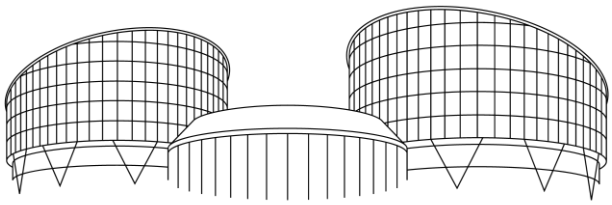

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

CASE OF SUSO MUSA v. MALTA

(Application no. 42337/12)

JUDGMENT

STRASBOURG

23 July 2013

FINAL

09/12/2013

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

In the case of Suso Musa v. Malta,

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

Ineta Ziemele, *President,*
David Thór Björgvinsson,
George Nicolaou,
Ledi Bianku,
Zdravka Kalaydjieva,
Vincent A. De Gaetano,
Paul Mahoney, *judges,*

and Fatoş Aracı, *Deputy Section Registrar,*

Having deliberated in private on 2 July 2013,

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

PROCEDURE

1. The case originated in an application (no. 42337/12) against the Republic of Malta lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by Mr Ibrahim Suso Musa ("the applicant"), on 4 July 2012.

2. The applicant was represented by Dr N. Falzon, a lawyer practising in Valletta. The Maltese Government ("the Government") were represented by their Agent, Dr P. Grech, Attorney General.

3. The applicant alleged that his detention had not been in accordance with Article 5 § 1 of the Convention and that he had not had an effective means of challenging its lawfulness as provided for by Article 5 § 4 of the Convention.

4. On 22 October 2012 the application was communicated to the Government. It was also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1).

5. Written observations were also received from the International Commission of Jurists, which had been given leave to intervene by the President of the Chamber (Article 36 § 2 of the Convention).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicant, allegedly a Sierra Leone national, was born in 1983 and was detained at Safi Barracks at the time of the introduction of the application.

A. Background to the case

7. The applicant entered Malta in an irregular manner by boat on 8 April 2011. Upon arrival, he was arrested by the police and presented with a document containing both a Return Decision and a Removal Order in view of his presence in Malta as a prohibited immigrant in terms of Article 5 of the Immigration Act (Chapter 217 of the Laws of Malta). He was defined as such owing to his entry into Malta in an irregular manner and in consideration of the fact that he did not have sufficient means to support himself. The Return Decision informed the applicant of the possibility to apply for a period of voluntary departure. The lower half of the same document contained a Removal Order based on the rejection of the applicant's request for a period of voluntary departure. It noted that the request had not been acceded to for the following reasons: the risk that the applicant might abscond; the fact that his application for legal stay was considered to be manifestly unfounded or fraudulent; and the fact that he was considered to be a threat to public policy, public security or national security (see paragraph 27 below).

8. In fact, the applicant never actually made a request for a voluntary departure period, since the rejection was, as explained above, automatically presented to him with the information regarding the possibility of making such a request. The applicant was never informed of the considerations leading to this decision or given any opportunity to present information, documentation and/or other evidence in support of a possible request for a voluntary departure period.

9. The applicant was further informed, through the joint Return Decision and Removal Order, of his right to appeal against the Decision and Order before the Immigration Appeals Board ("the IAB") within three working days. No further information was provided on the appeals procedure, including the availability of legal assistance; the latter assertion was denied by the Government.

10. On the basis of the Return Decision and Removal Order, and in accordance with the Immigration Act, the applicant was detained in Safi Barracks.

B. Asylum proceedings

11. On 14 April 2011, whilst in Safi Barracks, the applicant submitted the Preliminary Questionnaire, the first stage of his application for asylum in Malta.

12. On 31 December 2011 the applicant's asylum application was rejected by the Office of the Refugee Commissioner, who considered that the claim as presented failed to meet the criteria for recognition of refugee status.

13. On 24 January 2012 the applicant appealed to the Refugee Appeals Board. The parties presented submissions on 29 March 2012.

14. On 2 April 2012 the Refugee Appeals Board rejected the applicant's appeal, thereby definitively closing the asylum procedure almost twelve months after his arrival in Malta.

C. Proceedings challenging the legality of detention

15. In the meantime, pending the above asylum proceedings, the applicant lodged an application with the IAB on 28 June 2011 in order to challenge the legality of his detention in terms of the Immigration Act. The application was based on Article 5 § 1 of the Convention and Regulation 11(10) of the Common Standards and Procedures for Returning Illegally Staying Third-Country Nationals Regulations (Legal Notice 81 of 2011, hereinafter "LN 81") (see "Relevant domestic law" below). In his application the applicant argued that the decision to detain him, as well as his ongoing detention, were contrary to the law. With regard to the original decision to detain him, the applicant argued that, contrary to the requirements of Regulation 11(8) of LN 81, when he was presented with the Return Decision and Removal Order no assessment had been made as to the possibility of exploring "other sufficient and less coercive measures". Furthermore, in deciding to detain him, the responsible authorities had decided *a priori* and without an individual assessment of his situation that he presented a risk of absconding and that he was avoiding or hindering the return or removal procedure. Moreover, the decision was taken without the applicant having had an opportunity to make a request for voluntary departure. The applicant further argued that his ongoing detention was also contrary to the law because once he had presented his asylum application in April 2011, return procedures could not be commenced or continued in his regard under Regulation 12 of the Procedural Standards in Examining Applications for Refugee Status Regulations (Legal Notice 243 of 2008, hereinafter "LN 243") (see "Relevant domestic law" below).

16. On 27 September 2011 the Immigration Police responded to the applicant's application before the IAB; this was followed by further submissions by the applicant. On 22 November 2011 the IAB issued a

decree requesting the parties to submit further information on specific queries raised by it. The applicant made further submissions highlighting the delay that was being created in the proceedings, and final submissions were also made by the Immigration Police.

17. On 5 July 2012, more than a year after the applicant's challenge, the IAB rejected his application. It noted that, despite the fact that, according to Regulation 11(1) of LN 81, Part IV of those Regulations did not apply to persons who were apprehended or intercepted by the competent authorities in connection with the irregular crossing by sea or air of the external border of Malta and who did not subsequently obtain an authorisation or a right to stay in Malta, the applicant had obtained the right to stay ("*joqgħod*") in Malta on lodging his application for asylum. Indeed it had been correct to rely on Regulation 12(1) of LN 243, which stated that an individual had the right to enter or remain on the island pending a decision on his asylum request. In the present case, that situation had applied to the applicant when he instituted his challenge before the IAB. In the applicant's case, had the asylum request still been pending, Section IV of LN 81 would in fact have been applicable, in particular in so far as an individual could not be kept in detention unless return proceedings were under way or he or she presented a risk of absconding. However, the situation had changed, given that on 2 April 2012 the applicant's asylum request had been rejected by a final decision. The latter implied that Section IV of LN 81 was no longer applicable to the applicant and thus the IAB could no longer decide on the request in terms of Regulation 11(8) of LN 81. Moreover, the applicant was not arguing the illegality of his detention on the basis of its length. In any event the IAB was not competent to decide whether there had been a breach of Article 5 of the Convention.

D. Criminal proceedings

18. While the above procedures were pending, on 16 August 2011, a riot broke out at Safi Barracks, resulting in a number of detained migrants, police officers and soldiers of the Armed Forces of Malta being injured. That same day, twenty-three migrants were arrested and charged in court in relation to the riot. The applicant was amongst the persons arrested and, together with the others, was accused of a number of offences including damage to private property, use of violence against public officers, refusal to obey lawful orders and breach of public peace and good order. The arrested men, including the applicant, were taken to Corradino Correctional Facility to await the outcome of the criminal proceedings.

19. The following day, on 17 August 2011, the Court of Magistrates confirmed that the arrest of the migrants, including the applicant, was justified and in accordance with the law. They were remanded in custody.

20. On 30 January 2012 the Court of Magistrates granted the applicant bail, under the terms of which he was released from Corradino Correctional Facility and returned to Safi Barracks.

E. Latest information

21. The applicant was released from detention in Safi Barracks on 21 March 2013, following 546 days of detention in an immigration context. The criminal proceedings in relation to the riot at Safi Barracks were still pending.

22. On an unspecified date (around January 2013), in an effort to make arrangements for the deportation of the applicant, the authorities interviewed him in the presence of a representative from the Consulate of the Republic of Sierra Leone. The latter, by a communication of 11 February 2012, informed the Maltese authorities that the applicant did not hail from Sierra Leone and that they could therefore not provide further assistance.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. The Immigration Act

23. Immigration and asylum procedures are mainly regulated by the Immigration Act ("the Act"), Chapter 217 of the Laws of Malta. Article 5 of the Act defines the term "prohibited immigrant" and, in so far as relevant, reads as follows:

> "(1) Any person, other than one having the right of entry, or of entry and residence, or of movement or transit under the preceding Parts, may be refused entry, and if he lands or is in Malta without leave from the Principal Immigration Officer, he shall be a prohibited immigrant.
>
> (2) Notwithstanding that he has landed or is in Malta with the leave of the Principal Immigration Officer or that he was granted a residence permit, a person shall, unless he is exempted under this Act from any of the following conditions or special rules applicable to him under the foregoing provisions of this Act, be a prohibited immigrant also -
>
> (*a*) if he is unable to show that he has the means of supporting himself and his dependants (if any) or if he or any of his dependants is likely to become a charge on the public funds; or ..."

24. Articles 6 and 9 regarding the powers of the Principal Immigration Officer in granting entry, and the relevant procedure, read as follows:

Article 6

"(1) Without prejudice to any rights arising from the preceding Parts, for the purposes of this Act, the Principal Immigration Officer may –

...

(b) grant leave to land or leave to land and remain to any other person arriving in Malta, under such conditions and for such period as the Principal Immigration Officer may deem proper to establish;

..."

Article 9

"(1) Without prejudice to any regulations made under Part III of this Act, leave to land or to land and remain in Malta shall be signified either by a written permit delivered to, or by an appropriate endorsement on the passport of, the person concerned, but the conditions attached to such leave may be contained in a separate document delivered to such person."

25. Article 10 of the Act regarding temporary detention reads, in so far as relevant, as follows:

"(1) Where leave to land is refused to any person arriving in Malta on an aircraft ...

(2) Where leave to land is refused to any person arriving in Malta by any other means, such person at his own request may, with the leave of the Principal Immigration Officer, be placed temporarily on shore and detained in some place approved by the Minister and notified by notice in the Gazette:

Provided that he shall be returned to the vessel by which he is to leave Malta immediately that he makes a request to that effect or that the Principal Immigration Officer so directs, whichever is the earlier.

(3) Any person, while he is detained under sub-article (1) or (2), shall be deemed to be in legal custody and not to have landed."

26. Article 14 of the Act, in so far as relevant, reads as follows:

"(1) If any person is considered by the Principal Immigration Officer to be liable to removal as a prohibited immigrant under any of the provisions of article 5, the said Officer may issue a removal order against such person who shall have a right to appeal against such order in accordance with the provisions of article 25A:...

(2) Upon such order being made, such person against whom such order is made, shall be detained in custody until he is removed from Malta.

Provided that if the person in respect of whom an expulsion order has been made is subject to criminal proceedings for a crime punishable with imprisonment or is serving a sentence of imprisonment, the Minister may give such directions as to whether the whole or part of the sentence is to be served before the expulsion of such person from Malta, and, in default of such directions, such person shall be removed after completion of the sentence"

27. In practice, on being apprehended prohibited immigrants are issued with a Return Decision and a Removal Order (on the same sheet of paper), in accordance with Article 14 of the Act. The document consists of a standard-format text which, in the applicant's case, read as follows:

RETURN DECISION

"It transpires that you are a prohibited immigrant by virtue of Article 5 of the Immigration Act, Chapter 217, because you

entered Malta illegally and have no means of subsistence

Therefore, by virtue of the powers vested in me as the Principal Immigration Officer by Regulation 3 of Legal Notice 81 of 2011, I am issuing this return decision and therefore terminating your stay. You have the right to apply for an appropriate period of voluntary departure

REMOVAL ORDER

This Return Decision is accompanied by a Removal Order in accordance with the same regulation since the request for a period of voluntary departure has not been acceded to for the following reasons,

a) there is a risk that you may abscond

b) your application for legal stay is considered as manifestly unfounded or fraudulent,

c) you are considered to be a threat to public policy, public security or national security

By virtue of regulation 7 of the above mentioned Legal Notice an entry ban will be issued against you and this shall remain valid for a period of five years and is subject to renewal

You have the right to appeal from this Decision/Order/Entry Ban to the Immigration Appeals Board within three working days at the Board's Registry, Fort St Elmo, Valletta"

28. An "irregular" immigrant is entitled to apply for recognition of refugee status by means of an application (in the form of a Preliminary Questionnaire) to the Commissioner for Refugees within two months of arrival. While the application is being processed, in accordance with Maltese policy, the asylum seeker will remain in detention for a period of up to eighteen months, which may be extended if, on rejection of the application, he or she refuses to cooperate in respect of his or her repatriation.

29. Article 25A of the Act concerns the appeals and applications (lodged by virtue of the provisions of the Act or regulations made thereunder, or by virtue of any other law) to be heard and determined by the Immigration Appeals Board ("the Board"). Article 25A reads, in so far as relevant, as follows:

"(5) Any person aggrieved by any decision of the competent authority under any regulations made under Part III, or in virtue of article 7 [residence permits], article 14 [removal orders] or article 15 [responsibility of carriers] may enter an appeal against such decision and the Board shall have jurisdiction to hear and determine such appeals.

(6) During the course of any proceedings before it, the Board, may, even on a verbal request, grant provisional release to any person who is arrested or detained and is a party to proceedings before it, under such terms and conditions as it may deem fit, and

the provisions of Title IV of Part II of Book Second of the Criminal Code shall, *mutatis mutandis* apply to such request.

(7) Any appeal has to be filed in the Registry of the Board within three working days from the decision subject to appeal: ...

(8) The decisions of the Board shall be final except with respect to points of law decided by the Board regarding decisions affecting persons as are mentioned in Part III, from which an appeal shall lie within ten days to the Court of Appeal (Inferior Jurisdiction).

(9) The Board shall also have jurisdiction to hear and determine applications made by persons in custody in virtue only of a deportation or removal order to be released from custody pending the determination of any application under the Refugees Act or otherwise pending their deportation in accordance with the following subarticles of this article.

(10) The Board shall only grant release from custody under subarticle (9) where in its opinion the continued detention of such person is taking into account all the circumstances of the case, unreasonable as regards duration or because there is no reasonable prospect of deportation within a reasonable time:

Provided that where a person, whose application for protection under the Refugees Act has been refused by a final decision, does not co-operate with the Principal Immigration Officer with respect to his repatriation to his country of origin or to any other country which has accepted to receive him, the Board may refuse to order that person's release.

(11) The Board shall not grant such release in the following cases:

(a) when the identity of the applicant including his nationality has yet to be verified, in particular where the applicant has destroyed his travel or identification documents or used fraudulent documents in order to mislead the authorities;

(b) when elements on which any claim by applicant under the Refugees Act is based, have to be determined, where the determination thereof cannot be achieved in the absence of detention;

(c) where the release of the applicant could pose a threat to public security or public order.

(12) A person who has been released under the provisions of subarticles (9) to (11) may, where the Principal Immigration Officer is satisfied that there exists a reasonable prospect of deportation or that such person is not co-operating with the Principal Immigration Officer with respect to his repatriation to his country of origin or to another country which has accepted to receive him, and no proceedings under the Refugees Act are pending, be again taken into custody pending his removal from Malta.

(13) It shall be a condition of any release under subarticles (9) to (12) that the person so released shall periodically (and in no case less often than once every week) report to the immigration authorities at such intervals as the Board may determine."

B. Relevant subsidiary legislation

30. Part IV of Subsidiary Legislation 217.12, Common Standards and Procedures for Returning Illegally Staying Third-Country Nationals

Regulations, Legal Notice 81 of 2011 (transposing Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in member States for returning illegally staying third-country nationals) reads, in so far as relevant, as follows:

Regulation 11

"(1) The provisions of Part IV shall not apply to third country nationals who are subject to a refusal of entry in accordance with Article 13 of the Schengen Borders Code or who are apprehended or intercepted by the competent authorities in connection with the irregular crossing by sea or air of the external border of Malta and who have not subsequently obtained an authorisation or a right to stay in Malta.

(2) A return decision, an entry-ban decision and a removal order shall be issued in writing and shall contain reasons in fact and in law and information on legal remedies:

Provided that the reasons in fact may be given in a restrictive way where the withholding of information is regulated by law, in particular where the disclosure of information endangers national security, public policy, and the prevention, detection, investigation and prosecution of criminal offences.

(3) A return decision shall be issued in a standard form and general information as regards such form shall be given in at least five languages which third-country nationals may reasonably be supposed to understand.

(4) The Board shall review decisions related to return on application by the third-country national as referred to in subregulation (2), and may temporarily suspend their enforcement.

(5) For the purposes of sub-regulation (4) a legal adviser shall be allowed to assist the third-country national and, where entitled to, free legal aid shall be provided to the third-country national.

(6) The Principal Immigration Officer shall provide, upon request, a written or oral translation of the main elements of a return decision and information on the legal remedies in a language the third-country national may reasonably be supposed to understand. (...)

(8) Where a third-country national is the subject of return procedures, unless other sufficient and less coercive measures are applicable, the Principal Immigration Officer may only keep him in detention in order to carry out the return and removal procedure, in particular where:

(*a*) there is a risk of absconding; or

(*b*) the third-country national avoids or hinders the return or removal procedure:

Provided that the detention shall be for a short period and shall subsist as long as the removal procedure is in progress and is executed with due diligence.

(9) Detention shall be a consequence of the removal order issued by the Principal Immigration Officer and it shall contain reasons in fact and in law.

(10) The third-country national subject to the provisions of subregulation (8) shall be entitled to institute proceedings before the Board to contest the lawfulness of detention and such proceedings shall be subject to a speedy judicial review.

(11) Where the third-country national is entitled to institute proceedings as provided in sub-regulation (10) he shall immediately be informed about such proceedings.

(12) The third country-national shall be immediately released from detention where in the opinion of the Board such detention is not lawful."

31. Regulation 12 of the Procedural Standards in Examining Applications for Refugee Status Regulations (Legal Notice 243 of 2008), Subsidiary Legislation 420.07, provides, in so far as relevant, as follows:

"(1) Notwithstanding the provisions of any other law to the contrary, and except where a subsequent application will not be further examined, or where an applicant is to be surrendered or extradited as appropriate to another Member State pursuant to obligations in accordance with a European Arrest Warrant or otherwise, or to a third country or to international criminal courts or tribunals, an applicant shall not be removed from Malta before his application is finally determined and such applicant shall be allowed to enter or remain in Malta pending a final decision of his application.

(2) An applicant for asylum shall -

(a) not seek to enter employment or carry on business unless with the consent of the Minister;

(b) unless he is in custody, reside and remain in the places which may be indicated by the Minister;

(c) report at specified intervals to the immigration authorities as indicated by the Minister;

(d) hand over all documents in his possession;

(e) be subject to search and his oral statements may be recorded subject to the applicant being previously informed thereof;

(f) be photographed and have his fingerprints taken:"

32. Subsidiary legislation 12.09, namely the Court Practice and Procedure and Good Order Rules, makes specific reference to constitutional cases. Rule 6 thereof reads as follows:

"Once a case has been set down for hearing the court shall ensure that, consistently with the due and proper administration of justice, the hearing and disposal of the case shall be expeditious, and the hearing of the cause shall as far as possible continue to be heard on consecutive days, and, where this is not possible, on dates close to one another."

C. Relevant international texts

33. The following are extracts of the relevant international reports and guidelines or recommendations relied on by the parties:

1. *Concluding observations of the UN Committee on the Elimination of Racial Discrimination Malta, l4 September 2011, paragraphs 13-14;*

"13. While noting the large inflow of immigrants and efforts made by the State party to dealing therewith, the Committee is concerned about reports that their legal safeguards are not always guaranteed in practice. The Committee is also concerned

about the detention and living conditions of immigrants in irregular situations in detention centres, in particular of women and families with children (art. 5).

14. The Committee is concerned about the recurrence of riots (2005, 2008 and 2011) by detained immigrants against their detention conditions, for example at Safi Barracks, and about the reported excessive use of force to counter the riots."

2. Amnesty International Report 2012: The State of the World's Human Rights, 2012, page 231;

"During 2011, more than 1,500 people arrived by sea from either the Middle East or North Africa, returning to the levels seen in 2009. Immigration detention continued to be mandatory for anyone whom the authorities deemed to be a "prohibited immigrant", and was often prolonged for up to 18 months.

According to reports, conditions in both detention and open reception centres worsened as a consequence of the number of new arrivals, increasing the impact on detainees' mental and physical health.

In March, the EU's 2008 "Returns Directive" was transposed into domestic legislation. The Directive provided common standards and procedures in EU member states for detaining and returning people who stay in a country illegally. However, the domestic legislation excluded those who had been refused entry – or had entered Malta irregularly – from enjoying these minimum safeguards. The Directive would therefore not apply to the vast majority of those it was meant to protect."

3. Report by Thomas Hammarberg, Commissioner for Human Rights of the Council of Europe following his visit to Malta from 23 to 25 March 2011, 9 June 2011, paragraphs 19-20;

"19. At the end of their detention, migrants, including refugees, beneficiaries of subsidiary protection, asylum seekers and persons whose asylum claims have been rejected, are accommodated in open centres around Malta. Conditions prevailing in these centres vary greatly, with adequate arrangements reported in the smaller centres that cater for some vulnerable groups, such as families with children or unaccompanied minors, and far more difficult conditions in the bigger centres. As mentioned above, when the Commissioner's visit took place the number of irregular arrivals had been very low for over 18 months and the 2011 arrivals from Libya had not yet started. As a result, the vast majority of migrants had moved out of the detention centres and were living in open centres, with the respective populations numbering at 49 and 2 231 respectively. The Commissioner visited the detention centre in Safi, and three open centres - the Hal-Far tent village, the Hangar Open Centre in Hal-Far and Marsa.

20. At the time of the visit the material conditions in the Safi detention centre, where all 49 of the migrant detainees were kept, appeared to be considerably better than those in open centres. Although a number of issues remained to be addressed, including those regarding the detainees' access to a diversified diet and water other than from the tap, the premises visited, including the dormitories, toilets and showers had been recently refurbished. The only female detainee of the centre was accommodated in a separate facility. The Commissioner wishes to note however, that in accordance with the mandatory detention policy referred to above, most of the persons (approximately 1 100) who have arrived from Libya since his visit have been placed in detention centres. This is naturally bound to have a significant impact on the adequacy of the conditions in these centres."

4. Report to the Maltese Government on the visit to Malta carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 19 to 26 May 2008, 17 February 2011).

"52. In accordance with Maltese policy on administrative detention of foreigners under aliens' legislation, all foreigners arriving illegally in Malta are still detained for prolonged periods, in the case of asylum seekers until such time as their request for refugee status is determined (normally 12 months) and for irregular immigrants for up to a maximum of 18 months. In practice, however, some may spend even longer periods in detention. The only declared exceptions to this general rule concern persons deemed to be vulnerable because of their age and/or physical condition, unaccompanied minors and pregnant women ...

53. The situation found in the detention centres visited by the delegation had not substantially improved since the CPT's previous visit in 2005. Indeed, many of the problems identified in the report on that visit still remain unresolved. In several parts of the detention centres, the combined effects of prolonged periods of detention in poor, if not very poor, material conditions, with a total absence of purposeful activities, not to mention other factors, could well be considered to amount to inhuman and degrading treatment.

a. material conditions

...

60. At Safi Barracks Detention Centre, which at the time of the visit accommodated a total of 507 immigration detainees, living conditions for detainees had slightly improved in comparison to the situation observed by the CPT in 2005.

At Warehouse No. 1, living conditions were less cramped than when last visited by the CPT, and the toilet facilities were new and clean. That said, the Committee has strong reservations as regards the use of converted warehouses to accommodate detainees. This should only be seen as a temporary - and short term - solution.

B Block has been refurbished since the CPT's last visit. The sanitary facilities have been renovated and a large exercise area is at the disposal of the immigration detainees. However, conditions were still difficult in certain rooms, where immigration detainees were sleeping on mattresses on the floor.

Surprisingly, poor conditions of detention were observed in the new C Block. Living conditions were cramped, access to natural light was insufficient and ventilation very poor. Further, access to running water was limited, as well as access to hot water, the latter being unavailable for prolonged periods.

In addition, the internal regulation in force at Safi Barracks provided for the compulsory closing of the doors in B and C Blocks every afternoon at 5 p.m., thereby preventing access to the outdoor yard. This exacerbated significantly the already far from ideal living conditions in these blocks."

5. UNHCR Guidelines on Applicable Criteria and Standards on the Detention of Asylum Seekers and Alternatives to Detention (2012) – guideline 9.1 paragraph 49;

"Because of their experience of seeking asylum, and the often traumatic event precipitating flight, asylum seekers may present with psychological illness, trauma,

depression, anxiety, aggression and other physical, psychological and emotional consequences. Such factors need to be weighed in the assessment of the necessity to detain (see Guideline 4). Victims of torture and other serious physical, psychological or sexual violence also need special attention and should generally not be detained."

6. Recommendation Rec(2003)5 of the Committee of Ministers to member states on measures of detention of asylum seekers (Adopted by the Committee of Ministers on 16 April 2003 at the 837th meeting of the Ministers' Deputies) – point 3 of the general provisions;

"The aim of detention is not to penalise asylum seekers. Measures of detention of asylum seekers may be resorted to only in the following situations:

– when their identity, including nationality, has in case of doubt to be verified, in particular when asylum seekers have destroyed their travel or identity documents or used fraudulent documents in order to mislead the authorities of the host state;

– when elements on which the asylum claim is based have to be determined which, in the absence of detention, could not be obtained;

– when a decision needs to be taken on their right to enter the territory of the state concerned, or

– when protection of national security and public order so requires."

7. The Council of Europe's Twenty Guidelines on Forced Return – CM2005(40) - Guideline 6;

"A person may only be deprived of his/her liberty with a view to ensuring that a removal order will be executed, if this is in accordance with a procedure prescribed by law and if, after a careful examination of the necessity of deprivation of liberty in each individual case, the authorities of the host state have concluded that compliance with the removal order cannot be ensured as effectively by resorting to non-custodial measures such as supervision systems, the requirement to report regularly to the authorities, bail or other guarantee systems."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 5 § 4 OF THE CONVENTION

34. The applicant complained that the Maltese legal system had not provided him with a speedy and effective remedy, contrary to Article 5 § 4 of the Convention. Despite slight changes in respect of the Immigration Appeals Board ("IAB") following the *Louled Massoud v. Malta* judgment (application no. 24340/08, 27 July 2010), it had taken more than a year to determine his application. Any other remedies had already been found to be inadequate by the Court in the *Louled Massoud* judgment. The applicant relied on Article 5 § 4 of the Convention, which reads as follows:

> "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."

35. The Government contested that argument.

A. Admissibility

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

B. Merits

1. The parties' submissions

(a) The applicant

37. The applicant submitted that, as the Court had held in *Louled Massoud*, there was no effective domestic remedy for the purposes of Article 5 § 4 which he could undertake in order to challenge the lawfulness of his detention. Indeed, although the applicant had attempted a remedy, it had taken more than a year for the IAB to determine his claim.

38. As to the constitutional redress proceedings, and particularly the request for hearing with urgency, the applicant noted that the two cases cited by the Government had been in the context of the enforcement of a return order concerning a child following wrongful removal under the relevant Maltese law incorporating the Hague Convention on the International Aspects of Child Abduction, and thus represented exceptional situations. Moreover, the Hague Convention explicitly mentioned a six week time-limit within which the courts must reach a decision. The applicant considered that it was uncertain whether such a request for hearing with urgency would be effective in other circumstances. He made reference to the application in the case of *Tafarra Besabe vs Commissioner of Police et al* (27/2007), which had been lodged in 2007 with a request to be treated with urgency and in April 2013 (the date of writing) was still pending. According to the applicant, despite the rules regarding court practice and procedure mentioned by the Government, it transpired from the Maltese judgments database that constitutional applications which ended with a judgment on the merits (as opposed to those struck out or withdrawn) generally required over a year to be concluded. The applicant submitted that in 2011 approximately eighty applications had been lodged before the courts exercising constitutional jurisdiction and only fourteen had been decided at first instance in that same year; a further thirty-three were still pending at first instance at the time of writing. One case had been decided on appeal in

that same year, nine had been decided on appeal in 2012, ten in 2013, and eight were still pending on appeal. The statistics (submitted to the Court) were even worse for applications lodged in 2012. These clearly showed that as a rule constitutional redress proceedings were not determined within days. Indeed, according to the 2013 EU Justice Scoreboard, the Maltese judicial system was one of the systems with the longest delays among the Member States. The two cases mentioned by the Government underlined the limited applicability of the urgent procedure before the courts exercising constitutional jurisdiction, which were the final level of judicial proceedings. Moreover, given that the courts exercising constitutional jurisdiction reviewed points of law, they rarely entered into a detailed examination of the facts, which would have been done by the courts below; thus, it could not be said that the whole judicial process was determined during the period of weeks when the case was being heard before them under the urgent procedure.

39. Moreover, in the present case, before lodging a complaint before the courts exercising constitutional jurisdiction, the applicant had to exhaust ordinary remedies, an action he had undertaken by instituting proceedings before the IAB. These, however, had lasted for over a year, a delay which itself was not compatible with the Convention.

40. Lastly, the applicant submitted that, as a migrant, he had access to the constitutional courts in theory but not in practice. Although he had the right to request legal aid, no legal-aid lawyers regularly visited immigration detention centres to render their services or make known their availability. Nor was any explanation given to persons in the same situation as the applicant's regarding their legal rights and the applicable procedures. The applicant's only chance of instituting such proceedings was dependent on a small number of *pro bono* NGO lawyers.

41. As to the Government's submissions in respect of a bail application, the applicant submitted that the Government had failed to explain in what way this procedure was accessible to him, noting particularly that bail was usually granted in the course of appeals against removal orders and return decisions. In any event the granting of bail was subject to conditions such as the deposit of an amount usually in the region of EUR 1,000 and a guarantor who would provide subsistence and accommodation, conditions which were hardly ever met by immigrants reaching Malta by boat. Moreover, IAB practice showed that such bail was granted exclusively to persons having overstayed their visa to remain in Malta. Furthermore, a bail application was not intended to assess the legality of detention or to provide a remedy in the event that a violation was upheld.

(b) The Government

42. The Government submitted in particular that the applicant could have sought judicial review in respect of the lawfulness of his detention by

instituting constitutional redress proceedings before the domestic courts, which had wide-ranging powers and could redress any Convention violation. As to the length of such proceedings the Government submitted that a mechanism was in place for such proceedings to be treated expeditiously. They firstly made reference to subsidiary legislation 12.09 namely, the Court Practice and Procedure and Good Order Rules, which emphasised the need for speedy resolution of such matters (see "Relevant domestic law" above). Secondly, they noted that it was possible for an applicant to request that a case be treated, heard and concluded with urgency. The Government submitted two examples: *Richard John Bridge vs Attorney General*, where the case had been decided by two levels of jurisdiction over approximately a month and a half (from 6 July 2012 to 24 August 2012), and a second case, *Michael Caruana vs Attorney General*, which had been brought on 2 August and decided on 14 August 2012 (no appeal having been lodged), in the context of Hague Convention proceedings. In their further observations at a later stage in the case, the Government submitted a further two examples, namely *Stacy Chircop vs Attorney General* (4/2013) concerning a breach of fair-trial rights in ongoing criminal proceedings, which had been lodged on 22 January 2013 and decided at first instance on 8 February 2013 (no appeal lodged), and *Jonathan Attard vs the Commisioner of Police and the Attorney General in representation of the Government* (13/2013), concerning complaints under Articles 5 and 6 of the Convention, which had been lodged on 14 February 2013, had been decided at first instance on 1 April 2013 and was (in May 2013) pending on appeal before the Constitutional Court.

43. The Government further noted that the statistical data submitted by the applicant did not reflect the subject matter and the complexity of the cases, nor did they refer to cases where hearing with urgency had been requested and granted. Similarly, in relation to the reference to the *Tefarra Besabe* case, the applicant had not proved that a request for hearing with urgency had been lodged in that case. The Government considered that delays were exceptional and not the rule, and that the EU Justice Scoreboard should be ignored by the Court as there were no guarantees of its accuracy; moreover, it had not referred to constitutional cases. It was also wrong to consider that constitutional proceedings did not assess the facts as this was often the case, given that the complaints differed from those debated before the ordinary courts.

44. The Government strongly objected to the fact that the Court was allowing applicants in cases involving irregular immigrants to circumvent domestic remedies. They considered that this could only be done when there were no effective remedies, which was in their view clearly not the case, given the examples above. It further noted that in *Louled Massoud* the Court had erred in finding that constitutional redress proceedings were ineffective. They considered that the Court had reached that conclusion on the basis of

incomplete information about the workings of that system with regard to requests for hearing with urgency. They requested the Court to act in accordance with the principle of subsidiarity and to let the domestic courts asses the evidence, allowing the Government to cross-examine witnesses.

45. The Government further noted that legal aid was provided to prohibited immigrants at the appellate stage of their asylum application, as well as for the purposes of criminal proceedings and constitutional redress proceedings, together with appropriate facilities where they could meet such lawyers. Moreover, there was unlimited access to legal assistance provided by NGOs. The Government alleged that, had the applicant asked the detention centre staff for the services of a lawyer, he would have been provided with the services of a legal-aid lawyer. To substantiate their claim the Government submitted one example where a legal-aid lawyer had instituted legal proceedings on behalf of a person in detention (*Mourad Mabrouk vs Ministry of Justice and Home Affairs* (39/2008)).

46. Albeit not under their submissions related to Article 5 § 4, in their objection of non-exhaustion of domestic remedies in respect of the applicant's complaint under Article 5 § 1, the Government submitted that the applicant could have lodged an application for bail under Article 25A (6) of the Act. While such a remedy was usually used in the context of challenges to removal orders, Article 25A (9) did not exclude the possibility that such an application could be made in other circumstances. The Government considered that Article 25A (10) addressed the applicant's complaint and although sub-article (11) provided for exceptions, release could not be excluded completely – in particular, the prospects of success were greater if the applicant's identity had been established. Again, such a procedure could have been accompanied by a request for hearing with urgency. The Government considered that what the applicant sought was his release and that the remedy in question could have provided that.

47. Given that the remedies were adequate and accessible and would have had high prospects of success had the complaints been justified, the Government considered that there had been no violation of the provision in question.

(c) The third-party intervener

48. The International Commission of Jurists ("ICJ"), in their report (see paragraph 81 et seq. below), expressed concern at allegations heard from detainees that public lawyers did not always provide effective representation to detained migrants. It was suggested that lawyers sometimes spoke only very briefly to detainees and did not, or did not have time to, advise them in detail or gather sufficient information on their cases.

49. Furthermore, in the case of *Louled Massoud* this Court had found that the IAB system did not constitute an effective remedy guaranteeing the detainee's right under Article 5 § 4 to challenge his or her detention. The

ICJ report considered that there was a need for substantial reform of the system of immigration appeals, by, among other things, entrusting to a court of law the task of reviewing in full the decisions taken by the executive immigration authorities or, at least, reviewing in full the IAB's decision, with automatic suspensive effect on the execution of the expulsion.

1. The Court's assessment

(a) General principles

50. Under Article 5 § 4, an arrested or detained person is entitled to bring proceedings for a review by a court bearing upon the procedural and substantive conditions which are essential for the "lawfulness" of his or her detention (see *Amie and Others v. Bulgaria*, no. 58149/08, § 80, 12 February 2013). The notion of "lawfulness" under Article 5 § 4 of the Convention has the same meaning as in Article 5 § 1, so that the arrested or detained person is entitled to a review of the "lawfulness" of his detention in the light not only of the requirements of domestic law, but also of the Convention, the general principles embodied therein and the aim of the restrictions permitted by Article 5 § 1 (see *E. v. Norway*, 29 August 1990, § 50, Series A no. 181, *Louled Massoud v. Malta*, no. 24340/08, § 39, 27 July 2010; and *Rahmani and Dineva v. Bulgaria*, no. 20116/08, § 75, 10 May 2012). Article 5 § 4 does not guarantee a right to judicial review of such breadth as to empower the court, on all aspects of the case including questions of pure expediency, to substitute its own discretion for that of the decision-making authority. The review should, however, be wide enough to bear on those conditions which are essential for the lawful detention of a person according to Article 5 § 1 (see *S.D. v. Greece*, no. 53541/07, § 72, 11 June 2009; and *Popov v. France*, nos. 39472/07 and 39474/07, § 94, 19 January 2012).

51. According to the Court's case-law, Article 5 § 4 refers to domestic remedies that are sufficiently certain, otherwise the requirements of accessibility and effectiveness are not fulfilled. The remedies must be made available during a person's detention with a view to that person obtaining a speedy judicial review of the lawfulness of his or her detention capable of leading, where appropriate, to his or her release (see *Kadem v. Malta*, no. 55263/00, § 41, 9 January 2003 and *Raza v. Bulgaria*, no. 31465/08, § 76, 11 February 2010). Indeed, Article 5 § 4, in guaranteeing arrested or detained persons a right to bring proceedings to challenge the lawfulness of their detention, also proclaims their right, following the institution of such proceedings, to a speedy judicial decision concerning the lawfulness of that detention (see *Musial v. Poland* [GC], no. 24557/94, § 43, ECHR 1999-II).

(b) Application of these principles to the present case

52. The Court notes that the courts exercising constitutional jurisdiction in the Maltese legal system would have been competent to examine the lawfulness of the applicant's detention in the light of the Convention. However, the Court has also held on numerous occasions that constitutional proceedings in Malta are rather cumbersome for Article 5 § 4 purposes, and that lodging a constitutional application does not ensure a speedy review of the lawfulness of an applicant's detention (see *Sabeur Ben Ali v. Malta*, no. 35892/97, § 40, 29 June 2000; *Kadem*, cited above § 53; *Stephens v. Malta (no. 2)*, no. 33740/06, § 90, 21 April 2009; and *Louled Massoud*, cited above, § 45). Where an individual's personal liberty is at stake, the Court has very strict standards concerning the State's compliance with the requirement of a speedy review of the lawfulness of detention (see, for example, *Kadem*, cited above,§§ 44-45; *Rehbock v. Slovenia* (no. 29462/95, § 82-86, ECHR 2000-XII, where the Court considered periods of seventeen and twenty-six days excessive for deciding on the lawfulness of the applicant's detention); and *Mamedova v. Russia* (no. 7064/05, § 96, 1 June 2006, where the length of appeal proceedings lasting, *inter alia*, twenty-six days, was found to be in breach of the "speediness" requirement)).

53. The Court notes that the first two cases submitted by the Government refer to the specific context of Hague Convention proceedings, where, as also noted by the applicant, the courts are bound by a strict time-limit established by law. The other two cases mentioned in their supplementary observations are more recent. One of them can be said to have been dealt with speedily, although it is unclear for what reason this was so, but in any case the Court notes that in that case no appeal had been lodged. On the other hand the second case (concerning Article 5 § 3) was still pending on appeal three months after it was lodged. Consequently, the only example submitted by the Government which could be of some relevance, bearing in mind the subject matter, itself fails to fulfil the speediness criterion required by Article 5 § 4.

54. Moreover, this has to be seen against the background of the statistics supplied by the applicant. While it is true that those statistics failed to mention whether a request for hearing with urgency had been granted in any of the cases concerned, the Government failed to shed light on that matter. Likewise, the Government did not submit any details as to how often requests for hearing with urgency were granted, nor did they argue that requests for hearing with urgency in proceedings regarding the lawfulness of detention were, as a rule, acceded to by the courts exercising constitutional jurisdiction. It cannot be ignored that the example submitted by the applicant concerning the lawfulness of immigrants' detention and the conditions of such detention (as apparent from public information) was still pending six years after it was lodged. Against this background, little

comfort can be found in the subsidiary legislation cited by the Government, which states that constitutional cases "shall be expeditious".

55. It is clear from the above that the Government have not submitted any information or case-law capable of casting doubt on the Court's prior conclusions as to the effectiveness of this remedy. In these circumstances, the Court remains of the view that, in the Maltese system, pursuing a constitutional application would not have provided the applicant with a speedy review of the lawfulness of his detention.

56. As to the Government's submission that the applicant could have obtained release by lodging an application for release (bail) under Article 25A of the Act, the Court sets out the following considerations.

The Government made reference to both sub-article (6) and sub-article (9), seemingly considering them as one remedy to which sub-articles (10) and (11) applied. On reading the law the Court observes that it is unclear whether the provisions are independent: the first, sub-article (6), refers to provisional release and the second, sub-article (9), refers simply to "release from custody". While it is clear that sub-articles (10)-(13) refer to release under sub-article (9), it is unclear whether they have any connection with sub-article (6), the purpose of which remains vague in the absence of any appropriate explanations by the Government or the domestic case-law.

In any event, the Court observes that both provisions deal solely with provisional release from detention. Indeed, sub-article (6) is explicit to that effect, while under sub-article (9) this conclusion transpires from the fact that, as clearly stated in sub-article (12), a decision granting release can be revoked.

The Government considered that Article 25A (10) addressed the applicant's complaint and that, although sub-article (11) provided for exceptions, release could not be excluded completely. The Court observes that release under the said provisions may be granted only if it is shown that the detention was unreasonable on account of its duration or if there is no prospect of deportation. It follows that such a remedy is not applicable to a person in the initial stages of detention, pending a decision on an asylum application, and in consequence cannot be considered as a remedy for persons in that situation.

57. In so far as this remedy may have been available to the applicant at a later stage, namely after his application for asylum had been determined, the Court notes that, even assuming that it could have resulted in his temporary release (had the applicant not been excluded for the reasons mentioned below), it would not have provided for a formal assessment of the lawfulness of his detention as required under Article 5 § 4. The Government did not deny this, limiting themselves to considering that there was no distinction between such temporary release and a finding that the person's detention was not lawful. The Court cannot agree. It suffices to mention two basic notions: (a) if that were the case, in a criminal context there would be

no purpose in having two separate provisions in the Convention, namely Article 5 § 3 and Article 5 § 4; and (b) while a finding that a period of detention was unlawful allows an applicant to raise a claim under Article 5 § 5, a decision granting bail does not, given that it is granted or refused irrespective of the legality of the detention.

58. However – even if one were to consider that a decision on provisional release which was dependent on whether the duration of the detention was excessive or on whether there was any prospect of deportation could in substance be considered as an informal assessment of lawfulness in view of the link with the requirements of the second limb of Article 5 § 1 (f) – the Court has already held such remedy to be ineffective. Indeed, in *Louled Massoud* (cited above, § 44), the Court held that proceedings under Article 25 are limited in scope and offer no prospects of success for someone in the applicant's situation (namely where the identity of the detainee, including his nationality, has yet to be verified). It is inconsistent for the Government to argue that despite the exceptions in sub-article (11) the applicant's release could not be excluded, given that the Government's arguments under Article 5 § 1 revolve around the lack of cooperation by the applicant, his voluntarily misleading the authorities as to his identity and the threat he posed to national security and public order, all exceptions under the said sub-article. Moreover, in *Louled Massoud* the Court also held that such proceedings could not be considered to determine requests speedily as required by Article 5 § 4 of the Convention. The Government submitted no new examples capable of altering that conclusion, nor did they substantiate their argument that such proceedings could be heard with urgency. Indeed, the proceedings undertaken by the applicant to contest the lawfulness of his detention (albeit under Regulation 11(10) of LN 81 and not Article 25A of the Act) were also duly lodged before the same Board, and it took the IAB more than a year to determine the claim, only to find that the provision no longer applied at that stage and that it was not competent to assess any violation of Article 5. In the light of all this, the Court cannot but reiterate that, as they stand, proceedings before the IAB cannot be considered to determine requests speedily as required by Article 5 § 4 of the Convention.

59. The foregoing considerations are sufficient for the Court to conclude that it has not been shown that the applicant had at his disposal an effective and speedy remedy under domestic law by which to challenge the lawfulness of his detention.

60. Article 5 § 4 of the Convention has therefore been violated.

61. The Court finds it appropriate to point out that, as the applicant and the third-party intervener have submitted, had these remedies been effective in terms of their scope and speed, issues in relation to accessibility might also arise, particularly in respect of constitutional court proceedings. The Court notes the apparent lack of a proper system enabling immigration

detainees to have access to effective legal aid. Indeed, the fact that the Government were able to supply only one example of a detainee under the Immigration Act making use of legal aid – despite the thousands of immigrants who have reached Maltese shores and have subsequently been detained in the past decade and who, as submitted by the Government, have no means of subsistence – appears merely to highlight this deficiency. The Court notes that, although the authorities are not obliged to provide free legal aid in the context of detention proceedings (see *Lebedev v. Russia*, no. 4493/04, § 84, 25 October 2007), the lack thereof, particularly where legal representation is required in the domestic context for the purposes of Article 5 § 4, may raise an issue as to the accessibility of such a remedy (see *Abdolkhani and Karimnia v. Turkey*, no. 30471/08, § 141, 22 September 2009, and *Amuur v. France*, 25 June 1996, § 53 *in fine*, *Reports of Judgments and Decisions* 1996-III).

II. ALLEGED VIOLATION OF ARTICLE 5 § 1 OF THE CONVENTION

62. The applicant complained that his detention from 8 April 2011 [*sic*] to 16 August 2011 and from 30 January 2012 to the date of his release did not fall within any of the situations provided for by Article 5 and, more particularly, that it had not been carried out to prevent his unauthorised entry into Malta or with a view to his deportation, given that he had been awaiting a decision on his asylum application and the consequent authorisation under the terms of Regulation 12 of LN 243. Without prejudice to the above, he contended that the Maltese authorities had not sought alternatives to his detention despite its length, and that his conditions of detention had been inadequate. Moreover, making reference to the case of *Louled Massoud* (cited above), he noted that to date there were no procedural safeguards against arbitrary detention. He invoked Article 5 § 1 of the Convention, which in so far as relevant reads as follows:

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

63. The Government contested that argument.

A. Admissibility

64. The Government submitted that the applicant had failed to exhaust domestic remedies, in so far as he had neither made a request for bail before the IAB nor had he instituted constitutional redress proceedings.

65. The applicant reiterated his submissions under Article 5 § 4 above.

66. The Court has already held that the applicant did not have at his disposal an effective and speedy remedy by which to challenge the lawfulness of his detention (see paragraph 59 above). It follows that the Government's objection must be dismissed.

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

B. Merits

1. The parties' submissions

(a) The applicant

68. The applicant complained that his detention from 8 April 2011 [*sic*] to 16 August 2011 and from 30 January 2012 to 21 March 2013 did not fall within any of the situations provided for by Article 5.

69. In view of his asylum application and consequent authorisation to enter or remain in Malta in pursuance of Regulation 12 of LN 243, from the date of his presentation of the Preliminary Questionnaire (14 April 2011) his detention could not have been carried out to prevent his unauthorised entry into Malta or with a view to his deportation (given that his application for asylum was still pending). The applicant recalled Malta's obligations under Article 31 of the Convention Relating to the Status of Refugees, and particularly the prohibition of *refoulement*. The applicant argued that the Court's statement in *Saadi v. the United Kingdom* ([GC], no. 13229/03, ECHR 2008), to the effect that temporary admission to enter a country after applying for asylum did not amount to a lawful entry, had been confined to situations where a State had not authorised entry. In his view it was not a universally applicable principle that no asylum seeker could be considered to have been granted lawful entry, an assertion which would be contrary to the sovereign right of States to regulate entry into their territories. The applicant considered that he had received explicit authorisation under Regulation 12 of LN 243. Moreover, the applicant made reference to the European Union's Return Directive (Preamble, recital 9) which, albeit not legally binding, provided that a third-country national who had applied for asylum in a Member State should not be regarded as staying illegally on the territory of that Member State until a negative decision on the application,

or a decision ending his or her right of stay as an asylum seeker, had entered into force.

70. In so far as the period of detention following the negative decision on his asylum claim (2 April 2012-21 March 2013) could be considered to have been for the purposes of deportation, the applicant noted that the Government had admitted that the deportation had been stalled as a result of the ongoing criminal proceedings against the applicant. Nevertheless, on 7 January 2013, nine months after the applicant had ceased to be an asylum seeker, the Government had initiated deportation proceedings despite the fact that the criminal proceedings were then still ongoing. The applicant pointed out that the Government had failed to explain in what way the process in his case had satisfied the due diligence test. The applicant submitted that he had at no point directly or indirectly hindered his deportation. He had always stated that he was from Sierra Leone, and the Consulate's denial of his nationality claim (based on an extremely short interview during which no request for official documentation had been made) could not be considered conclusive.

71. Without prejudice to the above considerations, the applicant submitted that the decision to detain him and the decision to keep him in detention had been taken automatically, without any consideration of his individual circumstances. In this regard, the applicant noted how parallels could be drawn between recent statements by the Court (he referred to *Yoh-Ekale Mwane v. Belgium*, no. 10486/10, § 124, 20 December 2011) and the obligation of all Member States of the European Union to only detain third-country nationals where no other "sufficient but less coercive measures [could] be applied effectively in a specific case" (Article 15, Return Directive). As in *Yoh-Ekale Mwane*, in the present situation the applicant's identity had been known to the Maltese authorities – upon his arrival, since he had disclosed all details requested of him, following his completion of the Preliminary Questionnaire and following his interview with the Office of the Refugee Commissioner – and at no stage had the Maltese authorities indicated the presence of a real risk of his absconding. In fact, the applicant had applied for asylum in Malta, clearly expressing his wish to be granted international protection in that country. Furthermore, the applicant pointed to the Court's statements in *Louled Massoud* (§ 68) highlighting the possibility for the authorities to seek effective alternatives to detention in order to ensure that the applicant remained in Malta.

72. The applicant also argued that his continued detention violated Convention Article 5 § 1 (f) owing to its unlawfulness and arbitrariness (he referred to *Louled Massoud*, cited above, § 71). Despite the Court's conclusions in that case, no changes to Maltese legislation or administrative practice had been made to address the matter. The applicant submitted that, significantly, the legal basis for his detention had been insufficiently clear and precise. The length of his detention had been based on a Government

policy that had not had the force of law. In exacerbation of this lack of clarity and legal basis, the Government policy stated that if a detained migrant was imprisoned in Corradino Correctional Facility for any number of days (167 in the applicant's case), this duration was deemed not to form part of the period of mandatory detention for that specific migrant, despite the fact that the asylum application would still be processed during that time.

73. The applicant further submitted that the requirement that his detention should not be arbitrary had also not been fulfilled (the applicant referred to *A. and Others v. the United Kingdom* [GC], no. 3455/05, § 164, ECHR 2009). He underlined that at no stage had an individual assessment been conducted in his regard in order to ascertain whether he did in fact present a threat to national security or otherwise, his detention being an automatic decision. The Maltese authorities had repeatedly stated that detention was necessary to safeguard national security, to ensure the smooth provision of services and to guarantee an efficient asylum procedure. In the light of that, the applicant opined that they could easily have applied reception arrangements that did not involve deprivation of his liberty. In his view, the provision of medical assistance, shelter, sustenance and other basic needs could certainly be carried out in an environment that was more conducive to a person's physical and psychological well-being than Malta's detention centres. Moreover, the nature and material conditions of the detention centres certainly did not conform to the Maltese Government's stated intention of securing orderly and efficient procedures. The applicant stressed that the place and conditions of his detention had been inappropriate for the purpose pursued (whatever this may have been). He referred to several expert reports that not only highlighted the military nature of Malta's detention centres but also commented on the low standard of the material conditions in those centres (see the relevant extracts under "Relevant international reports" above, and the report relied on by the third party intervener). He noted that Safi B-Block was an apartment-style building entirely closed off by chicken wire and constantly guarded by soldiers or security officers, where no provision was made for the special situation of asylum seekers highlighted by the Court (he cited, for example, *M.S.S. v. Belgium and Greece* [GC], no. 30696/09, ECHR 2011, and *Louled Massoud*, cited above) and by UNHCR (see paragraph 33 above). In fact, the applicant noted that the building was not originally intended as asylum-seeker accommodation, but was part of a larger military barracks; only in 2002 had the premises been converted to their present use.

74. The applicant pointed out that he had been detained for just over one month before the ICJ visit on which the latter had based their report used for the purposes of the submissions in the present case. During such time no changes to the structure, management or policy had been undertaken; thus, those submissions were entirely relevant.

(b) The Government

75. The Government submitted that, as held in *Saadi v the United Kingdom* (cited above), temporary admission to enter a country after applying for asylum did not amount to lawful "entry" for the purposes of Article 5 § 1 (f). Asylum seekers remained unauthorised entrants and were liable to be detained under Article 5 § 1 (f) to prevent their unauthorised entry. Moreover, such detention needed not be necessary in each case. They submitted that the sole fact that the applicant had made an asylum claim was not capable of regularising his position, nor could such an application render his detention unlawful. The *Saadi* judgment had clearly stated that a State could detain immigrants pending an asylum application; therefore, it was not necessary to assess each case on its merits. Likewise, the Government did not consider that they were obliged to grant lawful entry under the terms of LN 243.

76. The Government further submitted that the applicant's detention had been connected to the purpose of preventing an unauthorised entry and had been carried out in good faith as the detention centre had been set up especially for that purpose. Moreover, the place and conditions of detention had been appropriate. The Safi detention centre had been used as a detention centre since 2002, it was a two-storey building fully refurbished in 2007, and again in 2009 and 2010. Although security grilles had been put in front of and over the windows to prevent escape, it was not a prison and while the facility was basic it provided sleeping, dining and recreational facilities, toilets, showers, a television and telephones (a telephone card was provided to the immigrants every two months), a veranda and two large recreational yards (to which access was allowed from sunrise to sunset). The State had attempted other entertainment measures such as installing sports equipment, which had been vandalised and turned into weapons after a few days. The detainees were allowed to move freely on the floor where they were accommodated and were allowed daily visits by NGOs (open door policy). Immigrants could also join two EU-funded projects. The centre was also equipped with a medical clinic. In relation to the length of the applicant's detention, the Government submitted that his detention had been required for the purposes of his repatriation, as he was a failed asylum seeker [*sic*].

77. In respect of the period following the determination of the applicant's asylum application, the Government submitted that his detention had been in accordance with the second limb of Article 5 § 1 (f). The Government made reference to *Chahal v. the United Kingdom* (15 November 1996, *Reports* 1996-V), noting that once action was being taken with a view to deportation it was immaterial whether the person's detention could be reasonably considered necessary. The Government further considered that the present case was different from that of *Louled Massoud* (cited above). They noted that in the present case the applicant's deportation had been stalled only as a consequence of the pending criminal

proceedings (in relation to the riot) against the applicant as a result of which the authorities could not deport him, given that his presence was essential to safeguard his fair trial rights. However, "attempts in order to prepare" for the applicant's deportation had been made once the criminal proceedings had been finally determined. The Government claimed that it was only after the reply of the Consulate of Sierra Leone that it had become clear that the applicant could not be repatriated, and in consequence he had been released.

78. The Government submitted that in the present case the applicant had not been subjected to indefinite detention. Indeed, the policy in place established that rejected asylum seekers could only be kept in detention up to a maximum of eighteen months. They noted that none of the irregular immigrants reaching Malta carried documents, making it impossible for the authorities to ascertain the identity of the persons concerned upon entry. This resulted in a lengthy process which depended on the immigrants' cooperation. In the present case it was the applicant who had intentionally given wrong information (about his country of origin), thereby hindering the process of deportation. The Government submitted that the detention policy had been framed with reference to the situation regarding migration in Malta. It was based on domestic law and was not discriminatory. Detention applied to persons irregularly entering Malta or whose presence in Malta was otherwise irregular. However, vulnerable persons were not subject to detention.

79. In relation to the third-party submissions, the Government submitted a press release which they had issued as a reaction to the International Commission of Jurists ("ICJ") report, in which they criticised the report as highly unrealistic. They considered that the ICJ had portrayed a very negative picture of a small country which had been doing its best to cope with a totally disproportionate influx of prohibited immigrants. The Court therefore had to take this into consideration. The Government considered that the limitations referred to in Article 25A (11) of the Immigration Act were in line with the Council of Europe Committee of Ministers' Recommendation to member states on measures of detention of asylum seekers (Recommendation Rec(2003)5) (see paragraph 33 above). Detention was consequent to breaches of domestic law and as such protected immigrants by giving them shelter, medical assistance, food and clothing, without which they would be homeless and without means of subsistence. In that light there was no point in deciding cases on a case-by-case basis. They further considered that the Return Directive did not apply to the applicant given that he had crossed irregularly by sea and had not subsequently obtained authorisation or a right to stay. Moreover, the twelve or eighteen months' detention periods were maximum periods justified by the need to prevent individuals from absconding and avoiding deportation. Such absconding was common, as evidenced by the various immigrants returned to Malta under the Dublin II Regulation. Indeed, the authorities

made constant efforts to repatriate immigrants in the shortest possible time even though they faced all sorts of tricks and deceit by immigrants. These were, however, lengthy operations dependent on third-party cooperation.

80. Lastly, the Government noted that the ICJ report referred to the period between 26 and 30 September 2011, during which the applicant had not been in detention and during which time there had been an extraordinary influx of detainees due to the Libyan crisis. Nevertheless, they submitted that the detainees' needs had still been met.

(c) The third-party intervener

81. The International Commission of Jurists ("ICJ") submitted a report entitled "Not here to stay", Report of the international Commission of Jurists on its visit to Malta on 26-30 September 2011, May 2012, which assessed migration and asylum practice in Malta (at the time of the Libyan crisis). They highlighted a number of conclusions relevant to the present case.

82. The intervener drew attention to the fact that detention for the purposes of preventing unauthorised entry could be justified only where the detention could be shown to be closely connected to that purpose, for the whole period of the detention. In the light of international refugee law, as well as the relevant European standards, the circumstances in which it was permissible to detain an asylum seeker on the grounds of unauthorised entry had to be narrowly drawn. They noted that the recently revised UNHCR Guidelines (mentioned above at paragraph 33) and the Conclusions adopted by the Executive Committee on the International Protection of Refugees, established a presumption against detention. Those provisions stipulated that detention could only be resorted to where necessary on specified grounds prescribed by law (guidelines 4.1 and 4.2). They stipulated that the detention of asylum seekers for other purposes, such as to deter future asylum seekers, or to dissuade asylum seekers from pursuing their claims, or for punitive or disciplinary reasons, was contrary to the norms of refugee law. The ICJ considered that inconsistency of national laws or practices with these norms would be an indicator of arbitrariness under Article 5 § 1 (f). Moreover, EU legislation clearly considered asylum seekers as "lawfully staying" in a Member State during the process of their asylum application. As a consequence, their detention on grounds of unauthorised entry could not be provided for except for very short periods and in exceptional circumstances. The ICJ submitted that European Union law in the field of asylum should be interpreted as constituting "national law" for the purposes of Article 5 of the European Convention, unless domestic law provided for higher standards, since the Common European Asylum System was directly applicable in EU Member States as a minimum standard.

83. As to the second limb of Article 5 § 1 (f) – detention pending expulsion – this could only be justified so long as deportation or extradition proceedings were in progress. The test had to be applied strictly, ensuring that a real prospect of expulsion was being diligently pursued at all stages of the person's detention. In the case of asylum seekers, detention would not be justified for any significant length of time during the course of asylum proceedings where national and international law prohibited expulsion in the course of those proceedings.

84. As to the other requirements set forth in the Court's case-law, the ICJ submitted that good faith in the imposition of detention implied a measure of openness and due process so that the procedures under national law which allowed for alternatives to detention or for release from detention, such as a period of voluntary departure, were not circumvented or manipulated so as to deprive them of meaning. They made reference to *Čonka v. Belgium* (no. 51564/99, ECHR 2002-I) and *R.U. v. Greece* (no. 2237/08, 7 June 2011). In their view, where the law or procedure was applied so as to deprive it of effect. In its report, the ICJ expressed concern at the expulsion decision notification routinely given to undocumented migrants on arrival in Malta based on the rejection of the inexistent voluntary return request. The ICJ noted that this practice constituted a breach of the EU Return Directive 2008/115/EC.

85. As to procedural protection against arbitrariness, the ICJ referred to the above mentioned UNHCR Guidelines which also stated that asylum seekers "are entitled to minimum procedural guarantees" (Guideline 7).

86. Further, the ICJ referred to the Council of Europe's Twenty Guidelines on Forced Return which established a general principle whereby alternatives to the detention of migrants should be considered first, irrespective of vulnerability. Guideline 6 (see paragraph 33 above) had been held by the Court of Justice of the European Union to be an authoritative instrument of interpretation of EU asylum law, alongside the European Convention and the Court's case-law. Similarly, the said UNHCR Guidelines clearly spelt out the pre-eminence of alternative measures over detention (Guideline 4.3). In a series of cases, this Court had found the measure of detention not to have been carried out in good faith, as, despite the situation of vulnerability, the authorities had not considered less severe measures (the third-party intervener made reference to *Yoh-Ekale Mwanje*, cited above). Even the UN Human Rights Committee, in *C v Australia* (Communication No. 900/1999, 28 October 2002) had found a violation of the right to liberty because the respondent State had not demonstrated that there were no less invasive means of achieving the same ends. However, in Malta, any prohibited immigrant subject to a removal order had to "be detained until he [was] removed from Malta". This meant that the detention of undocumented migrants was the rule and not the exception; it was not applied on a case-by-case basis or where necessary as a last resort. The EU

Return Directive excluded arrivals by sea from the further protection contained in it. Whether this exclusion also referred to persons authorised under national law (Article 12 of LN 243 of 2008) to stay in Malta pending the resolution of their application was unclear.

87. By expressing the maximum length of detention only in policy documents rather than in primary legislation, Malta was acting contrary to the principle of legality under international law, including under Article 5 § 1 ECHR, as held in *Abdolkhani and Karimnia v Turkey* (cited above). Moreover, in the third-party intervener's view, the period of eighteen months of administrative detention was *per se* contrary to the requirement under Article 5 § 1 (f), as no deportation procedure lasting that long could be said to have been undertaken with due diligence.

88. Lastly, the ICJ expressed concern that the Safi Barracks detention centres, including B-Block, were located on two military bases – a situation at odds with international law and standards. The guidance of the Committee for the Prevention of Torture (CPT) stipulated that, except for short periods, detained migrants should be held in specifically designed centres in conditions tailored to their legal status and catering for their particular needs. The ICJ report concluded that the accumulation of poor conditions of detention, brought the situation in the Safi Barracks detention centre beyond the threshold of degrading treatment, in violation of Malta's international human rights obligations under Article 3 of the Convention.

2. The Court's assessment

(a) General principles

89. Article 5 enshrines a fundamental human right, namely the protection of the individual against arbitrary interference by the State with his or her right to liberty. The text of Article 5 makes it clear that the guarantees it contains apply to "everyone" (see *Nada v. Switzerland* [GC], no. 10593/08, § 224, ECHR 2012). Sub-paragraphs (a) to (f) of Article 5 § 1 contain an exhaustive list of permissible grounds on which persons may be deprived of their liberty and no deprivation of liberty will be lawful unless it falls within one of those grounds (see *Saadi v. the United Kingdom* [GC], no. 13229/03, § 43, ECHR 2008). One of the exceptions, contained in sub-paragraph (f), permits the State to control the liberty of aliens in an immigration context.

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

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

91. As to the second limb of Article 5 § 1 (f), any deprivation of liberty will be justified only for as long as deportation or extradition proceedings are in progress. If such proceedings are not prosecuted with due diligence, the detention will cease to be permissible under Article 5 § 1 (f) (see *Chahal v. the United Kingdom,* 15 November 1996, *Reports* 1996-V).

92. Under the sub-paragraphs of Article 5 § 1 any deprivation of liberty must, in addition to falling within one of the exceptions set out in sub-paragraphs (a)-(f), be "lawful". Where the "lawfulness" of detention is in issue, including the question whether "a procedure prescribed by law" has been followed, the Convention refers essentially to national law and lays down the obligation to conform to the substantive and procedural rules of national law. Compliance with national law is not, however, sufficient: Article 5 § 1 requires in addition that any deprivation of liberty should be in keeping with the purpose of protecting the individual from arbitrariness. It is a fundamental principle that no detention which is arbitrary can be compatible with Article 5 § 1 and the notion of "arbitrariness" in Article 5 § 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 *Saadi,* cited above, § 67).

93. To avoid being branded as arbitrary, detention under Article 5 § 1 (f) must be carried out in good faith; it must be closely connected to the ground of detention relied on by the Government; the place and conditions of detention should be appropriate, bearing in mind that "the measure is applicable not to those who have committed criminal offences but to aliens who, often fearing for their lives, have fled from their own country"; and the

length of the detention should not exceed that reasonably required for the purpose pursued (ibid., § 74; see also *A. and Others v. the United Kingdom* [GC], no. 3455/05, § 164, ECHR 2009, and *Louled Massoud*, cited above, § 62).

(b) Application of these principles to the present case

94. The Court notes that the Government's submissions are to some extent contradictory and despite specific questions on the matter they do not refer to specific time-lines. However, the Government appeared to consider that the applicant's first period of detention (before he had obtained a final decision on his asylum claim) was carried out in pursuance of the first limb of Article 5 § 1 (f). Nevertheless, they considered that the duration of that detention was required for the purposes of repatriation of the applicant, who was "a failed asylum seeker".

95. Furthermore, the Court notes that hardly any submissions have been made as to the effect of Legal Notice 243, on which the applicant based most of his arguments. The Government simply submitted their interpretation of that provision, namely that it did not oblige them to provide the applicant with any authorisation to stay. However, the Court notes that the IAB itself had interpreted the provision differently. Indeed, in the determination of the applicant's case, the IAB upheld the argument that the provision authorised entry and that therefore in principle the circumstances of the applicant's case were such that he could not be detained.

96. The Court notes that its case-law does not appear to offer specific guidelines as to when detention in an immigration context ceases to be covered by the first limb of Article 5 § 1. In *Saadi* the Grand Chamber considered that the applicant's detention for seven days while his asylum application was being determined fell under that limb. Similarly, in the case of *Kanagaratnam v. Belgium* (no. 15297/09, 13 December 2011), the Court considered that the applicant's detention pending his asylum claim fell under the first limb of Article 5 § 1 (f), namely to prevent his effecting an unauthorised entry into the country. Nevertheless, in the context of Greece, the Court examined and found a violation of Article 5 § 1 under its second limb on the basis that the applicant's detention pending asylum proceedings could not have been undertaken for the purposes of deportation, given that national law did not allow for deportation pending a decision on asylum (see *Ahmade v. Greece*, no. 50520/09, §§ 142-144, 25 September 2012, and *R.U. v. Greece*, no. 2237/08, §§ 88-96, 7 June 2011).

97. The Court considers that the applicant's argument to the effect that *Saadi* should not be interpreted as meaning that all member States may lawfully detain immigrants pending their asylum claim, irrespective of national law, is not devoid of merit. Indeed, where a State which has gone beyond its obligations in creating further rights or a more favourable position – a possibility open to it under Article 53 of the Convention –

enacts legislation (of its own motion or pursuant to European Union law) explicitly authorising the entry or stay of immigrants pending an asylum application (see for example, *Kanagaratnam*, cited above, § 35 *in fine*, in relation to Belgian law), an ensuing detention for the purpose of preventing an unauthorised entry may raise an issue as to the lawfulness of detention under Article 5 § 1 (f). Indeed, in such circumstances it would be hard to consider the measure as being closely connected to the purpose of the detention and to regard the situation as being in accordance with domestic law. In fact, it would be arbitrary and thus run counter to the purpose of Article 5 § 1 (f) of the Convention to interpret clear and precise domestic law provisions in a manner contrary to their meaning (see *Longa Yonkeu v. Latvia*, no. 57229/09, § 125, 15 November 2011). The Court notes that in *Saadi* the national law (albeit allowing temporary admission) did not provide for the applicant to be granted formal authorisation to stay or to enter the territory, and therefore no such issue arose. The Court therefore considers that the question as to when the first limb of Article 5 ceases to apply, because the individual has been granted formal authorisation to enter or stay, is largely dependent on national law.

98. Turning to the facts of the present case, and reiterating that it is primarily for the national authorities to interpret domestic law, the Court observes that it is faced with conflicting interpretations of LN 243, and particularly of Regulation 12(1) thereof, which provides that an applicant shall be "allowed to enter or remain in Malta pending a final decision of his application". On the one hand, the Government asserted that the provision did not grant any right to stay; on the other hand, the IAB's decision held that the applicant had been correct to rely on it in order to challenge his detention, given that it provided that an individual had the right to enter and to remain on the island pending a decision on his asylum request. It is not for the Court to interpret the intention of the legislature one way or another. However, it may well be that what was intended was for the provision to reflect international standards to the effect that an asylum seeker may not be expelled pending an asylum claim (see for example, *S.D. v. Greece*, no. 53541/07, § 62, 11 June 2009), without necessarily requiring that an individual be granted formal authorisation to stay or to enter the territory. The fact that the provision, while establishing the conditions to be met by the asylum seeker, does not provide for any formal authorisation procedure or for the issuance of any relevant documentation (as per Article 9 of the Immigration Act) lends support to this interpretation. In this situation the Court considers that the first issue that arises concerns the quality of domestic law. The Court reiterates that the words "in accordance with a procedure prescribed by law" do not merely refer back to domestic law; they also relate to the quality of the law, requiring it to be compatible with the rule of law, a concept inherent in all Articles of the Convention. Quality in this sense implies that where a national law authorises deprivation of

liberty, it must be sufficiently accessible and precise in order to avoid all risk of arbitrariness (see *Dougoz v. Greece*, no. 40907/98, § 55, ECHR 2001-II, citing *Amuur v. France*, § 50, cited above).

99. In the present case, while it is clear that Article 5 in conjunction with Article 14 of the Act authorised the detention of prohibited immigrants, it is undeniable that Legal Notice 243, which "applies notwithstanding the provisions of any other law to the contrary" (see the text of the provision in "Relevant domestic law" above), created some confusion as to the extent of the legal basis -- in particular, whether detention under the Immigration Act was lawful (in terms of domestic law) only up to the moment where an individual applied for asylum or continued to be lawful pending the determination of the asylum claim. However, in the present circumstances, while considering that clarification of the legal framework is called for in the domestic system, the Court is ready to accept that the detention had a sufficiently clear legal basis, namely Article 5 in conjunction with Article 14 of the Act, and that, given that it has not been established that the applicant had actually been granted formal authorisation to stay – the Court in fact notes that the applicant had not been issued with the relevant written documentation under Article 9 of the Act – his detention between 8 April 2011 (the date of his arrival) and 2 April 2012 (the date of rejection of his asylum claim) (excluding the period of detention in connection with the criminal proceedings) fell under the first limb of Article 5 § 1 (f).

100. Nevertheless, the Court must examine whether the applicant's detention was arbitrary. The Court notes a series of odd practices on the part of the domestic authorities, such as the by-passing of the voluntary departure procedure (see paragraph 8 above) and the across-the-board decisions to detain, which the Government considered did not require individual assessment (see paragraph 79 above). In respect of the latter, the Court notes that Recommendation Rec(2003)5 of the Committee of Ministers to member states on measures of detention of asylum seekers, which was extensively cited by the Government, also considers that "[m]easures of detention of asylum seekers should be applied only after a careful examination of their necessity in each individual case". In the light of these practices the Court has reservations as to the Government's good faith in applying an across-the-board detention policy (save for specific vulnerable categories) with a maximum duration of eighteen months.

101. Nevertheless, even accepting that the applicant's detention had been closely connected to the purpose of preventing his unauthorised entry to the country, the Court is concerned about the appropriateness of the place and the conditions of detention endured. Various international reports have expressed concerns on the matter (see paragraph 33 et seq. above). Both the CPT and the ICJ considered that the conditions in question could amount to inhuman and degrading treatment under Article 3 of the Convention; furthermore, those conditions must surely have been exacerbated during the

Libyan crisis, a time when the applicant was in detention. In that light, the Court finds it difficult to consider such conditions as appropriate for persons who have not committed criminal offences but who, often fearing for their lives, have fled from their own country.

102. Lastly, the Court notes that in the present case it took the authorities one year to determine the applicant's asylum claim. This cannot be considered as a period of detention reasonably required for the purpose pursued, namely to determine an application to stay. However, the Court notes that, for more than five months during this period (from 16 August 2011 to 29 January 2012), the applicant was remanded in custody in connection with criminal charges. Therefore the Court must only examine for the purposes of this complaint the period, amounting to more than six months in total, during which he was detained for the purposes of the first limb of Article 5 § 1 (f). Nevertheless, the Court has already considered periods of three months' detention pending a determination of an asylum claim to be unreasonably lengthy, when coupled with inappropriate conditions (see *Kanagaratnam*, cited above, §§ 94-95). Hence, it cannot consider a period of six months to be reasonable, particularly in the light of the conditions of detention described by various independent entities (see, *a contrario*, *Saadi*, cited above, where it took the authorities seven days, during which the applicant was detained in suitable conditions, to determine the applicant's asylum application despite the difficult administrative problems with which the United Kingdom was confronted during the period in question, with an escalating flow of huge numbers of asylum seekers).

103. It follows that the applicant's detention up to the date of determination of his asylum application was not compatible with Article 5 § 1 (f) of the Convention, which has therefore been violated.

104. As to the second period of the applicant's detention, namely from 2 April 2012 to 21 March 2013, the Government submitted that his detention had been effected for the purposes of the second limb of 5 § 1 (f), that is to say, where action is being taken with a view to deportation. The Court reiterates that detention under Article 5 § 1 (f) will be justified only for as long as deportation proceedings are in progress. If such proceedings are not prosecuted with due diligence, the detention will cease to be permissible under Article 5 § 1 (f) (see *Chahal*, cited above, § 113). However, the Government admitted that the applicant's deportation had been stalled because of the criminal proceedings pending against him and that in view of those proceedings the authorities could not deport him (see paragraph 77 above). It is unclear when those proceedings were terminated; however, it was only in January 2013 that attempts to prepare the applicant for deportation were initiated. In consequence, it cannot be said that the period of detention of ten months between 2 April 2012 and January 2013 was for the purposes of deportation. As to the subsequent two months, the Government have not indicated any steps taken by the authorities, apart

from an interview with the Consul of Sierra Leone, as a result of which they considered that the applicant could not be repatriated. The Court notes, however, that the applicant remained in detention until March 2013 despite the fact that the authorities had known since 11 February 2013 that there was no prospect of deporting him.

105. This alone suffices for the Court to consider that, in the present case, the applicant's detention following the determination of his asylum claim was not compatible with Article 5 § 1 (f). The Court also considers it worthwhile to reiterate that it has already found in *Louled Massoud* (cited above), that the Maltese legal system did not provide for a procedure capable of avoiding the risk of arbitrary detention pending deportation. Those circumstances have not changed, as evidenced by the finding of a violation under Article 5 § 4 in the present case (see paragraph 60 above). Moreover, the Court has already considered the applicant's conditions of detention (in its examination of the first period of detention) and found those conditions to be of concern.

106. The foregoing considerations are sufficient to enable the Court to conclude that the national system failed as a whole to protect the applicant from arbitrary detention, and that his prolonged detention following the determination of his asylum claim cannot be considered to be compatible with the second limb of Article 5 § 1 (f) of the Convention.

107. In conclusion, the Court finds that there has been a violation of Article 5 § 1 of the Convention in respect of the applicant's immigration-related detention, pending his asylum application and following its determination.

III. ALLEGED VIOLATION OF ARTICLE 5 § 2 OF THE CONVENTION

108. The applicant further complained of the fact that on his arrival he had not been provided with any information regarding the specific reason for his detention. He relied on Article 5 § 2 of the Convention, which reads as follows:

> "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."

A. The parties' submissions

109. The Government submitted that the applicant had failed to exhaust domestic remedies and that in any event the complaints failed to comply with the six-month rule. If, as in the case of *Louled Massoud* (cited above), the Court was to hold that there existed no domestic remedy for the purposes of this complaint, the six months were to be calculated from the date of the omission complained of. In the applicant's case, that had been

the date of his arrest on 8 April 2011, which was more than six months before the date of the lodging of his application on 4 July 2012.

110. The Government submitted that Article 5 § 2 did not require that a person be given reasons for his or her arrest in any particular way, nor did it guarantee a right of access to a lawyer. Referring to *Fox, Campbell and Hartley v. the United Kingdom* (30 August 1990, Series A no. 182), the Government submitted that the applicant had been served with a removal order and a booklet containing information about his rights. The booklet was made available in various languages. In practice, when irregular immigrants were intercepted coming ashore, the immigration police would place them on a bus, where they were informed of the removal order and of their rights. The removal order contained information relative to the time-limit for appealing (three working days) and the fact that the appeal had to be lodged with the registry of the IAB, Fort St. Elmo, Valletta. Moreover, there were no particular formalities required in order to lodge an appeal, and most applicants lodged their appeals by writing in person to the IAB objecting to their removal. In any event further information could have been provided by the detention centre staff or a legal-aid lawyer had the applicant so requested, as explained in the booklet provided. Furthermore, the Government argued that the applicant had failed to substantiate his assertion that he did not understand English; indeed, he had requested that the proceedings before the IAB be conducted in English.

111. The applicant submitted that the applicable rule was that upheld by the Court in *Varnava and Others v. Turkey* [GC] (nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90, § 157, ECHR 2009), namely that where "an applicant avails himself of an apparently existing remedy and only subsequently becomes aware of circumstances which render the remedy ineffective, it may be appropriate for the purposes of Article 35 § 1 to take the start of the six-month period from the date when the applicant first became or ought to have become aware of those circumstances". In the present case the applicant had attempted to exhaust ordinary remedies by lodging an application before the IAB, in the belief that the procedure following the *Louled Massoud* judgment could remedy the deficiencies at issue, and it was only during those proceedings that it turned out that no changes had been made. The application had been lodged shortly after the termination of those proceedings and therefore could not be considered as out of time.

112. The applicant submitted that on his entry to Malta in an irregular manner the only documentation provided to him, subsequent to his classification as a "prohibited immigrant" under the terms of Article 5 of the Immigration Act, was the Return Decision and Removal Order (RDRO) together with a booklet bearing the title "Your Entitlements, Responsibilities and Obligations while in Detention", produced by the Ministry for Parliamentary and Home Affairs. The Return Decision and

Removal Order were of limited quality in both content and form. The document consisted of a standard text provided exclusively in English (see paragraph 27 above), and no interpretation or further explanation was provided to ensure that it was made comprehensible. In the Return Decision and Removal Order no reference was made to the applicant's detention, the possible reasons for it or the possibility of challenging the legality of his detention. Similarly, the information booklet mentioned by the Government contained absolutely no information on the reasons for detention, either in a general manner or in a manner specifically relating to the applicant. The applicant noted that Regulation 12 of the said document provided information – albeit of an extremely basic nature – on the possibility of applying to the IAB if an individual felt that his detention was no longer reasonable. Furthermore, the document referred to the possibility of applying to the Board merely on grounds of the possible unreasonableness of the person's detention and not on grounds of its unlawfulness. In addition, while stating that an appeal was possible the documentation did not provide any explanation as to how to lodge such an appeal or on what grounds, nor did it indicate the address of the Board or any other means of contacting the IAB, legal representatives or NGOs. Thus, the applicant submitted that he had at no point been informed promptly, in a language that he understood, of the reasons for his arrest, in violation of his rights under Convention Article 5 § 2. Even assuming that the reasons of the detention were self-evident given the circumstances, the applicant submitted that at some point in time the grounds for his detention had changed from the first limb to the second limb of Article 5 without any explanation being forthcoming. He further noted that according to the Court's case-law such information had to give the real reason for detention, in order to enable the detention to be challenged under Article 5 § 4, and that different grounds of detention required different levels of information as well as different timeframes (the applicant cited, for example, *Kaboulov v. Ukraine*, no. 41015/04, 19 November 2009, and *Saadi*, cited above).

B. The Court's assessment

113. The Court reiterates that Article 5 § 2 contains the elementary safeguard that any person arrested should know why he is being deprived of his liberty. This provision is an integral part of the scheme of protection afforded by Article 5: by virtue of paragraph 2 any person arrested must be told, in simple, non-technical language that he can understand, the essential legal and factual grounds for his arrest, so as to be able, if he sees fit, to apply to a court to challenge its lawfulness in accordance with Article 5 § 4. Whilst this information must be conveyed "promptly" (in French: "*dans le plus court délai*"), it need not be related in its entirety by the arresting officer at the very moment of the arrest. Whether the content and

promptness of the information conveyed were sufficient is to be assessed in each case according to its special features (see *Čonka*, cited above, § 50, with further references). It also reiterates that paragraph 2 of Article 5, like paragraph 4, is applicable both to persons deprived of their liberty by arrest and to those deprived of it by detention (see, by implication, *Shamayev and Others v. Georgia and Russia,* no. 36378/02, § 414). Thus, Article 5 § 2 applies to Article 5 § 1 (f) cases, although less detailed reasons are required to be given than in Article 5 § 1 (c) cases (see *Bordovskiy v. Russia*, no. 49491/99, § 56, 8 February 2005).

114. The Court does not consider it necessary to examine any of the Government's objections in this respect as in its view the complaint is in any event inadmissible for the following reasons.

115. The Court notes that the RDRO informed the applicant that he was considered as a prohibited immigrant according to Article 5 of the Immigration Act because he had entered Malta illegally and had no means of subsistence. He was further informed that his stay had been terminated and that an entry ban, a return decision and a removal order were being issued because the request for voluntary departure (which in practice he had never lodged) had been refused. The Court observes that, contrary to the applicant's assertion, the RDRO also informed him that he could appeal against this decision/order/entry ban to the IAB within three working days at the Board's Registry, Fort St Elmo, Valletta. However, the applicant stressed that nowhere in the RDRO was any reference made to the fact that as a consequence of such a situation he had to be detained, or to the legal basis for such detention, namely Article 14 of the Act. Nevertheless, the booklet, which listed the entitlements, responsibilities and obligations of the persons concerned while in detention (and which was also given to the applicant on his arrival) explained that a prohibited immigrant could apply for refugee status and that pending the determination of that application "you will be placed in detention for a period up to 18 months" (which could be extended in certain circumstances). The booklet also informed the applicant, amongst other things, that any person detained under the Immigration Act could apply to the IAB if he felt that his detention was no longer reasonable. However, the Court observes that this information – which, moreover, explained solely that the applicant would be detained pending any asylum claim he might wish to lodge – again failed to give the legal basis for his detention, or even a part thereof (referring to the periods before, during or after the asylum procedure).

116. The Court thus observes that, while the information supplied by means of the RDRO and the booklet enabled the applicant to know why he was being detained throughout the different stages of his detention, what it failed to supply was the actual legal provision forming the basis for his detention. While the Court finds this regrettable, it considers that the information given to the applicant would have allowed him to contest the

legality of his detention on the basis of the Immigration Act. While it is true that the information provided did not give details as to the method of instituting proceedings challenging the lawfulness of the detention (as opposed to proceedings challenging its unreasonableness or appeals against the orders issued), Article 5 § 2 does not require the State to give such elaborate details, especially where it is not alleged that the applicant requested more information on the procedure (as the applicant in the present case was allowed to do according to the information provided in the booklet) and that this request was refused. The information furnished therefore satisfied the requirements of Article 5 § 2 of the Convention (see, *mutatis mutandis*, *Čonka*, cited above, § 52).

117. As to the language in which the information was given, the applicant did not specifically claim that he did not understand English or was unable to understand the information given on the bus or to communicate with the officers (see, *mutatis mutandis*, *Galliani v. Romania*, no. 69273/01, § 54, 10 June 2008), nor did he claim that he was unable to understand any other language in which the booklet was provided. Likewise, he did not submit that he had requested an interpreter and had his request refused.

118. Accordingly, the Court considers that this complaint is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

IV. APPLICATION OF ARTICLE 46 OF THE CONVENTION

119. The relevant parts of Article 46 of the Convention read as follows:

> "1. The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.
>
> 2. The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution. ..."

120. The Court reiterates that by Article 46 of the Convention the Contracting Parties have undertaken to abide by the final judgments of the Court in any case to which they are parties, execution being supervised by the Committee of Ministers. It follows, *inter alia*, that a judgment in which the Court finds a breach of the Convention or the Protocols thereto imposes on the respondent State a legal obligation not just to pay those concerned the sums awarded by way of just satisfaction, but also to choose, subject to supervision by the Committee of Ministers, the general and/or, if appropriate, individual measures to be adopted in their domestic legal order to put an end to the violation found by the Court and to redress as far as possible the effects (see *Menteş and Others v. Turkey* (Article 50), 24 July 1998, § 24, *Reports* 1998-IV; *Scozzari and Giunta*, [GC], nos. 39221/98 and 41963/98, § 249, ECHR 2000-VIII; and *Maestri v. Italy* [GC],

no. 39748/98, § 47, ECHR 2004-I). In principle it is not for the Court to determine what may be the appropriate measures of redress for a respondent State to perform in accordance with its obligations under Article 46 of the Convention (see *Scozzari and Giunta*, cited above; *Brumărescu v. Romania* (just satisfaction) [GC], no. 28342/95, § 20, ECHR 2001-I; and *Öcalan v. Turkey* [GC], no. 46221/99, § 210, ECHR 2005-IV). With a view, however, to helping the respondent State fulfil its obligations under Article 46, the Court may seek to indicate the type of individual and/or general measures that might be taken in order to put an end to the situation it has found to exist (see *Broniowski v. Poland* [GC], no. 31443/96, § 194, ECHR 2004-V; *Scoppola v. Italy (no. 2)* [GC], no. 10249/03, § 148, ECHR 2009; and *Stanev v. Bulgaria* [GC], no. 36760/06, § 255, 17 January 2012).

121. In the Court's view, the problems detected in the applicant's particular case may subsequently give rise to numerous other well-founded applications which are a threat to the future effectiveness of the system put in place by the Convention (see *Driza v. Albania*, no. 33771/02, § 122, ECHR 2007-... (extracts)).The Court's concern is to facilitate the rapid and effective suppression of a defective national system hindering human-rights protection. In that connection, and having regard to the situation which it has identified above (see paragraphs 59-60 above and also *Louled Massoud*, cited above, § 47), the Court considers that general measures at national level are undoubtedly called for in execution of the present judgment.

122. In the instant case the Court considers that it is necessary, in view of its finding of a violation of Article 5 § 4, to indicate the general measures required to prevent other similar violations in the future. It observes that it has found a violation of Article 5 § 4 on account of the fact that none of the remedies available in Malta could be considered speedy for the purposes of that provision. Thus, the Court considers that the respondent State must above all, through appropriate legal and/or other measures, secure in its domestic legal order a mechanism which allows individuals taking proceedings to determine the lawfulness of their detention to obtain a determination of their claim within Convention-compatible time-limits, but which nevertheless maintains the relevant procedural safeguards. The Court reiterates that although it is not always necessary that an Article 5 § 4 procedure be attended by the same guarantees as those required under Article 6 for criminal or civil litigation, it must have a judicial character and provide guarantees appropriate to the type of deprivation of liberty in question (see *A. and Others*, cited above, § 203, and *Idalov v. Russia* [GC], no. 5826/03, § 161, 22 May 2012).

123. The Court notes that it has also found a violation of Article 5 § 1 on account in particular of the duration of the applicant's detention coupled with the inadequate conditions at the barracks where he was held. Having regard to that finding, the Court recommends that the respondent State

envisage taking the necessary general measures to ensure an improvement in those conditions and to limit detention periods so that they remain connected to the ground of detention applicable in an immigration context.

V. APPLICATION OF ARTICLE 41 OF THE CONVENTION

124. Article 41 of the Convention provides:

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

A. Damage

125. The applicant claimed 25,000 euros (EUR) in respect of non-pecuniary damage on account of the violations of Article 5 and the psychological harm he had suffered during his eighteen-month detention period.

126. The Government considered that a finding of a violation would be sufficient just satisfaction. They relied on the Court's findings under Article 6 in previous cases, according to which it was impossible to speculate as to the outcome of the trial had the violation in question not occurred. In any event they submitted that any award granted by the Court should not exceed EUR 3,000.

127. The Court notes that it has found multiple violations of Article 5 of the Convention and considers it equitable to award the applicant EUR 24,000 in respect of non-pecuniary damage.

B. Costs and expenses

128. The applicant also claimed EUR 3,392.50 (EUR 2,875 for 49.5 hours at EUR 50 per hour for legal work, plus tax, and EUR 400 in administrative costs) in respect of the costs and expenses incurred before the domestic courts and the Court.

129. The Government submitted that no costs should be paid in relation to the domestic proceedings (before the IAB and the Refugee Appeals Board) and that in any event the sum awarded should not exceed EUR 2,000.

130. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these were actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the sum of EUR 3,000, covering costs under all heads, in respect of the

costs and expenses incurred in the domestic proceedings and before the Court.

C. Default interest

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

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the complaints under Article 5 §§ 1 and 4 admissible and the remainder of the application inadmissible;

2. *Holds* that there has been a violation of Article 5 § 4 of the Convention;

3. *Holds* that there has been a violation of Article 5 § 1 of the Convention;

4. *Holds*
   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts:
      (i) EUR 24,000 (twenty-four thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
      (ii) EUR 3,000 (three thousand euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

5. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 23 July 2013, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Fatoş Aracı	Ineta Ziemele
Deputy Registrar	President