the European Convention in a situation where the court decisions made in the procedure for determining immigration detention analysed only the situation of the first applicant (the mother of the other three minor applicants), mentioning her children only as accompanying her into detention (see, European Court of Human Rights, *Minasian and Others v. The Republic of Moldova*, Judgment of 17 January 2023, Application No. 26879/17, paragraphs 52-54).

33. Relating the aforementioned positions of the European Court of Human Rights with the facts of the present case, the Constitutional Court notes that the appellant and the persons who were with him at the time of the deprivation of liberty (G. K., H. K. and M. K.) were interrogated only on 9 November 2022. They were interrogated in the presence of a translator in a language they understand, and informed about the reasons for deprivation of liberty and the content of the decisions made against them. Therefore, they were informed about the reasons for the deprivation of liberty four days after being deprived of their liberty and the adoption of the first-instance decisions on expulsion and placement under supervision. In this connection, the Constitutional Court notes that, in the cases of H.K. and M.K., who were deprived of their liberty together with the appellant and G.K., the Court of BiH found a violation of their rights under Article 5, paragraph 2 of the European Convention. It found the violation because of the long period of time that had passed before they were interrogated as to the mentioned circumstances. For this reason, the procedure of placing those persons under supervision, unlike the appellant and G.K., was ultimately suspended. In addition, the Court of BiH assessed in those cases that the fact that H.K. and M.K. were placed in the Immigration Centre during the weekend (Saturday and Sunday, 5 and 6 November 2022) was not a justification for the failure to act, because neither the Law on Foreigners nor the European Convention provides for such exceptions. Furthermore, the Constitutional Court points out that it was indisputable from the beginning that the appellant was a minor, which is why the competent authority was obliged to act with increased attention and promptness, which it evidently did not do. In view of the above, and the case-law of the European Court of Human Rights in this regard (see paragraph 31 of the present decision), the Constitutional Court holds that the period between the moment of deprivation of liberty and the notification of the reasons for his

detention was not consistent with the standards under Article 5, paragraph 2 of the European Convention.

34. Furthermore, the Constitutional Court notes that, because of the ineffective action of the first-instance authority, there was a delay in assessing the appellant's vulnerability in terms of establishing the fact that the minor was unaccompanied. Namely, that fact, *i.e.* the circumstance that G. K. was not the appellant's mother, was undisputedly established only after the first-instance decision on placing them under supervision in the Immigration Centre had been passed. Moreover, the Constitutional Court notes that the second-instance administrative authority and the Court of BiH, in the lower-instance and contested decisions, assessed this circumstance exclusively in relation to G.K. and her situation relating to the facts and law. Namely, the Constitutional Court notes that the second-instance administrative authority and the Court of BiH neither considered the appellant's allegations nor analysed whether his detention in the Immigration Centre was an appropriate measure in terms of Article 123, paragraph 4 of the Law on Foreigners. This was to be done in the context of his personal situation and his best interests as an unaccompanied minor, which makes him a particularly vulnerable person. In addition, the Constitutional Court notes that the available documentation does not show that the appellant was placed in the department of the institution specialised in minors, as required by the aforementioned legal provision. Taking into account the aforementioned case law of the European Court of Human Rights (see paragraph 29 of the present decision), the Constitutional Court concludes that the competent administrative authorities and the ordinary court did not act in good faith. They did not act in the best interests of the minor and in accordance with the provisions of the Law on Foreigners and, consequently, the provisions of paragraph 5, paragraph 1, subparagraph f) of the European Convention have been violated.

35. As to the appellant's claims about the violation of Article 5, paragraph 4 of the European Convention, the Constitutional Court considers it necessary to point out that the entire proceedings, including the proceedings on legal remedies before the ordinary court, lasted more than a month. That is four days longer than the period for which the supervision measure was imposed (the measure lasted until 5 December 2002, and the contested decision of the Court of BiH was made on 9 December 2022). The Constitutional Court points out again that it was indisputable from the beginning that the appellant was a minor, which is why the competent authority was obliged to act with increased attention and promptness. In addition, the Constitutional Court notes that the Court of BiH passed its decision on the lawsuit three days after the expiration of the time limit prescribed by Article 120, paragraph 7 of the Law on Foreigners, although the Court, according to

the Law on Foreigners, was obliged to consider the case as urgent. In view of the above, the Constitutional Court concludes that in the light of the circumstances of the present case, the speediness requirement under Article 5, paragraph 4 of the European Convention was not complied with. In addition, the Constitutional Court notes that the administrative authorities and the Court of BiH did not consider the appellant's arguments contesting the decision to place him under supervision in the Immigration Centre. Specifically, in the proceedings related to legal remedies sought by the appellant and G.K., the second-instance administrative authority and the ordinary court analysed only the allegations related to G.K. They considered only her situation. Relating all of the above with the case law of the European Court of Human Rights (see paragraph 32 of the present decision), the Constitutional Court concludes that Article 5, paragraph 4 of the European Convention has been also violated in the appellant's case.

36. In view of all the above, the Constitutional Court concludes that the contested decisions are in violation of the appellant's right to liberty and security of person under Article II(3)(d) of the Constitution of Bosnia and Herzegovina and Article 5 paragraph 1, subparagraph f) and paragraphs 2 and 4 of the European Convention.

37. The Constitutional Court recalls that in its previous case law it has taken the following position. Indeed, the Constitutional Court considered the time-based aspect of the decision on ordering or extending the detention measure, in a situation where it determines that the appellant's deprivation of liberty resulted in a violation of the right to liberty and security of person. However, at the time of the decision of the Constitutional Court, the deprivation of liberty based on the contested decisions had expired. In such a situation, it suffices to establish a violation of the constitutional right and to point to the omissions made in the proceedings to extend the detention measure (see, *inter alia*, Constitutional Court, Decision on Admissibility and Merits AP-4531/15 of 8 December 2015, paragraphs 68 and 69, with further references, available at www.ustavnisud.ba). Given that in the appellant's case, the supervision measure ordered by the contested decisions expired on 5 December 2022, the Constitutional Court establishes, only declaratively, a violation of the right to liberty and security of person under Article II(3)(d) of the Constitution of Bosnia and Herzegovina and Article 5 paragraph 1, subparagraph f) and paragraphs 2 and 4 of the European Convention. However, the Constitutional Court points out that the administrative authorities, or in fact, the court, in case of further extension of the supervision measure, have to carry out the procedure in compliance with the guarantees under Article II(3)(d) of the Constitution of Bosnia and Herzegovina and Article 5 of the European Convention.

Other rights

38. The appellant referred to a violation of the rights under Article II(3)(b) of the Constitution of Bosnia and Herzegovina and Article 3 of the European Convention and Article II(3)(f) of the Constitution of Bosnia and Herzegovina and Article 8 of the European Convention. The violation was found in respect of the right to liberty and security of person and the essence of the allegations of the violation of the aforementioned rights actually refers to the violation of the right to liberty and security of person. The Constitutional Court has already decided on that. Consequently, the Constitutional Court holds that there is no need to examine these allegations separately.

Compensation for non-pecuniary damage

39. The Constitutional Court notes that the supervision of the appellant in the Immigration Centre, which was the subject of the appeal, had ended. In addition, the Constitutional Court notes that, on 16 January 2023, he had left the Centre for the Admission and Accommodation of Asylum Seekers in Delijaš - Trnovo, where he was subsequently placed. It is also established that the appellant did not inform the competent authority about the change of address within the statutory time limit and, consequently, his current place of residence is unknown. Therefore, the Constitutional Court holds that the finding of the violation is sufficient satisfaction.

VII. Conclusion

40. The Constitutional Court concludes that there is a violation of the rights under Article II(3) (d) of the Constitution of Bosnia and Herzegovina and Article 5, paragraph 2 the European Convention. The violation was found since the appellant, as an unaccompanied minor, was not informed “without delay” in a language he understands about the reasons for deprivation of liberty and the content of the decisions made against him. In addition, the Constitutional Court concludes that there is a violation of the rights under Article II(3)(d) of the Constitution of Bosnia and Herzegovina and Article 5 paragraph 1, subparagraph f) and paragraph 4 of the European Convention. The violation was found as the administrative authorities and the ordinary court, deciding to place the appellant under supervision in the Immigration Centre, did not act in good faith, in the best interests of the minor and in accordance with the provisions of the Law on Foreigners. This is so as they failed to consider the appellant’s situation in the proceedings related to legal remedies. They failed to consider the fact that the appellant was an unaccompanied minor. The ordinary court made the decision upon the appellant’s lawsuit three days after the expiration of the time limit prescribed by Article 120, paragraph 7 of the Law on Foreigners, and the request for an extraordinary review of the judgment was decided four days after the appellant’s detention in the Immigration Centre had expired.

41. Pursuant to Article 59(1) and (2) of the Rules of the Constitutional Court, the Constitutional Court decided as stated in the enacting clause of this decision.

42. Pursuant to Article VI(5) of the Constitution of Bosnia and Herzegovina, the decisions of the Constitutional Court shall be final and binding.

Valerija Galić
President
Constitutional Court of Bosnia and Herzegovina