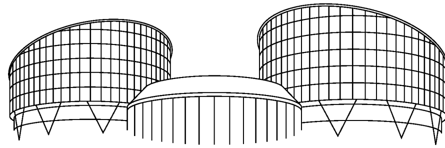

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

# CASE OF ABDULLAHI ELMI AND AWEYS ABUBAKAR v. MALTA

*(Applications nos. 25794/13 and 28151/13)*

JUDGMENT

STRASBOURG

22 November 2016

*This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.*

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

**In the case of Abdullahi Elmi and Aweys Abubakar v. Malta,**

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

András Sajó, *President,*
Vincent A. De Gaetano,
Paulo Pinto de Albuquerque,
Krzysztof Wojtyczek,
Iulia Motoc,
Gabriele Kucsko-Stadlmayer,
Marko Bošnjak, *judges,*
and Marialena Tsirli, *Section Registrar,*

Having deliberated in private on 11 October 2016,

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

# PROCEDURE

1. The case originated in two applications (nos. 25794/13 and 28151/13) 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 two Somali nationals, Mr Burhaan Abdullahi Elmi and Mr Cabdulaahi Aweys Abubakar ("the applicants"), on 17 April 2013.

2. The applicants were represented by Dr M. Camilleri and Dr K. Camilleri, lawyers practising in Valletta. The Maltese Government ("the Government") were represented by their Agent, Dr P. Grech, Attorney General.

3. The applicants alleged that their detention was arbitrary and unlawful, and that they had not had a remedy to challenge the lawfulness of that detention. They further complained about the conditions of detention. They relied on Articles 3 and 5 §§ 1 and 4.

4. On 28 August 2014 the applications were communicated to the Government.

# THE FACTS

## I. THE CIRCUMSTANCES OF THE CASE

5. The applicants were born in 1996 and 1995 respectively. At the time of the introduction of the application the two applicants were detained in Safi Barracks Detention Centre, Safi, Malta.

## A. Background to the case

### *1. Mr Burhaan Abdullahi Elmi (the first applicant)*

6. Mr Burhaan Abdullahi Elmi entered Malta in an irregular manner by boat on 16 August 2012. Upon arrival, he was registered by the immigration police and given an identification number (12U-029). During the registration process the immigration authorities asked the applicant to provide his personal details, including name, nationality, and age. He informed them that he was born in 1996 and therefore was sixteen years old. The Government claimed that he was seventeen years old. Although no interpreter was present the applicant was helped by some other irregular immigrants who had arrived with him and who could speak English.

7. He was then presented with two documents in English, one containing a Return Decision and the other a Removal Order. The Return Decision stated that he was a prohibited immigrant by virtue of Article 5 of the Immigration Act (Chapter 217 of the Laws of Malta) because he was in Malta "without means of subsistence and liable to become a charge on public funds". The Return Decision also informed the first applicant that his stay was being terminated and of the possibility to apply for a period of voluntary departure. The Removal Order was based on the consideration that the applicant's request for a period of voluntary departure had been rejected. It informed him that he would remain in custody until removal was affected and that an entry ban would be issued against him. The two documents further informed him of the right to appeal against the Decision and Order before the Immigration Appeals Board ("the IAB") within three working days.

8. The first applicant claimed that the contents of the decision in English were not explained to him, and that he could not understand the language. According to the Government, in practice the immigration police inform the migrants verbally in English about their right to appeal, and the migrants translate for each other.

9. He was further provided with an information leaflet entitled "Your entitlements, responsibilities and obligations while in detention" in Arabic, a language he did not understand. According to the Government the first applicant did not request a booklet in another language.

10. In accordance with Article 14 (2) of the Immigration Act (see Relevant domestic law), the first applicant was detained. He was originally detained in Warehouse 2 at Safi Barracks, and in 2013 was moved to Block B.

### *2. Mr Cabdulaahi Aweys Abubakar (the second applicant)*

11. Mr Cabdulaahi Aweys Abubakar entered Malta in an irregular manner by boat on 31 August 2012. Upon arrival, he was registered by the

immigration police and given an identification number (12W-062). During the registration process the immigration authorities asked the second applicant to provide his personal details, including name, nationality, and age. He informed them that he was born in 1995 and therefore was seventeen years old.

12. He was then presented with two documents in English, one containing a Return Decision and the other a Removal Order. The Return Decision stated that he was a prohibited immigrant by virtue of Article 5 of the Immigration Act (Chapter 217 of the Laws of Malta) because he was in Malta "without means of subsistence and liable to become a charge on public funds" and "without leave granted by the principal Immigration Officer". The Return Decision also informed the second applicant that his stay was being terminated and of the possibility to apply for a period of voluntary departure. The Removal Order was based on the consideration that the applicant's request for a period of voluntary departure had been rejected. It informed him that he would remain in custody until removal was affected and that an entry ban would be issued against him. The two documents further informed him of the right to appeal against the Decision and Order before the Immigration Appeals Board ("the IAB") within three working days.

13. The second applicant claimed that the contents of the decision in English were not explained to him, and that he could not understand the language. According to the Government, in practice the immigration police inform the migrants verbally in English about their right to appeal, and the migrants translate for each other.

14. He was further provided with an information leaflet entitled "Your entitlements, responsibilities and obligations while in detention" in Arabic, a language he did not understand. According to the Government the second applicant did not request a booklet in another language.

15. In accordance with Article 14 (2) of the Immigration Act (see Relevant domestic law), the second applicant was detained. He was originally detained in Warehouse 2 at Safi Barracks and in January 2013 was moved to Block B.

## B. Asylum proceedings

### *1. Mr Burhaan Abdullahi Elmi*

16. A few days following Mr Burhaan Abdullahi Elmi's arrival he was called for an information session provided by the Staff of the Office of the Refugee Commissioner. He was assisted in submitting the Preliminary Questionnaire (PQ), thereby registering his wish to apply for asylum under Article 8 of the Refugees Act, Chapter 420 of the Laws of Malta (see

Relevant domestic law, below). He stated on the form that he was sixteen years old.

*2. Mr Cabdulaahi Aweys Abubakar*

17. A few days following Mr Cabdulaahi Aweys Abubakar's arrival he was called for an information session provided by the Staff of the Office of the Refugee Commissioner. He was assisted in submitting the PQ, thereby registering his wish to apply for asylum. He stated on the form that he was born in 1995 and was seventeen years old.

## C. The AWAS Age-Assessment Procedure

*1. Mr Burhaan Abdullahi Elmi*

18. In Mr Burhaan Abdullahi Elmi's case, on 31 August 2012 he was referred to AWAS for age assessment. Within a few weeks of his arrival, three people from AWAS interviewed him. After the interview they informed him that as they could not confirm his minor age through the interview they would send him for a further age verification (FAV) test - this would be an X-ray of the bones of the wrist. He was taken for the FAV test shortly after his interview. The first applicant claimed that, some weeks later, in or around October 2012, he was informed verbally by AWAS staff that he was found to be a minor and that he would be released shortly.

19. Until the date of the lodging of the application, that is eight months after his arrival in Malta, Mr Burhaan Abdullahi Elmi had not received a written decision informing him of the outcome of the age-assessment procedure, and was still in detention.

*2. Mr Cabdulaahi Aweys Abubakar*

20. In Mr Cabdulaahi Aweys Abubakar's case, on 18 September 2012 he was referred to AWAS for age assessment. He was interviewed by three people from AWAS in the third week of September 2012. After the interview they informed him that as they could not confirm his minor age through the interview they would send him for a FAV test. He was taken for the FAV test on 8 February 2013, five months after his interview with AWAS. The second applicant claimed that, some weeks later, in March 2013, he was informed verbally by AWAS staff that he was found to be a minor and that he would be released shortly.

21. Until the date of the lodging of the application, that is almost eight months after his arrival in Malta, Mr Cabdulaahi Aweys Abubakar had not received a written decision informing him of the outcome of the age-assessment procedure, and was still in detention.

22. In the meantime both Mr Cabdulaahi Aweys Abubakar and members of the Jesuit Refugee Service who visited him in detention contacted AWAS on a number of occasions to inquire about the case, but no reply was forthcoming.

## D. Conditions of detention

### *1. Mr Burhaan Abdullahi Elmi*

23. Mr Burhaan Abdullahi Elmi claims to have been held in very difficult conditions of detention with adult men of various nationalities. In Warehouse 2 and Block B, of Safi Detention Centre, physical conditions were basic and he often lacked the most basic necessities, including clothing, particularly shoes, which were only replaced every four months. Recreational activity was limited, and the yard was taken over by adult males, making it difficult for a young person like him to play with them. Educational activities were virtually non-existent. There was a lack of information, difficulties communicating with the outside world, and obstacles in obtaining the most basic services. Moreover, the centre was overcrowded and lacked protection from abuse and victimisation. Fights often broke out between men of different origins, nationalities or tribes, and he also referred to an episode where he had been beaten up by a fellow detainee. Noting there was no privacy or security, Mr Burhaan Abdullahi Elmi stressed that he felt very insecure in detention, and that his food was often stolen by detainees as was his blanket. He explained that Warehouse 2 was worse than Block B, it was like a big hall of people, hundreds of people, and he had a bunk bed in this big warehouse. He considered that the conditions in Warehouse 2 were very similar to those in Warehouse 1, which had been documented in a number of reports, including two CPT reports of 2007 and 2011. The first applicant also stated that he had difficulty communicating with a doctor in the absence of an interpreter and that he suffered from dizziness and eye problems.

### *2. Mr Cabdulaahi Aweys Abubakar*

24. Mr Cabdulaahi Aweys Abubakar's narration about the conditions of detention in Warehouse 2 and Block B are similar to those referred to by the first applicant. Mr Cabdulaahi Aweys Abubakar also noted that in the first two weeks of his detention he had had stomach pains, but no doctor was available, nor was an ambulance called. He alleged that he had headaches and rashes on his scalp; however, the detention authorities would not provide him with the shampoo prescribed by the doctor. He noted that in October 2012 the detention authorities had not taken him to a hospital appointment; it had had to be rescheduled to March 2013. On that date, the doctor prescribed medication, however, up to the date of the introduction of

the application (17 April 2013) this had not been forthcoming. He also referred to an incident in which he had been beaten up by a fellow detainee who had allegedly also previously attacked another detainee with a knife. He noted that when he arrived in detention he was given two bed sheets, a blanket, a T-shirt, and two pairs of underwear, but no shoes, not even flip-flops. The second applicant further explained that they were fed chicken every day and that he was unable to keep in touch with his relatives, as the five-euro phone card distributed to them every two months only allowed four minutes of talk time to Somalia.

## E. Latest developments

### *1. Mr Burhaan Abdullahi Elmi*

25. The Government informed the Court that following the lodging of the application with the Court, on 19 April 2013 Mr Burhaan Abdullahi Elmi was released from detention under a care order and placed in an open centre for unaccompanied minors. He subsequently left Malta before the termination of his asylum proceedings; indeed the last day of registration at the open centre was 2 August 2013. In the absence of any further contact with the Office of the Refugee Commissioner, on 31 August 2013 the applicant's asylum claim was implicitly "withdrawn as discontinued".

26. It appears that the first applicant absconded and went to Germany and was held by the German authorities, who in turn requested the Maltese authorities to take him back in terms of the Dublin Regulation. Following the acceptance of that request on 7 May 2014 the Maltese authorities were informed by the German authorities that return was suspended pending proceedings in Germany.

27. In a signed declaration sent to the Court by his legal representatives the first applicant admitted to being in Schonbach, Germany, as he was waiting there for the outcome of the judicial proceedings as to whether he would be sent back to Malta in terms of the Dublin II Regulation to have his asylum claim determined.

### *2. Mr Cabdulaahi Aweys Abubakar*

28. The Government informed the Court that following the lodging of the application with the Court, on 24 April 2013 Mr Cabdulaahi Aweys Abubakar was released from detention under a care order and placed in an open centre for unaccompanied minors. He was granted subsidiary protection on 14 September 2013.

## II. RELEVANT DOMESTIC LAW AND PRACTICE

### A. The Immigration Act and the Refugees Act

29. The relevant articles of the above-mentioned Acts can be found in *Aden Ahmed v. Malta* (no. 55352/12, §§ 31-35, 23 July 2013).

### B. Government Policy

30. According to the Irregular Immigrants, Refugees and Integration Policy Document, issued by the Ministry for Justice and Home Affairs and the Ministry for the Family and Social Solidarity, in 2005:

> "Irregular immigrants who, by virtue of their age and/or physical condition, are considered to be vulnerable are exempt from detention and are accommodated in alternative centres".

31. The document contains an inclusive list of those categories of migrants considered vulnerable, which includes: "unaccompanied minors, persons with disability, families and pregnant women". With specific reference to unaccompanied minors and age assessment, the policy document states that:

> "Unaccompanied children and minors will be placed under state custody in terms of the Children and Young Persons (Care Order) Act (Chapter 285). This ensures that an unaccompanied minor is given the same treatment as a Maltese minor. ... The detention of minors should be no longer than what is absolutely necessary to determine their identification and health status. Interviews are to be carried in a 'child friendly' manner.
>
> Unfortunately there will be cases where individuals make false claims about their age in order to benefit from the terms and conditions of a Care Order. In order to ensure, as far as possible, that:
>
> (a) Care Orders are only issued in respect of true minors;
>
> (b) provisions for minors are not abused, and
>
> (c) actual minors are not deprived of the accommodation and services to which they are entitled by virtue of their age and the degree of vulnerability associated with it, Ministry for Justice and Home Affairs in consultation with the Ministry for the Family and Social Solidarity shall, in those cases where there is good reason to suspect the veracity of the minority age claimed by the immigrant, require the individual concerned to undertake an age verification test as soon as possible after arrival".

### C. The Age-Assessment Procedure

32. In order to give effect to this policy, a procedure known as the Age-Assessment Procedure was developed and implemented first by the Refugee Service Area within Aġenzija Appoġġ (the National Agency for children, families and the community) and later by AWAS (formerly

OIWAS), with a view to assessing claims to minor age. Although AWAS is not formally charged with the responsibility for this procedure by the law which constitutes it (see below) in practice the said agency has full responsibility for this procedure.

33. In practice, from the information available, it appears that the Age-Assessment Procedure consisted of a number of different phases. Individuals were referred to the Agency for the Welfare of Asylum Seekers (AWAS) by the Immigration Police (where they declare to be minors on arrival) or the Refugee Commissioner (where they declare to be minors in their PQ). Following referral, an initial interview is conducted by one member of AWAS staff. Where this interview is inconclusive, a second interview is conducted by a panel of three persons known as the Age-Assessment Team (AAT).

34. Where the panel is convinced that the individual concerned is not a minor, the minority age claim is rejected. Where a doubt remains, s/he is referred for a Further Age Verification (FAV) test, which essentially consists of an X-ray of the bones of the wrist. Although the AAT is not bound by the results of the test, in practice, it would appear that in most cases where it is resorted to the result will determine the outcome of the assessment.

35. If the individual concerned is found to be a minor, a care order is issued, the individual is released from detention and placed in an appropriate non-custodial residential facility, and a legal guardian is appointed to represent the minor. Once a guardian is appointed the asylum interview is carried out, and during the said interview the minor is assisted by a legal guardian. If the individual's claim to minor age is rejected, AWAS informs the Refugee Commissioner so that his office can proceed with the refugee status determination procedure.

36. In so far as relevant, Regulation 6 of the Agency for the Welfare of Asylum Seekers Regulation, Subsidiary Legislation 217.11, reads as follows:

> "(1) The function of the Agency shall be the implementation of national legislation and policy concerning the welfare of refugees, persons enjoying international protection and asylum seekers.
>
> (2) In the performance of its functions, the Agency shall:
>
> (a) oversee the daily management of accommodation facilities either directly or through subcontracting agreements;
>
> (b) provide particular services to categories of persons identified as vulnerable according to current policies;
>
> (c) provide information programmes to its clients in the areas of employment, housing, education, health and welfare services offered under national schemes;
>
> (d) act as facilitator with all public entities responsible for providing services to ensure that national obligations to refugees and asylum seekers are accessible;

(e) promote the Government's policy and schemes regarding resettlement and assisted voluntary returns;

(f) maintain data and draw up reports that are considered relevant for its own function and to provide statistics to appropriate policy-making bodies;

(g) advice the Minister on new developments in its field of operation and propose policy or legislation required to improve the service given and fulfil any legal obligations in respect of its service users;

(h) encourage networking with local voluntary organisations so as to increase the service standards as well as academic research;

(i) work with other public stakeholders and, where possible, offer its services to asylum seekers accommodated in other reception centres not under its direct responsibility; and

(j) implement such other duties as may be assigned to it by the Minister or his representative."

37. Regulation 15 of the Procedural Standards in Examining Applications for Refugee Status Regulations Subsidiary Legislation 420.07 - Legal Notice 243 of 2008, as applicable at the time of the present case (prior to amendments in 2014) laid down some basic procedural safeguards applicable when minors are interviewed, including the provision of information about the asylum procedure, assistance with preparation for the interview and presence of the representative during the interview. Its paragraph (2) dealt with the use of medical procedures to determine age within the context of an application for asylum. In so far as relevant it read as follows:

"(1) In relation to an unaccompanied minor falling within the provisions of article 13(3) of the Act, as soon as possible, and not later than thirty days from the issue of the care order under that article:

(a) it shall be ensured that the appointed representative of the unaccompanied minor is given the opportunity to inform the unaccompanied minor about the meaning and possible consequences of the personal interview and, where appropriate, how to prepare himself for the personal interview. The representative shall be present at the interview and may ask questions or make comments within the framework set by the person who conducts the interview;

(b) where an unaccompanied minor has a personal interview on his application for asylum, that interview is to be conducted and the decision prepared by a person who has the necessary knowledge of the special needs of minors.

(2) Medical examinations to determine the age of unaccompanied minors within the framework of any possible application for asylum may be carried out.

Provided that:

(a) unaccompanied minors are informed prior to the examination of their application for asylum, and in a language which they may reasonably be supposed to understand, of the possibility that their age may be determined by medical examination. This shall include information on the method of examination and the possible consequences of the result of the medical examination for the examination of the application for asylum, as well as the consequences of refusal on the part of the unaccompanied

> minor to undergo the medical examination which may include the rejection of his claim that he is a minor;
>
> (b) unaccompanied minors and their representatives consent to carry out the determination of the age of the minors concerned;
>
> (c) the decision to reject an application from an unaccompanied minor who refused to undergo this medical examination shall not be based solely on that refusal:
>
> Provided that an unaccompanied minor who has refused to undergo such a medical examination shall not prevent the determining authority from taking a decision on the application for asylum and that the best interests of the minor shall be a primary consideration in any such decision."

38. Article 15 of the Reception of Asylum Seekers (Minimum Standards) Regulations, Subsidiary Legislation 420.06 – Legal Notice 320 of 2005, states that:

> "an unaccompanied minor aged sixteen years or over may be placed in accommodation centres for adult asylum seekers".

### D. Other Relevant Subsidiary Legislation

39. 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, aka the Return Directive) in so far as relevant, is set out in *Aden Ahmed* (cited above, §§ 31-35).

## III. RELEVANT INTERNATIONAL TEXTS

40. Under European Union law, in particular Article 24 of The Reception Conditions Directive provides guidance on the type of accommodation to be provided to unaccompanied minors, which must be with adult relatives, with a foster family, in reception centres with special provisions for minors, or in other suitable accommodation. Detention of unaccompanied minors is not fully prohibited but is only allowed in exceptional circumstances and never in prison accommodation (Article 11 (3) of the Recast Directive). The directive considers that a 'minor' means a third-country national or stateless person below the age of 18 years; it also notes that applicants aged sixteen and over, but under the age of eighteen and therefore still minors, may be placed in accommodation centres for adult asylum seekers, but only if it is in the best interests of the child[1].

[1] This condition is not applicable to Ireland and the United Kingdom.

41. In so far as relevant the United Nations Convention on the Rights of the Child, of 20 November 1989, ratified by Malta in 1990, reads as follows:

**Article 1**

"For the purposes of the present Convention, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier."

**Article 2**

"1. States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.

2. States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members."

**Article 3**

"1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

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

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

**Article 37**

"States Parties shall ensure that:

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

(b) No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time;

(c) Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so

and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances;

(d) Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action."

42. In Recommendation Rec(2003)5 of the Committee of Ministers of the Council of Europe, 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, the Committee of Ministers recommended, in particular in respect of minors, that:

"20. As a rule, minors should not be detained unless as a measure of last resort and for the shortest possible time.

21. Minors should not be separated from their parents against their will, nor from other adults responsible for them whether by law or custom.

22. If minors are detained, they must not be held under prison-like conditions. Every effort must be made to release them from detention as quickly as possible and place them in other accommodation. If this proves impossible, special arrangements must be made which are suitable for children and their families.

23. For unaccompanied minor asylum seekers, alternative and non-custodial care arrangements, such as residential homes or foster placements, should be arranged and, where provided for by national legislation, legal guardians should be appointed, within the shortest possible time."

43. In Recommendation 1985 (2011) of the Parliamentary Assembly of the Council of Europe, of 7 October 2011, entitled "Undocumented migrant children in an irregular situation: a real cause for concern", the Parliamentary assembly considered that undocumented migrant children are triply vulnerable: as migrants, as persons in an undocumented situation and as children. They recommended that member States refrain from detaining undocumented migrant children, and protect their liberty by abiding by the following principles:

"9.4.1. a child should, in principle, never be detained. Where there is any consideration to detain a child, the best interest of the child should always come first;

9.4.2. in exceptional cases where detention is necessary, it should be provided for by law, with all relevant legal protection and effective judicial review remedies, and only after alternatives to detention have been considered;

9.4.3. if detained, the period must be for the shortest possible period of time and the facilities must be suited to the age of the child; relevant activities and educational support must also be available;

9.4.4. if detention does take place, it must be in separate facilities from those for adults, or in facilities meant to accommodate children with their parents or other family members, and the child should not be separated from a parent, except in exceptional circumstances;

9.4.5. unaccompanied children should, however, never be detained;

> 9.4.6. no child should be deprived of his or her liberty solely because of his or her migration status, and never as a punitive measure;
>
> 9.4.7. where a doubt exists as to the age of the child, the benefit of the doubt should be given to that child;"

44. Prior to the above recommendation, in Resolution 1707 (2010) 28 January 2010, the Parliamentary Assembly, called on member states of the Council of Europe in which asylum seekers and irregular migrants are detained to comply fully with their obligations under international human rights and refugee law, and encouraged them to abide by a number of guiding principles, *inter alia*, that vulnerable people should not, as a rule, be placed in detention and specifically that unaccompanied minors should never be detained.

## IV. RELEVANT MATERIALS

45. The 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, reads as follows;

> "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."

46. The 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), in so far as relevant reads as follows:

"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."

47. The 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 26 to 30 September 2011, published on 4 July 2013, in so far as relevant in connection with Safi barracks, reads as follows:

"44. At the time of the visit, *Safi Detention Centre* was accommodating a total of 506 male adult detainees (236 in Warehouse No. 1, 113 in Warehouse No. 2 and 124 in Block B).

In keeping with the Government's Detention Policy, no unaccompanied minors were held in either of the two detention centres visited. Upon issuance of a care order

by the Minister of Social Policy, unaccompanied minors were always transferred to a juvenile institution. Single women were always accommodated separately from male detainees.

...

48. As was the case in 2008, a number of detainees complained about disrespectful behaviour and racist remarks by detention officers (in particular in the Warehouses at Safi Detention Centre). **The CPT reiterates its recommendation that the Maltese authorities remind all members of staff working in detention centres for foreigners that such behaviour is not acceptable and will be punished accordingly.**

...

55. At both [*Lyster and*] *Safi Detention Centres*, material conditions have improved since the 2008 visit. ... At Safi Barracks, additional renovation work had been carried out in Block B. It is noteworthy that all foreign nationals received personal hygiene products on a regular basis and were also supplied with clothes and footwear.

However, material conditions of detention were still appalling in the two Warehouses at Safi Barracks. In particular, at Warehouse No. 1, foreign nationals were being held in extremely crowded conditions and the sanitary facilities consisting of seven mobile toilets (without a flush) and seven mobile shower booths, located in the outdoor exercise yard, were in a deplorable state. In fact, the Warehouses are not suitable for accommodating persons for prolonged periods, but should only be used in the event of an emergency.

**The CPT recommends that the Maltese authorities take the necessary measures to ensure that all immigration detainees currently being held in the two Warehouses at Safi Barracks are transferred as soon as possible to Ta' Kandja Detention Centre and that both Warehouses are in future only used for short-term detention in emergency situations.**

...

57. At *Safi Detention Centre*, conditions of detention in the two warehouses were further exacerbated by the total lack of any organised activities. The situation was slightly better, but far from satisfactory in Block B, where detainees could play football in the exercise yard (surrounded by high walls), which was accessible from 8.30 a.m. to 7 p.m.

**The CPT calls upon the Maltese authorities to introduce a regime providing purposeful activities to foreign nationals held at Safi [and Ta' Kandja Detention] Centres.**

...

58. Medical and nursing services in detention centres for foreigners were provided by two separate privately-run companies. There was a pool of doctors ensuring the presence of one doctor from Mondays to Fridays (including public holidays), for five hours per day at Safi [and four hours per day at Lyster Barracks]. Further, a nurse was present in each detention centre from Mondays to Fridays from 8 a.m. to 3 p.m. In addition, at Safi Barracks, a nurse from the local health-care service came to the establishment to administer medication requiring supervision in the evenings and at weekends.

The CPT must stress that, given the size of the inmate populations, the current arrangements for the provision of health care were clearly insufficient to ensure that

> detainees' health problems were dealt with in a timely and effective manner. The delegation was overwhelmed by complaints from detainees about delays in seeing a doctor (up to several days) and, subsequently, in receiving prescribed medicines (up to one week). In practice, only a limited number of requests (usually five) per detention block were forwarded by detention officers to the nurse on duty on a first-come first-served basis. This was described by many detainees as source of constant tension among themselves. ...
>
> In the two Warehouses at Safi Barracks, the delegation observed that a significant number of detainees were lying in bed all day in total apathy. Given that nurses never entered the detention areas, the likelihood was great that detainees in need of urgent psychological support remained undetected for a long time. Regrettably, both centres were still not being visited by a psychologist and a psychiatrist.
>
> Another major shortcoming was the lack of systematic medical screening of detainees upon admission to a detention centre. The delegation was informed by health-care staff that, on arrival at the port, all foreign nationals had undergone a chest X-ray, but no further screening was performed at the detention centres. In this regard, the CPT wishes to recall that systematic medical screening is not only an essential means of protecting detainees and staff alike (in particular, with regard to transmissible diseases) but also an important safeguard against ill-treatment. ...
>
> 60. As regards contact with the outside world, the CPT welcomes the fact that, in both detention centres visited, foreign nationals could receive telephone calls from the outside. They were also were provided with telephone cards free of charge on a regular basis, although these were limited to a total of 5€ every two months."

In their report the CPT noted that, at Safi Detention Centre, attempts were made by the management to provide misleading information and to hide from the delegation a significant number of complaints which had been lodged by foreign nationals.

48. In a report by the International Commission of Jurists ("ICJ") 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), 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 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.

49. They considered that a lesser, though still worrisome, situation of overcrowding existed in B-Block of the Safi Barracks at the time of the ICJ visit. While this centre was provided with open cells, these were overcrowded with bunk beds, and the only privacy was that which had been tentatively achieved through hanging blankets from the top of the bunks. In their view in B-Block, the kitchen and the bathroom appeared rather dirty.

50. They noted, *inter alia*, that in the Warehouse the number of toilets and showers appeared to the delegation to be insufficient in comparison to

the number of people detained. The migrants detained in Warehouse One had no facilities for cooking, mainly due to the structure of the detention centre, which did not allow for a kitchen, big enough for all detainees, to be installed.

51. Other relevant extracts from their report read as follows:

> "There is a lack of leisure facilities in the detention centres visited. In Warehouse One, the only entertainment was provided by a single television in the main common room and by the recreation-yard. In B-Block, there was also a recreation-yard, although of rather limited dimensions, and the detainees expressly complained of the lack of means of recreation, claiming that they had only one ball at their disposal. No books seemed to be present in the detention facilities." ...
>
> "The detainees in Warehouse One also complained about the clothing provided to them. According to them, clothes were given to them through charity and some of them were wearing very worn out t-shirts." ...
>
> " [the ICJ] considers that in Safi Barracks, the accumulation of poor conditions of detention, including sanitary conditions, together with the apparent existence of cases of psychological instability, with the lack of leisure facilities, the overcrowded conditions and the mandatory length of 18 months of detention brought, at the time of the visit, the situation in the detention centre beyond the threshold of degrading treatment, and therefore in violation of Article 3 ECHR, Articles 1 and 4 EU Charter, Article 7ICCPR and Article 16 CAT."

52. *Bridging Borders,* a JRS Malta report on the implementation of a project to provide shelter and psychosocial support to vulnerable asylum seekers between June 2011 and June 2012, highlights the fact that not all medication prescribed by medical personnel in detention is provided free by the Government health service. In fact the said report notes that during the lifetime of the project the organisation purchased medication for 130 detainees.

53. *Care in Captivity,* a more recent JRS Malta report on the provision of care for detained asylum seekers experiencing mental health problems (research period December 2013 to June 2014), documented several obstacles to quality health care including: lack of availability of interpreters; lack of attendance for follow-up appointments following discharge to detention (in seven out of seventy-four cases); and failure to dispense prescribed psychotropic medication in some cases. It held that:

> "In this regard, the current system where, after discharge from the ASU ward, the responsibility for continuity of care, in terms of attendance of hospital appointments and dispensation of medication, falls under detention health care providers and custodial staff appears not to be operating effectively."

54. In so far as relevant, extracts from a report by Human Rights Watch in 2012 called "Boat-ride to Detention", reads as follows:

> "Children lack adequate information about the age determination process (including whether documents are accepted and whether there is an appeal). Some migrants who request an age determination procedure are seemingly ignored: interviewees reported telling authorities they were minors but never receiving age determination. Other

children never request an age determination because they lack information on the procedure.”

“The government should do more to provide children with reliable information about the age determination procedure. Children receive no guidance on the content of the procedure, whether documents will be useful, or whether they can appeal. Malta has taken considerable steps in providing information to migrants about the process for asylum, including by conducting information sessions to every incoming migrant. It could easily do the same for the age determination process.”

55. A 2014 report issued by Aditus, a local NGO entitled “Unaccompanied Minor Asylum-Seekers in Malta: a technical Report on Ages Assessment and Guardianship Procedures”, reads as follows:

“The procedural information provided to persons undergoing age assessment is extremely limited which further excludes the applicant from active participation in the process.”

“Under the old procedure [2012] persons were not adequately informed of the possibility of appeal... persons were also typically not informed of the reasons for a negative decision”

“Most experts agree that age assessment is not a determination of chronological age but rather an educated guess. There are risks that due to the inaccuracy of age assessment techniques, persons claiming to be minors may have their age mis-assessed”

56. The relevant extracts of General Comment no.6 (2005) of the Committee on the Rights of the Child, entitled “Treatment of unaccompanied and separated children outside their country of origin” read as follows:

“61. In application of article 37 of the Convention and the principle of the best interests of the child, unaccompanied or separated children should not, as a general rule, be detained. Detention cannot be justified solely on the basis of the child being unaccompanied or separated, or on their migratory or residence status, or lack thereof. Where detention is exceptionally justified for other reasons, it shall be conducted in accordance with article 37(b) of the Convention that requires detention to conform to the law of the relevant country and only to be used as a measure of last resort and for the shortest appropriate period of time. In consequence, all efforts, including acceleration of relevant processes, should be made to allow for the immediate release of unaccompanied or separated children from detention and their placement in other form of appropriate accommodation....

63. In the exceptional case of detention, conditions of detention must be governed by the best interests of the child and pay full respect to article 37(a) and (c) of the Convention and other international obligations. Special arrangements must be made for living quarters that are suitable for children and that separate them from adults, unless it is considered in the child’s best interests not to do so. Indeed, the underlying approach to such a program should be “care” and not “detention”. Facilities should not be located in isolated areas where culturally-appropriate community resources and access to legal aid are unavailable. Children should have the opportunity to make regular contact and receive visits from friends, relatives, religious, social and legal counsel and their guardian. They should also be provided with the opportunity to receive all basic necessities as well as appropriate medical treatment and

psychological counselling where necessary. During their period in detention, children have the right to education which ought, ideally, to take place outside the detention premises in order to facilitate the continuance of their education upon release. They also have the right to recreation and play as provided for in article 31 of the Convention. In order to effectively secure the rights provided by article 37(d) of the Convention, unaccompanied or separated children deprived of their liberty shall be provided with prompt and free access to legal and other appropriate assistance, including the assignment of a legal representative."

57. In their report "20 years of combatting torture" 19th General Report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) 1 August 2008 - 31 July 2009, the CPT remarked as follows:

"97. The CPT considers that every effort should be made to avoid resorting to the deprivation of liberty of an irregular migrant who is a minor. Following the principle of the "best interests of the child", as formulated in Article 3 of the United Nations Convention on the Rights of the Child, detention of children, including unaccompanied and separated children, is rarely justified and, in the Committee's view, can certainly not be motivated solely by the absence of residence status.

When, exceptionally, a child is detained, the deprivation of liberty should be for the shortest possible period of time; all efforts should be made to allow the immediate release of unaccompanied or separated children from a detention facility and their placement in more appropriate care. Further, owing to the vulnerable nature of a child, additional safeguards should apply whenever a child is detained, particularly in those cases where the children are separated from their parents or other carers, or are unaccompanied, without parents, carers or relatives.

98. As soon as possible after the presence of a child becomes known to the authorities, a professionally qualified person should conduct an initial interview, in a language the child understands. An assessment should be made of the child's particular vulnerabilities, including from the standpoints of age, health, psychosocial factors and other protection needs, including those deriving from violence, trafficking or trauma. Unaccompanied or separated children deprived of their liberty should be provided with prompt and free access to legal and other appropriate assistance, including the assignment of a guardian or legal representative. Review mechanisms should also be introduced to monitor the ongoing quality of the guardianship.

99. Steps should be taken to ensure a regular presence of, and individual contact with, a social worker and a psychologist in establishments holding children in detention. Mixed-gender staffing is another safeguard against ill-treatment; the presence of both male and female staff can have a beneficial effect in terms of the custodial ethos and foster a degree of normality in a place of detention. Children deprived of their liberty should also be offered a range of constructive activities (with particular emphasis on enabling a child to continue his or her education)."

# THE LAW

## I. JOINDER OF THE APPLICATIONS

58. In accordance with Rule 42 § 1 of the Rules of Court, the Court decides to join the applications, given their similar factual and legal background.

## II. PRELIMINARY ISSUES

### Article 37 § 1 of the Convention

59. Article 37 § 1 of the Convention allows the Court to strike an application out of its list of cases and provides as follows:

> "1. The Court may at any stage of the proceedings decide to strike an application out of its list of cases where the circumstances lead to the conclusion that
>
> (a) the applicant does not intend to pursue his application; or
>
> (b) the matter has been resolved; or
>
> (c) for any other reason established by the Court, it is no longer justified to continue the examination of the application.
>
> However, the Court shall continue the examination of the application if respect for human rights as defined in the Convention and the Protocols thereto so requires."

60. In their first round of observations the Government submitted that it was not clear whether the first applicant intended to pursue his application, given the fact that he had absconded and had not kept the Court informed of his whereabouts, or of the outcome of his judicial proceedings in Germany. In their view, this behaviour was clear evidence that he was no longer interested in pursuing the application, and thus the Court should strike out his application. In their second round of observations, following the declaration produced by the first applicant's legal representative, the Government highlighted that the signature on the declaration did not correspond to that on the application form; in consequence it could not be taken as a valid expression of interest to continue pursuing the application.

61. The first applicant's legal representatives, who submitted that they were still in touch with the first applicant, relied on the declaration made by him (in February 2015), in which he stated that he was in Germany and that he was still interested in pursuing his case before the Court, through his legal representatives who remained authorised to so do. In their further submissions they noted that they were regularly in contact - by telephone and with an interpreter - with the first applicant throughout the proceedings before this Court. They further explained that a photograph of the declaration signed by the first applicant (in February 2015) had been sent

through a free instant messaging service for mobile telephones. They submitted that following the Government's contestation (August 2015) the first applicant's legal representatives again contacted the first applicant and his lawyer in Germany in order to obtain a further declaration. However, the first applicant informed them that he was unable to make the trip to his lawyer's office in Frankfurt to have the declaration and signature authenticated, as he had no money for the journey. The first applicant's legal representatives also submitted a signed declaration, dated 14 September 2015, by Ms Lena Ronte, an advocate practising in Germany, currently representing the first applicant in the proceedings in Germany. In the mentioned declaration she confirmed that the first applicant was residing in a reception centre in Schonbach, Germany, awaiting the outcome of his asylum proceedings. She confirmed that the first applicant's representatives before this Court had contacted her to obtain a fresh declaration by him but that she had been unable to meet him, although she had spoken with him by telephone. According to her declaration, the first applicant told her that he was still interested in pursuing the case before the Court and confirmed that he was represented by Dr Michael Camilleri and Dr Katrine Camilleri, as stated in the authority form he signed on 16 April 2013.

62. The Court notes that the first applicant's legal representatives have not rebutted the Government's challenge concerning the difference in the first applicant's signatures in the application and the declaration. Nevertheless, in the Court's view, while the signatures on the two documents are certainly different, it cannot be excluded that the first applicant, being Somali, was little accustomed to the Latin alphabet at the time of his signature in 2013. This situation may have evolved by the time the applicant signed his declaration in 2015 and thus the Court finds no reason to doubt its veracity in the present circumstances. Indeed, the Court considers that the submissions made by the first applicant's legal representatives, together with the first applicant's declaration in February 2015 as well as that of his lawyer in Germany dated September 2015, leave no doubt that the first applicant wishes to pursue his application.

63. Accordingly, the Court rejects the Government's request to strike the application no. 25794/13 out of its list of cases under Article 37 § 1 of the Convention, and continues the examination of the case.

## III. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

64. The applicants complained about the conditions of their detention in Warehouse 2 and Block B in Safi Barracks. They relied on Article 3 of the Convention, which reads as follows:

> "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

## A. Admissibility

### 1. *The Government's objection as to non-exhaustion of domestic remedies*

#### (a) The parties' submissions

65. The Government submitted that the applicants had not brought their complaint before the domestic authorities. They considered that the applicants had a twofold remedy, namely constitutional redress proceedings to challenge the conditions of their detention while they were in detention and an action for damage in tort after they left detention. They further noted that an action under the European Convention Act was not subject to any time-limits. A summary of their submissions can be found in *Mahamed Jama v. Malta* (no. 10290/13, §§ 49-53, 26 November 2015).

66. The applicants submitted that there existed no effective domestic remedy which should have been used. A summary of their lawyers' submissions can be found in *Mahamed Jama* (cited above, §§ 54-57).

#### (b) The Court's assessment

67. The Court notes that in the present case, when the applicants lodged their application with the Court (on 17 April 2013) complaining, *inter alia*, about their conditions of detention, the applicants were still in detention, and thus, apart from requiring a remedy providing compensation, they required to have a preventive remedy capable of putting an end to the ongoing violation of their right not to be subjected to inhuman or degrading treatment.

68. In a number of cases concerning the same situation, the Court has already found that none of the remedies indicated by the Government, alone or in aggregate, satisfy the requirements of an effective remedy in the sense of preventing the alleged violation or its continuation in a timely manner (see *Mahamed Jama*, cited above, §§ 58-66, and *Moxamed Ismaaciil and Abdirahman Warsame v. Malta*, nos. 52160/13 and 52165/13, §§ 43-51, 12 January 2016).

69. It follows that the Government's objection is dismissed.

### 2. *Conclusion*

70. 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 applicants

71. The applicants considered the conditions of detention to be basic. They noted in particular the lack of access to constructive or recreational activities, insufficient provision of basic needs (including clothing), lack of information, difficulties in communicating with the outside world, limited access to open air, and obstacles in obtaining the most basic services. Other factors which had to be taken into consideration were their young age, their inability to communicate in any language apart from Somali, and the fact that they were detained in a facility with adult men from many different ethnic, linguistic and cultural backgrounds. Further, the detention centre was staffed by men, most having a security background, leaving a huge gap in the provision of social welfare services to detainees, in spite of their best efforts. In their view all the above took a greater toll, given their personal circumstances and situation while they were in detention. In particular both applicants claimed that they had been bullied and victimised by fellow detainees in both the facilities where they had been detained.

72. They referred to the international reports about the matter, noting that while those reports did not refer to Warehouse 2, but solely to Warehouse 1, the conditions were practically identical in both warehouses. According to the CPT the warehouses were unsuitable to accommodate people in the long term.

73. The first applicant also considered the warehouses to be overcrowded. There was no privacy, and he felt insecure as there was no protection from abuse and victimisation. He also emphasised that he had a number of health problems while he was in detention, during which period he was unable to obtain the necessary medical care; no support was provided while he was waiting for his age-assessment procedure.

74. Relying on the Court's case-law the applicants submitted that when assessing conditions of detention account had to be taken of the cumulative effect of the conditions, and that the minimum level of severity of ill-treatment or degrading treatment depended on the circumstances of the case, such as the duration, physical and mental effects, sex, age and state of health of the victim. In the present case, at the time of their detention both the applicants were minors. They noted that in *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium* (no. 13178/03, ECHR 2006-XI) concerning the detention of a five-year-old child, the Court had emphasised that steps should be taken to enable the effective protection of children and vulnerable members of society, including reasonable measures to prevent ill-treatment of which the authorities have or ought to have knowledge (§ 53). According to the Court, her very young age, her immigration status, and the fact that

she was unaccompanied rendered that child extremely vulnerable, and the respondent State owed her a duty of care and protection as part of its positive obligations under Article 3 (§ 55). The applicants submitted that even though they were older than the applicant in the aforementioned case, they were nevertheless minors and thus should have benefited from the enhanced guarantees provided by law for the protection of this vulnerable category of asylum seekers.

75. They referred to Article 37 of the Convention on the Rights of the Child (see paragraph 41 above), to which Malta was a party. They noted that national law provided that "in the implementation of the provisions relating to material reception conditions and health care, account shall be taken of the specific situation of vulnerable persons which shall include minors, unaccompanied minors and pregnant women, found to have special needs after an individual evaluation of their situation". It also stipulated that in the implementation of the provisions relating to the reception of minors "the best interests of the child shall constitute a primary consideration". It did allow, however, that unaccompanied minors "aged sixteen years or over may be placed in accommodation centres for adult asylum seekers". Moreover, minor asylum seekers are entitled to "have access to the education system under similar conditions to Maltese nationals... Access to the education system shall not be postponed for more than three months from the date the application for asylum was lodged by the minor... Provided that this period may be extended to one year where specific education is provided in order to facilitate access to the education system." They noted that although the law does not specifically prohibit the detention of minors, several human rights monitoring bodies had emphasised that detention of children should be avoided (see paragraphs 48 and 54 above).

76. The applicants clarified that their complaint did not only relate to the physical conditions in which they were detained, which they considered to be very bad, but also to the severely detrimental impact that detention had on their wellbeing due to their particular personal circumstances. They noted that both the applicants spent around five months (from August to mid-January) in Warehouse 2 and around three months (from mid-January to the respective dates of their release in April) in Block B.

77. They referred to the report by the ICJ (see paragraphs 52 *et seq.*, above) and further noted that Warehouse 2, as its name implied, was designed for storage purposes and not to accommodate people. From the inside of the warehouse it was practically impossible to look outside, as all the windows were set high in the wall. This also limited the light inside the building and the ventilation. The only exits from the building were two doors to the yard, which were locked during the night. The first applicant complained that in summer it was scorching hot, and that he had been the victim of abuse by one of the hundreds of people of various ethnicities housed in the warehouse. The applicants submitted that according to

information obtained at the time, in August and September 2012 Warehouse 2 contained far more than the stipulated 200 detainees (approximately 290-320 people). From October the number of people held there went down to 200 or less and continued to go down progressively until January, when the detainees still held there were transferred to Block B.

78. The only recreational activity available in detention was watching television or spending time in the yard adjoining the block. This lack of facilities had been commented on by the CPT and the ICJ. The first applicant noted that it was however difficult to join in playing football because the yard was small and all the other detainees were older than him. Both applicants complained that there was hardly anything for them to do to occupy their minds during their time in detention; the second applicant noted that he was left with a lot of time to worry about his situation.

79. The applicants noted that it was not true that English classes were offered at Safi (they were offered at Lyster Barracks, another detention centre) and the SPARKLET project ended in November 2012, so it was only operating for the first three months of the applicants' detention and even while it was operational it only served small groups of migrants at any given time.

80. Both applicants complained about their access to medical care and the quality of medical care provided. In particular they noted the unavailability of interpreters (excluding fellow detainees); missed hospital appointments; and delay in the provision of medication/unavailability of medicine prescribed. While not doubting the efficacy of the medical personnel providing a service - given that they were more often than not communicating with migrants with little or no knowledge of English - it was difficult to understand how they could provide a quality service in an average of six minutes per patient (in the light of the Government submissions, see paragraph 94 below). The applicants again referred to the CPT report and the JRS Malta report, Bridging Borders (see IV. Relevant Materials, above).

81. The applicants submitted that the centres at Safi Barracks were both staffed exclusively by Detention Service personnel, most of whom came from a security background and were neither trained nor competent to provide psychological or social support to detainees. While the applicants acknowledged that the personnel did their best, there was no provision of psycho-social support to detainees, especially to the applicants who were minors. Thus many of their concerns related to the treatment they experienced at the hands of fellow detainees which could not be addressed. The applicants highlighted that they were not provided with support to deal with the harsh realities of life in detention.

82. Both applicants complained about the food in detention and that they mostly ate chicken while in detention. The first applicant complained that his skin was itching from the bad diet and when he tried to complain to the

soldiers he was told that the food would remain as it was. They considered that the quality and quantity of the food provided lacked variety and was not culturally appropriate. According to reports by *Médecins Sans Frontières* and the JRS (relevant links submitted to the Court) the diet provided had led to a number of gastrointestinal problems among detainees.

83. The applicants submitted that they received very little information apart from that provided by the Refugee Commissioner at the initial stages of the asylum procedure. Neither of them understood the written information, provided by the immigration authorities in Arabic, about their rights and obligations while in detention. They were also provided with very little information about the age-assessment procedure, to the extent that the second applicant felt compelled to go on a hunger strike in protest about the length of the procedure to determine his age. They referred to reports on the matter (see IV. Relevant Materials, above).

84. As to the lack of contact with the outside world, the applicants noted that like all the other detainees they were provided with a five-euro phone card once every two months. This meant that their contact with their families was extremely limited. Being minors this was particularly hard for them to bear. The credit provided was quite limited and often insufficient to make long-distance calls. Other, less costly, options were not available since detainees did not have Internet access. The lack of Internet access also hampered their access to information about what was happening in the outside world.

85. Contrary to what the Government claimed, both applicants stated that they were not provided with the basic items they needed while in detention. The first applicant explained that when he arrived in detention the only things he was given were two sheets, one T-shirt, a blanket and two pairs of underwear but no shoes, not even flip-flops. It was only after four months that he was given shoes he could wear to play football, and that was only because he protested. In the meantime he had had to make do with some shoes which had been left behind by other Somalis who had since been released.

86. The applicants found the living conditions in detention very difficult, particularly because of the fact that they had to live with so many people. They highlighted how unsafe they both felt in the often tense and violent atmosphere of detention, where other violent individuals were hosted (despite criminal records); both applicants describe incidents of bullying and intimidation which left them feeling very threatened and unsafe in detention, where it was impossible for them to obtain protection or effective redress for the harm suffered. Apart from being a minor, the first applicant also belonged to a minority group in that he was a member of the Midgan, a minority tribe, which caused him to fear other detainees, who often also stole his food. The applicants failed to understand how they, as minors, could be detained with other aggressive individuals, without any form of

protection, supervision or support. Furthermore they admitted that they did not always report certain individuals for fear of reprisals. They noted that incidents of assault in detention were common, particularly among detainees, although few if any were reported, possibly due to doubts about the efficacy of the system in place to provide redress. A report entitled *Becoming Vulnerable in Detention,* National Report on Malta, July 2010 under the DEVAS project, reported that 28% of respondents interviewed for the study reported being physically assaulted while in detention. Of these 68% were assaulted by other detainees; 18% of them reported that they had filed complaints in cases of physical assault, but none reported that the complaints had resulted in any change.

87. Furthermore, the applicants had to contend with the anxiety of not knowing what would happen to them or how long they would be detained. As the months went by, the adults who had arrived in Malta with them were released with protection, while they remained detained awaiting the outcome of the age-assessment procedure. This made life fraught with anxiety to the extent that the first applicant suffered from insomnia, and the second applicant repeatedly refused food in protest. The applicants claimed that prolonged detention caused a significant deterioration in their physical and mental well-being which was exacerbated by the lack of any real possibility of obtaining effective redress and the knowledge that detention was not serving any useful purpose and was in no way proportionate to the aim sought to be achieved.

*2. The Government's submissions*

88. The Government submitted that the Safi Detention centre (a military base) had two warehouses (House 1 and House 2) as well as (according to the photographs submitted) a two-storey building called B Block. They explained that Warehouse 2 had been closed at the beginning of 2013 for refurbishment. Both warehouses have a capacity of 200 persons and host only men and male minors undergoing age-assessment procedures. They consist of a single open space with half-length low partitions between rows of bunk beds. At the entrance of the warehouse, there is a common area with tables, benches and a television, which exits onto an outdoor recreational facility. There is also access to secluded sanitary facilities with hot and cold water which respect the privacy of the individual using the shower facilities. All compounds have recreation yards which are accessible to inmates from sunrise to sunset.

89. The Government submitted that they allocated substantial sums of money to secure the maintenance and upkeep of detention centres, while also providing shelter, food, clothing, and medical assistance to migrants. In the Government's view the facility catered for all the needs of the migrants. Further, as far as possible migrants with different ethnicities and religious beliefs were kept separate while in detention.

90. According to the Government, upon arrival an emergency bag is distributed and a second bag is supplied on the second day. Further supplies are provided on a regular basis to cater for the migrants' well-being, including that of the applicants, who did not have the financial means to purchase supplies. Every two weeks new cleaning products were supplied to each room in order to secure the cleanliness of the areas. The applicants were also given clothing and supplies to cater for personal hygiene, and had access to sanitary facilities equipped with hot and cold water, as well as secluded showers.

91. The Government submitted that whilst in detention the applicants were housed in a sheltered compound with adequate bedding and were provided with three meals a day on a daily basis (the menu changed daily and food was prepared in different ways) and mineral water. Meals were provided from a pre-set menu, however, particular dietary requests were regularly respected and the food supplied respected the relevant religious traditions. The detention centres had a medical practitioner and a nurse who provided on-site treatment and could make referrals to hospital treatment, and "custody clinics" were set up in all compounds housing migrants.

92. The detention centre is equipped with ceiling fans which can be used in the summer months and the building is equipped with windows that can be easily opened and which provide the necessary ventilation and circulations of air. The Government submitted that access to outside exercise was limited to one and a half hours daily, during which immigrants could engage in sports activities such as playing football.

93. Immigration detainees were provided with telephone cards and various telephones can be found in the detention centre. Moreover, the Red Cross also operated a mobile phone calling service on a daily basis. The Government submitted that access to the Internet or mobile phones was restricted for security reasons. Interpreters were provided for free at the detention centres. The detainees were further provided with stationery and books on request and have unlimited access to NGOs and legal assistance. In 2013 the immigrants also had the opportunity to take part in an EU funded project (SPARKLET) which provided, *inter alia*, educational and cultural activities.

94. The Government explained that medical services at the Safi Detention Centre had been outsourced since April 2007. Two doctors and two nurses visited the detention centres every day (except weekends) between 8 am and 3 pm (nurses) and 9 am and 11 pm (doctors). On a daily basis each doctor examined forty inmates, meaning that 400 patients were examined each week. The clinics on site at each of the compounds in Safi were refurbished and equipped with basic medical equipment. During silent hours (when doctors were not present) detainees were allowed to visit the nearest health centre to see a doctor. Furthermore, nurses from the Malta Memorial District Nursing Association (MMDNA) reported to detention

centres during weekdays in the evening and weekends both morning and evenings to dispense medicines. For migrants requiring mental health support, the doctor would refer them for further treatment at Mount Carmel Hospital (the State mental health hospital) and other referrals to the State General Hospital were made if specialised attention was necessary.

95. As to the second applicant's allegation, the Government reiterated that the Safi Detention centre had a clinic staffed by a doctor and a nurse, and in their absence he would have been taken to a health centre had he sought medical assistance. However, the Government claimed that no such report had ever been made by the applicant with the detention staff, neither was any report made concerning any beating by a fellow immigrant – in respect of which the second applicant gave no details. Further, the Government alleged (without any supporting evidence) that one of the people the applicant feared was in prison while the second applicant was detained in Safi. The Government further noted that the authorities kept medical appointments, but that it was the migrants who often refused to attend them, and other dates thus had to be fixed. The Government also contested the second applicant's allegation that he was not given shoes on arrival, as the emergency bag distributed on the first day contains flip-flops.

96. The Government submitted that the applicants were given information on their arrival, by means of an information leaflet and verbally, and the Commissioner for Refugees holds information sessions with the aid of interpreters. As to information concerning the AWAS procedure the Government submitted that information was easily available had the applicants asked for it from the staff at the detention centre; however it did not appear that they had asked for it. The Government further noted that although coming from a security background the staff at the detention centre were given training to provide support to migrants.

97. The Government referred to the Court's case-law (*Sizarev v. Ukraine*, no. 17116/04, 17 January 2013; *Selcuk and Akser v. Turkey*, nos. 23184/94 and 23185/94, 24 April 1998; *Pretty v. the United Kingdom*, no. 2346/02, ECHR 2002-III; and particularly *Aden Ahmed v. Malta,* no. 55352/12, 23 July 2013), and the principles cited therein. They considered that the conditions of detention at issue could not be compared to those in facilities in respect of which the Court had found a violation (for example, *Dougoz v. Greece*, no. 40907/98, ECHR 2001-II; *S.D. v. Greece*, no. 53541/07, 11 June 2009; and *A.A. v. Greece*, no. 12186/08, 22 July 2010). In the present case the applicants had been given ample personal space (as the warehouse was never overcrowded) with adequate ventilation and bedding as well as exercise time. They had a balanced and varied diet and other items as mentioned above. Moreover, according to the Government "immediate" action was being taken to determine the applicants' age and conclude the procedure. In their view the applicants' age verification assessment (which had been concluded within seven months)

had been determined diligently, and no room for uncertainty arose, given that their age could not be determined *ictu oculi*.

98. The Government distinguished the case from that of *Aden Ahmed* (cited above) in that the detention period in the present case was shorter, and the applicants were not particularly fragile given that they were sixteen and seventeen years of age respectively, thus were almost adults, who from the information provided did not require frequent medical attention. Their age also distinguished the case from that of *Mubilanzila Mayeka and Kaniki Mitunga* (cited above) which concerned a five-year old child. Bearing in mind all the above, the Government considered that there had not been a violation of Article 3.

### 3. *The Court's assessment*

#### (a) General principles

99. The Court reiterates that, according to its case-law, ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3 of the Convention. The assessment of this minimum level of severity is relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and state of health of the victim. Furthermore, in considering whether treatment is "degrading" within the meaning of Article 3, the Court will have regard to whether its object is to humiliate and debase the person concerned and whether, as far as the consequences are concerned, it adversely affected his or her personality in a manner incompatible with Article 3. However, the absence of such a purpose cannot conclusively rule out a finding of a violation of Article 3 (see *Riad and Idiab v. Belgium*, nos. 29787/03 and 29810/03, §§ 95-96, 24 January 2008).

100. Under Article 3, the State must ensure that a person is detained in conditions which are compatible with respect for human dignity and that the manner and method of the execution of the measure do not subject the individual to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention (see *Riad and Idiab*, cited above, § 99; *S.D. v. Greece*, cited above, § 47; and *A.A. v. Greece*, cited above, § 55). When assessing conditions of detention, account has to be taken of the cumulative effects of these conditions, as well as of specific allegations made by the applicant (see *Dougoz,* cited above, § 46). The length of the period during which a person is detained in specific conditions also has to be considered (see, among other authorities, *Alver v. Estonia*, no. 64812/01, § 50, 8 November 2005, and *Aden Ahmed,* cited above, § 86).

101. The extreme lack of personal space in the detention area weighs heavily as an aspect to be taken into account for the purpose of establishing whether the impugned detention conditions were "degrading" from the point of view of Article 3 (see *Karalevičius v. Lithuania*, no. 53254/99, § 36,

7 April 2005, and *Yarashonen v. Turkey*, no. 72710/11, § 72, 24 June 2014, and, for a detailed analysis of the principles concerning the overcrowding issue, see *Ananyev and Others v. Russia*, nos. 42525/07 and 60800/08, §§ 143-48, 10 January 2012).

102. The Court further reiterates that, quite apart from the necessity of having sufficient personal space, other aspects of physical conditions of detention are relevant for the assessment of compliance with Article 3. Such elements include access to outdoor exercise, natural light or air, availability of ventilation, and compliance with basic sanitary and hygiene requirements (see *Ananyev and Others*, cited above, § 149 et seq. for further details, and *M.S.S. v. Belgium and Greece* [GC], no. 30696/09, § 222, ECHR 2011). The Court notes in particular that the Prison Standards developed by the Committee for the Prevention of Torture make specific mention of outdoor exercise and consider it a basic safeguard of prisoners' well-being that all of them, without exception, be allowed at least one hour of exercise in the open air every day and preferably as part of a broader programme of out-of-cell activities (see *Ananyev and Others*, cited above, § 150).

103. With more specific reference to minors, the Court has established that it is important to bear in mind that the child's extreme vulnerability is the decisive factor and takes precedence over considerations relating to the status of illegal immigrant (see *Mubilanzila Mayeka and Kaniki Mitunga,* cited above, § 55, and *Popov v. France*, nos. 39472/07 and 39474/07, § 91, 19 January 2012). Children have specific needs that are related in particular to their age and lack of independence, but also to their asylum-seeker status. The Court has also observed that the Convention on the Rights of the Child encourages States to take appropriate measures to ensure that a child who is seeking to obtain refugee status enjoys protection and humanitarian assistance, whether the child is alone or accompanied by his or her parents (see to this effect *Popov,* cited above, § 91).

104. Accordingly, the reception conditions for children seeking asylum must be adapted to their age, to ensure that those conditions do not "create ... for them a situation of stress and anxiety, with particularly traumatic consequences" (see *Tarakhel v. Switzerland* [GC], no. 29217/12, § 99, ECHR 2014 (extracts)). Otherwise, the conditions in question would attain the threshold of severity required to come within the scope of the prohibition under Article 3 of the Convention (ibid.).

**(b) Application to the present case**

105. The Court notes that it has already had occasion to express its concern about the appropriateness of the place and the conditions of detention in Safi Barracks (see *Suso Musa v. Malta*, no. 42337/12, § 101, 23 July 2013 in the context of an Article 5 complaint). In that case it noted that various international reports had expressed concerns on the matter. 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 had been exacerbated during the Libyan crisis, a time when Mr Suso Musa was in detention. In that light, the Court found 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.

106. The Court notes that the present case concerns a period subsequent to that commented on by international bodies (see above). However it is safe to assume that Warehouse 2 remained in the same conditions it was in in 2011 (date of reports) until it closed for refurbishment in 2013, the time when the applicants were moved to Block B. In respect of the latter Block the Government have not claimed that any further improvements have been made since those reports.

107. As to overcrowding the Court notes that, on the one hand, the applicants submitted that in the months of August and September Warehouse 2 hosted approximately 290-320 inmates. On the other hand the Government have submitted that Warehouse 2 can host around 200 inmates and that it was never overcrowded. The Court observes that the Government did not provide any specific rebuttal to this allegation, nor did they submit any relevant documentation concerning the number of detainees present at the relevant time, or the size of the premises. The Court considers that in the absence of exact numbers and the relevant measurements of Warehouse 2 being provided by any of the parties it cannot conclude with certainty that there existed overcrowding which was so severe as to justify in itself a finding of a violation of Article 3. Nevertheless, the Court notes that even at the time of the CPT visit in 2011 Warehouse 1 was hosting more than 200 inmates (see paragraph 47 above). The Court thus considers that the numbers submitted by the applicants are credible. Those numbers indicate that Warehouse 2 hosted around 50% more individuals than it was intended to host, and in the Court's view this gives rise to a presumption that the applicants were detained in overcrowded conditions for around two months.

108. In any event it is for the Court to assess the other aspects of the conditions of detention which are relevant to the assessment of compliance with Article 3.

109. As regards the suffering from heat raised by the first applicant, the Court reiterates that suffering from cold and heat cannot be underestimated, as such conditions may affect well-being, and may in extreme circumstances affect health (see *Aden Ahmed*, cited above, § 94). Nevertheless, the Court notes that ceiling fans were in place, and despite the fact that Malta is an extremely hot country in the summer months the Court considers that the authorities cannot be expected to provide the most advanced technology. The applicants were also provided with telephone cards and three meals a day. The meals of which the applicants complain do not appear to have been entirely unbalanced or to have affected their

health - indeed it has not been shown that the first applicant's allegation as to itching was as a result of the food provided. Further, the applicants' basic needs had been seen to by the distribution of items free of charge, and even if it is regrettable that certain items were not readily available, the applicants were not left without clothes or in unhygienic conditions – even if partly with private help.

110. However, the Court is concerned about a number of other factors. The applicants complained of limited light and ventilation - while this concern has not been specifically highlighted by international reports in connection with Warehouse 2 and Block B (where both applicants were detained for around five and three months respectively), the Court notes that such reports considered that Warehouse 2 was not intended to host people, and that it was not suitable to accommodate people for prolonged periods (see paragraphs 46 and 47 above). Similarly, although not emphasised by the applicants, the CPT report considered that the sanitary facilities in the warehouses were in a deplorable state and that the conditions of detention there were "appalling". The situation appears to have improved slightly in the last three months of their detention when they were detained in Block B. However, the Court also notes that while the applicants had access to a common area equipped with a television, as well as to a yard, for a specific time daily, the CPT also highlighted the complete lack of any organised activity in the warehouses, and the poor situation prevailing also in Block B.

111. These concerns assume a new dimension in view of the fact that the applicants were minors at the time of their detention (as confirmed by the domestic procedures). While it is true that the applicants were not young children, they still fell within the international definition of minors, in respect of which detention should be a last resort and which should be limited to the shortest time possible. As mentioned above, under the Court's case-law reception conditions for children seeking asylum must be adapted to their age. However no measures were taken to ensure that the applicants as minors received proper counselling and educational assistance from qualified personnel specially mandated for that purpose (see *Mubilanzila Mayeka and Kaniki Mitunga,* cited above, § 50). Nor were any entertainment facilities provided for persons of their age. Furthermore, the Court cannot ignore the applicants' submissions to the effect that there was a tense and violent atmosphere, as also documented by reports (see paragraph 86 above). The lack of any support mechanism for the applicants, as minors, as well as the lack of information concerning their situation, must have exacerbated their fears.

112. The Court reiterates that a State's obligations concerning the protection of migrant minors may be different depending on whether they are accompanied or not (see *Rahimi v. Greece*, no. 8687/08, § 63, 5 April 2011). However, the Court has found violations in both ambits. It found a violation of Article 3 in *Popov* (cited above, § 103) concerning

accompanied minors in view of the children's young age (five months and three years), the length of their detention (over a period of fifteen days) and the conditions of their confinement in a detention centre. It also found a violation of Article 3 in the *Muskhadzhiyeva and Others* (cited above, § 63) concerning four young children who were held, accompanied by their mother, for one month pending their removal – the Court having taken into consideration their young age (seven months to seven years), the duration of the detention and their health status (see also *Kanagaratnam v. Belgium*, no. 15297/09, § 69, 13 December 2011). The Court has also previously found, in *Rahimi* (cited above, §§ 85-86) in respect of an unaccompanied minor (aged fifteen) in such facilities, that the conditions of his detention were so poor that they undermined the very essence of human dignity and that they could be regarded in themselves, without taking into consideration the length of the detention (a few days), as degrading treatment in breach of Article 3 of the Convention (see also *Mubilanzila Mayeka and Kaniki Mitunga*, cited above, §§ 50-59, in connection with a five-year-old unaccompanied minor).

113. The Court observes that in the applicants' case the aforementioned conditions persisted for a period of around eight months, during which no specific arrangements were made for the applicants as migrants awaiting the outcome of their age-assessment procedure (whose status as minors was later confirmed). The Court reiterates that the applicants, as asylum-seekers, were particularly vulnerable because of everything they had been through during their migration and the traumatic experiences they were likely to have endured previously (see *M.S.S.,* cited above, § 232). Moreover, in the present case the applicants, who were sixteen and seventeen years of age respectively, were even more vulnerable than any other adult asylum seeker detained at the time because of their age (see, *a contrario*, *Mahamed Jama*, cited above, § 100).

114. It follows, in the present case, that since the applicants were minors who were detained for a period of around eight months, the cumulative effect of the conditions complained of amounted to degrading treatment within the meaning of the Convention.

115. There has accordingly been a violation of Article 3 of the Convention.

## III. ALLEGED VIOLATION OF ARTICLE 5 § 4 OF THE CONVENTION

116. The applicants complained that they did not have a remedy which met the requirements of Article 5 § 4, as outlined in the Court's jurisprudence, to challenge the lawfulness of their detention. The provision 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."

## A. Admissibility

117. The Government submitted that Article 5 § 4 did not apply to the present case since, according to the Court's case-law, such a remedy is no longer required once an individual is lawfully free. They noted that the applicants had been released.

118. The applicants noted that they were entitled to raise this complaint, since they had not had such a remedy during their detention, and had instituted proceedings before the Court while they were still in detention.

119. While it is true that Article 5 § 4 cannot be relied on by a person who has been lawfully released (see *Stephens v. Malta (no. 1)*, no. 11956/07, § 102, 21 April 2009), the Court notes that when the applicants lodged their application with the Court they were still detained and they were precisely complaining that they did not have an effective remedy to challenge the lawfulness of their detention during the time they were detained. They are not complaining of the absence of such a remedy following their release. In consequence the provision is clearly applicable. Moreover, the Court reiterates that a released person may nonetheless challenge under Article 5 § 4 the speediness of a remedy (see *Aden Ahmed*, cited above, § 105).

120. It follows that the Government's objection must be dismissed.

## B. Merits

### 1. *The parties' submissions*

121. The applicants relied on the Court's findings in *Louled Massoud v. Malta* (no. 24340/08, 27 July 2010), whereby the Court held that the available remedies in the Maltese domestic system were ineffective and insufficient for the purposes of Article 5 § 4. A summary of their submissions can be found in *Mahamed Jama* (cited above, §§ 109-11).

122. The Government submitted that this review was provided by Article 409A of the Maltese Criminal Code, and even if that were not so, it could be provided by means of proceedings before the constitutional jurisdictions. A summary of their lawyers' submissions can be found in *Mahamed Jama* (cited above, §§ 112-14).

### 2. *The Court's assessment*

123. The Court has already had occasion to examine such complaints and found that it had not been shown that applicants in situations such as that of the present case had at their disposal an effective and speedy remedy

under domestic law by which to challenge the lawfulness of their detention (see, *inter alia, Mahamed Jama*, cited above, §§ 115-21, and *Moxamed Ismaaciil and Abdirahman Warsame*, cited above, § 112-18). There is no reason to hold otherwise in the present case.

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

## IV. ALLEGED VIOLATION OF ARTICLE 5 § 1 OF THE CONVENTION

125. The applicants also complained under Article 5 § 1 (f) that their continued detention for eight months was arbitrary and unlawful, as it did not fall under either of the two limbs under the mentioned provision. In any event, even assuming it fell under the first limb, the law was not precise and did not provide for procedural safeguards. Moreover, their continued detention could not be considered reasonably required for the purpose, nor was it closely connected to the purpose of preventing an unauthorised entry. Furthermore, they had been detained in conditions which were not appropriate for young asylum seekers. The provision reads as follows:

> "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."

### A. Admissibility

126. The Government submitted that the applicants had not brought their complaint before the domestic authorities.

127. The Court has already held that the applicants did not have at their disposal an effective and speedy remedy by which to challenge the lawfulness of their detention (see paragraph 123 above). It follows that the Government's objection must be dismissed.

128. 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 applicants

129. The applicants submitted that their initial detention was for the purpose of deportation as a result of the removal order and was in line with Article 14 (2) of the Immigration Act. Nevertheless once they applied for asylum, they could no longer be detained under either limb as, in their view, Maltese law provided that once such application was lodged the asylum seeker "shall not be removed ... and the applicant shall be allowed to enter or remain in Malta pending a final decision" (see Relevant domestic law). However, even assuming that their detention was to be considered as falling under the first limb, they considered that an approximately eight month detention (eight months and three days and seven months and twenty-four days respectively) was arbitrary, as it exceeded the time reasonably required for its purpose, and thus could not be closely connected to the purpose of preventing an unauthorised entry.

130. They noted that their detention was not the result of an individual decision to detain on the particular circumstances of their cases. It was not a measure taken after less coercive measures were deemed to be ineffective. Their detention was a result of a blanket policy applied to all without distinction, which made the detention arbitrary and discriminatory, irrespective of the Government's claims to the contrary.

131. Moreover, at no point was their continued detention reviewed in order to determine whether it remained closely connected to the purpose pursued or whether the length of their detention had exceeded that reasonably required for the purpose. They believe that their eight-month detention pending the outcome of age-assessment procedures in fact exceeded the length of time "reasonably required for the purpose" and cannot be said to be "closely connected to the purpose of preventing unauthorised entry", especially given the relatively straightforward assessment process which consists of one or two interviews and an X-ray of the bones of the wrist. In their view, none of these procedures required more than a few days to be concluded. In fact, most of the months were spent waiting either to be sent for the 'bone test' or for the result of the test and the issuing of the care order. In fact the first applicant was taken for the bone test some weeks after his arrival but only released months later, although he was verbally informed in the interim that he was found to be a minor. As to the second applicant, he was interviewed some weeks after his arrival and taken for his bone test some five months later. They considered, that a huge influx of applications could not be used as a justification for unnecessarily prolonged administrative procedures, as a result of which they remained in detention.

132. Further, the applicants submitted that in spite of the fact that the AWAS procedure can have a determining impact on the continued detention of individuals detained in terms of the Immigration Act, it was not adequately regulated by law or by publicly available rules or procedures. The only reference to age-assessment procedures was that in the Government's policy document and subsidiary legislation (see Relevant domestic law below). They considered that nearly eight months to reach a determination on age was unjustifiable, and had an impact on the amount of time spent in detention (irrespective of the result of that process).

133. The applicants claimed that the Age-Assessment Procedure has often been criticised, as it is plagued by delays and by a lack of adequate procedural guarantees, including lack of information about the procedure followed and the possibility of appeal. No reasons are ever given for decisions and there is no real possibility to challenge the decision taken by the AAT. In addition, migrants undergoing Age-Assessment Procedures are detained throughout the procedures, usually in centres with adults without any special consideration for the fact that they are minors. They referred to the 2012 report of Human Rights Watch entitled 'Boat-ride to Detention: Adult and Child Migrants in Malta'[1].

134. Furthermore, the applicants submitted that they had not been kept in conditions which were appropriate for minor asylum seekers, and that they had no access to procedural safeguards.

**(b) The Government**

135. The Government submitted that the applicants' deprivation of liberty was a consequence of their unauthorised entry and pending the examination of their asylum application, thus in line with the first limb of the provision. Once they resulted to be minors, they had been released. They noted that practically all immigrants reaching Malta did not carry documents and thus ascertaining their identities upon entry was a lengthy process which dependent on the cooperation of the migrants themselves. Moreover, the large number of undocumented migrants constituted a huge and entirely justified security concern for Malta.

136. The Government considered that the detention was carried out in good faith, as the centre at issue had been set up especially for that purpose, and the detention had fulfilled all the conditions indicated by the Court in *Saadi v. the United Kingdom* [GC] (no. 13229/03, ECHR 2008). They also considered that detention was based in law and was not discriminatory, nor was it applied across the board.

137. They further noted that age assessment of persons who were quite young was fast tracked as in such cases there was little difficulty in

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1. http://www.hrw.org/sites/default/files/reports/malta0712webwcover.pdf last accessed 20 June 2014

assessing the age. In straightforward cases release from detention was effected within a maximum of two weeks from arrival. On the other hand with teenagers close to the age of adulthood, the procedure involved more steps and thus inevitably took longer. The procedure involved the holding of interviews with AWAS officials, and if they were inconclusive a Further Age Verification (FAV) test which consists of an X-ray of the hand and wrist bones and which, according to the Government, gives accurate results. At the same time the Government also admitted that the test had a margin of error of two years.

138. The Government submitted that in 2013 567 individuals had claimed to be unaccompanied minors and most of them had required referral to the FAV test. Thus, any delay in the examination of the applicants' request was as a result of this huge influx. Moreover, one had to bear in mind the small size of the island and its limited resources, which sometimes resulted in a waiting list to carry out certain tests. They further noted that out of the 567 individuals, only 274 were ruled to be minors.

### 2. *The Court's assessment*

139. The Court refers to its general principles relevant to the present case as reiterated in *Mahamad Jama* (cited above, §§ 136-40).

140. It is noted that the applicants do not complain about the lawfulness and compliance with Article 5 of their detention between their arrival and the date when they applied for asylum (see paragraph 129 above, *in primis*).

141. As to the subsequent period the Court observes that the applicants had been detained in accordance with the provisions of the Immigration Act (Articles 5 and 14(2), Chapter 217 of the Laws of Malta). While expressing reservations about the quality of all the applicable laws seen together in such context, the Court has already accepted that in cases similar to those of the applicants, the detention had a sufficiently clear legal basis, and that up to the decision on an asylum claim, such detention can be considered to fall under the first limb of Article 5 § 1 (f), namely to "prevent effecting an unauthorised entry" (see *Suso Musa*, cited above, § 99 and *Mahamed Jama*, cited above, § 144). There is no reason to find otherwise in the present case.

142. It remains to be determined whether the detention in the present case was not arbitrary, namely whether it was carried out in good faith; whether it was closely connected to the ground of detention relied on by the Government; whether the place and conditions of detention were appropriate and whether the length of the detention exceeded that reasonably required for the purpose pursued.

143. The Court has already noted a series of odd practices on the part of the domestic authorities when dealing with immigrant arrivals and subsequent detentions and it expressed its reservations as to the Government's good faith in applying an across-the-board detention policy (save for specific vulnerable categories) and the by-passing of the voluntary

departure procedure (see *Suso Musa*, cited above § 100 and *Mahamed Jama*, cited above, § 146) - reservations which it maintains, noting that the two practices persisted in the present case (see paragraphs 7 and 10 above in connection with the first applicant, and paragraphs 12 and 15 with the second applicant).

144. Nevertheless, the focus of the applicants' complaint concerns the fact that they were detained despite the fact that at the time they had claimed to be minors (and later found to be so). The Court reiterates that the necessity of detaining children in an immigration context must be very carefully considered by the national authorities (see *Mahamed Jama*, cited above, § 147). It is positive that in the Maltese context, when an individual is found to be a minor, the latter is no longer detained, and he or she is placed in a non-custodial residential facility, and that detention of minors should be no longer than what is absolutely necessary to determine their identification and health status (see paragraphs 31 and 36 above). An issue may however arise, *inter alia,* in respect of a State's good faith, in so far as the determination of age may take an unreasonable length of time - indeed, a lapse of various months may also result in an individual reaching his or her majority pending an official determination (ibid.).

145. The Court is, on the one hand, sensitive to the Government's argument that younger looking individuals are fast tracked, and that the procedure is lengthier only in cases of persons close to adulthood, as well as their statement that in 2013 out of 567 individuals, only 274 were ruled to be minors (in 2012 only forty-six turned out to be minors out of seventy-five - see *Mahamed Jama*, cited above, § 148). The Court observes that, as noted in *Mahamed Jama*, cited above, less than 10% of arrivals claimed to be minors in 2012 (that is when the applicants started their age-assessment procedure). In this connection, the Court considers that despite the fact that "borderline" cases may require further assessment, the numbers of alleged minors per year put forward by the Government cannot justify a duration of more than seven months to determine the applicants' claims. Indeed, the Government have not explained why it was necessary for the first applicant in the present case to wait for a few weeks for his first age-assessment interview (see paragraph 18 above) and to wait for around seven months to have a decision following a standard medical test. The Court notes that during this time the first applicant remained in detention, despite having been told orally that he had been found to be a minor six months before (see paragraph 18). Similarly the Government have not explained why, following his interview, the second applicant had to wait for five months to have the FAV test and to wait for another two and a half months for such a decision, and therefore for his release under a care order. Indeed, in the present case it transpires that in October 2012 the authorities were already aware that the first applicant was a minor, and yet he remained in detention until a care order was issued on 19 April 2013, while the

second applicant remained in detention for at least another month after his age was determined. In this connection the Court notes that Government policy clearly states that vulnerable people are exempt from detention and that unaccompanied minors are considered as a vulnerable category (see paragraphs 30 and 31 above).

146. It follows that, even accepting that the detention was closely connected to the ground of detention relied on, namely to prevent an unauthorised entry, and in practice to allow for the applicants' asylum claim to be processed with the required prior age assessment, the delays in the present case, particularly those subsequent to the determination of the applicants' age, raise serious doubts as to the authorities' good faith. A situation rendered even more serious by the fact that the applicants lacked any procedural safeguards (as shown by the finding of a violation of Article 5 § 4, at paragraph 124 above), as well as the fact that at no stage did the authorities ascertain whether the placement in immigration detention of the applicants was a measure of last resort for which no alternative was available (see, *mutatis mutandis*, *Popov*, cited above, § 119).

147. Moreover, as to the place and conditions of detention, the Court has already found that the situation endured by the applicants as minors, for a duration of eight months, was in breach of Article 3 of the Convention.

148. In conclusion, bearing in mind all the above, the Court considers that in the present case the applicants' detention was not in compliance with Article 5 § 1. Accordingly, there has been a violation of that provision.

## V. ALLEGED VIOLATION OF ARTICLE 5 § 2 OF THE CONVENTION

149. The applicants further complained under Article 5 § 2 that the Return Decision and Removal Order, provided to them in English, a language they did not understand, did not contain sufficient information enabling them to challenge their detention. The provision 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."

150. The Government submitted that the complaint was outside the six-month limit, in so far as the applicants had been informed of the reasons of their detention on 16 and 31 August 2012 respectively, while they lodged their application only on 17 April 2013, which is eight months after the alleged violation.

151. Relying on their submissions concerning non-exhaustion of domestic remedies, the applicants reiterated that migrant detainees had difficulties instituting judicial proceedings, and in consequence they submitted that they were not in a position to take action regarding this complaint within the six-month period prescribed by law.

152. The Court notes that in the absence of a remedy (see paragraph 123 above), in principle, the six-month time-limit must be calculated from the date of the omission complained of (see *Aden Ahmed*, cited above, § 69, and *Blokhin v. Russia* [GC], no. 47152/06, § 106, ECHR 2016).

153. Even assuming that in the early stages of their detention the applicants were unable to contest such a measure because of their inability to understand the factual circumstances and their lack of knowledge of the English language, the Court observes that no specific reasons have been brought to the Court's attention, explaining why they were able to bring proceedings around eight months after their arrival and subsequent detention, but not two months earlier, in order to comply with the six-month rule (see *Mahamed Jama*, cited above, § 166).

154. In such circumstances the Court considers that, the applicants having been informed of the reasons of their detention on 16 and 31 August 2012 respectively and having lodged their application on 17 April 2013, the complaint is inadmissible for non-compliance with the six-month rule set out in Article 35 § 1 and must be rejected pursuant to Article 35 § 4 of the Convention.

## VI. APPLICATION OF ARTICLE 41 OF THE CONVENTION

155. 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

156. The applicants claimed 50,000 euros (EUR) each in respect of non-pecuniary damage, as a result of the violations of Article 3 and 5 in the present case.

157. The Government argued that the claims made by the applicants were excessive, and noted that such awards were made by the Court only in cases of excessive beatings by the authorities and other serious Article 3 violations. They considered that a sum of EUR 3,000 would suffice in non-pecuniary damage, given the circumstances of the case.

158. The Court notes that it has found a violation of Articles 3, 5 § 1 and 5 § 4 in the present case, and therefore awards the applicants EUR 12,000 each, in respect of non-pecuniary damage.

### B. Costs and expenses

159. The applicants also each claimed EUR 4,000 for costs and expenses incurred before the Court. The sum corresponded to sixty hours of legal work at an hourly rate of EUR 60, as well as clerical costs of EUR 400.

160. The Government submitted that the award for costs and expenses should not exceed EUR 2,000 jointly.

161. 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 have been actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the above criteria and the documents in its possession, the Court considers it reasonable to award the sum of EUR 4,000 jointly, covering costs for the proceedings before the Court.

### C. Default interest

162. 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. *Decides* to join the applications;

2. *Dismisses* the Government's request to strike application no. 25794/13 out of its list of cases;

3. *Declares* the complaint under Article 5 § 2 inadmissible and the remainder of the applications admissible;

4. *Holds* that there has been a violation of Article 3 of the Convention;

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

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

7. *Holds*
(a) that the respondent State is to pay the applicants, 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 12,000 (twelve thousand euros) each, plus any tax that may be chargeable, in respect of non-pecuniary damage;

(ii) EUR 4,000 (four thousand euros) jointly, plus any tax that may be chargeable to the applicants, 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 amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

8. *Dismisses* the remainder of the applicants' claim for just satisfaction.

Done in English, and notified in writing on 22 November 2016, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

| Marialena Tsirli<br>Registrar | András Sajó<br>President |
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In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

(a) concurring opinion of Judge Sajó;

(b) concurring opinion of Judge Pinto de Albuquerque.

A.S.
M.T.

# CONCURRING OPINION OF JUDGE SAJÓ

I had the opportunity to express my reservations regarding the concept of vulnerability applied by the Court in *M.S.S. v. Belgium and Greece* [GC], no. 30696/09, ECHR 2011.

In the present context I have similar concerns. The present applicants are considered vulnerable, and this generalised vulnerability is factored in in the evaluation of the detention conditions, resulting in the finding of a violation of Article 3. We have no specific information concerning the applicants' traumatic experiences as alleged by the Court. The Court accepted such traumatising effects and the resulting vulnerability "because of everything they had been through during their migration and the traumatic experiences they were likely to have endured previously (see M.S.S.)".

I would have preferred specifics. Not even the applicants have alleged any such experiences. Further, the Court relies on the applicants' age, considering them to be children, and refers to the case-law that applies special standards of care as regards the conditions of detention of migrant children. However, all the cited cases concern small children (see *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, no. 13178/03, ECHR 2006-XI: five years old). In the present case the applicants were about seventeen years old and their age was contested at the time of the detention. I do not consider that case-law based on the problems of small children is applicable to adolescents.

# CONCURRING OPINION OF JUDGE PINTO DE ALBUQUERQUE

1. I voted for the findings of the present judgment. Nonetheless, I disagree with its motivation in so far as it finds a violation of Article 5 § 1 (f) of the European Convention on Human Rights ("the Convention") on the sole basis of the *in concreto* excessive length of the detention and the "serious doubts as to the authorities' good faith", while accepting that the detention had a sufficiently clear legal basis and was covered by the first limb of Article 5 § 1 (f) "up to the decision on the asylum claim"[1]. In my view, the reason for the given violation goes much deeper, since it lies in the way the national law itself is couched, which I find in blatant conflict with Article 5 § 1. The case was ultimately, and correctly, decided on the basis of the principle of necessity, as I will demonstrate below.

To that end, I will first describe the context of the contemporary, world-wide trend towards *crimmigration*[2], against which the present case must be understood, and outline the general international legal framework relating to the detention of asylum-seekers. Here, the opinion draws on a range of case-law, legal standards and practices relating to asylum-seekers' detention. Subsequently, I will confront the standards of international refugee law and international human-rights law with the Grand Chamber's and the Chambers' current interpretation of Article 5 § 1 (f) of the Convention. Finally, I will analyse the Maltese law and practice regarding the detention of refugees and asylum-seekers in general and of the applicants in particular[3].

## The trend to *crimmigration*

2. Irregular migration into Europe has surged in the last two decades. Many of the would-be migrants are entitled to apply for refugee status. Europe's response to this surge has notoriously emphasised the role of criminal law, as has been repeatedly acknowledged by the United Nations

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[1] See paragraphs 142 and 146 of the judgment.

[2] As an introduction to this concept, see Hernández, Crimmigration Law, American Bar Association, 2015; Guia *et al*, Social Control and Justice: Crimmigration in the Age of Fear, The Hague, 2013, Majcher, "Crimmigration" in the European Union through the Lens of Immigration Detention, Global Detention Project Working Paper No. 6, Geneva, 2013; Wilsher, Immigration Detention, Law, History, Politics, Cambridge, 2011; and Stumpf, The Crimmigration Crisis, 56 Am. U. L. Rev. 367 (2006).

[3] For the purpose of this opinion, detention means confinement within a restricted location, where freedom of movement is curtailed, and where the only opportunity to leave this location is to leave the territory. The terms asylum-seeker and refugee are used in this opinion with the scope described in my opinion attached to the judgment in *Hirsi Jamaa and Others v. Italy* [GC], no. 27765/09, 23 February 2012.

Secretary-General (the Secretary-General)[4], the United Nations High Commissioner for Refugees (UNHCR)[5], the United Nations High Commissioner for Human Rights (UNHCHR)[6], the United Nations Human Rights Committee (UNHRC)[7], the Working Group on Arbitrary Detention (WGAD)[8], the United Nations Special Rapporteur on the human rights of migrants (the Special Rapporteur)[9], the Parliamentary Assembly (PACE)[10] and the Committee of Ministers of

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[4] See the Secretary-General, Report of 7 August 2014, U.N. Doc. A/69/277, paragraphs 20 to 26.

[5] See UNHCR Beyond Detention: A global strategy to support governments to end the detention of asylum-seekers and refugees, 2014; UNHCR Detention Guidelines, Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention, 2012; and UNHCR's Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-Seekers, 1999.

[6] UNHCHR, Situation of migrants in transit, U.N. Doc. A/HRC/31/35, paragraphs 39 to 48.

[7] UNHRC, *Celepli v. Sweden*, Communication No. 456/1991, CCPR/C/51/D/456/1991 (1994), 18 July 1994, paragraph 9.2.

[8] See WGAD, Annual Report 2009, 15 January 2010, U.N. Doc. A/HCR/13/30, paragraphs 54 to 65; Annual Report 2008, 16 February 2009, U.N. Doc. A/HRC/10/21, paragraphs 65 to 68; Annual Report 2007, 10 January 2008, U.N. Doc. A/HRC/7/4, paragraphs 41 to 54; Annual Report 1999, 28 December 1999, U.N. Doc. E/CN.4/2000/4, annex II (Deliberation No. 5 on human rights guarantees that asylum-seekers and immigrants in detention should enjoy); Annual Report 1998, 18 December 1998, U.N. Doc. E/CN.4/1999/63, paragraphs 62 to 70; and Annual Report 1997, U.N. Doc. E/CN.4/1998/44, 19 December 1997, paragraphs 28 to 42.

[9] See the Special Rapporteur, Banking on mobility over a generation: follow-up to the regional study on the management of the external borders of the European Union and its impact on the human rights of migrants, U.N. Doc. A/HRC/29/36, 8 May 2015, paragraphs 24 to 84; Regional study: management of the external borders of the European Union and its impact on the human rights of migrants U.N. Doc. A/HRC/23/46, 24 April 2013, paragraphs 47 to 54; Detention of migrants in an irregular situation, U.N. Doc. A/HRC/20/24, 2 April 2012, paragraphs 5 to 67; Recapitulation of main thematic issues (irregular migration and criminalization of migrants; protection of children in the migration process; the right to housing and health of migrants), U.N. Doc. A/HRC/17/33, 21 March 2011, paragraphs 11 to 33; Report to the General Assembly, U.N. Doc. A/65/222, 3 August 2010 (on the impact of the criminalization of migration on the protection and enjoyment of human rights), pp. 5 to 16; Report to 11th session of the Human Rights Council, U.N. Doc. A/HRC/11/7, 14 May 2009, paragraphs 18 to 80 (Protection of children in the context of migration); Report to 7th session of the Human Rights Council, U.N. Doc. A/HRC/7/12, 25 February 2008, paragraphs13 to 59 (Criminalization of irregular migration); Report to the Commission on Human Rights, U.N. Doc. E/CN.4/2003/85, 30 December 2002, paragraphs 12 to 64 (The human rights of migrants deprived of their liberty).

[10] See PACE and Association for the Prevention of Torture, Visiting Immigration Detention Centres, A Guide for Parliamentarians, 2013; PACE Resolution 1707 (2010), The detention of asylum-seekers and irregular migrants in Europe; PACE Recommendation 1900 (2010)1, Detention of asylum-seekers and irregular migrants in Europe; PACE Resolution 1637 (2008), Europe's boat people: mixed migration flows by sea into southern Europe; PACE Recommendation 1850 (2008), Europe's "boat-people": mixed migration flows by sea into southern Europe; PACE Resolution 1521 (2006), Mass arrival of irregular

the Council of Europe[11], the Committee for the Prevention of Torture (CPT)[12], the Commissioner for Human Rights of the Council of Europe (the Commissioner)[13], the European Parliament and the Council of the European Union[14] and the European Union Agency for Fundamental Rights (FRA)[15].

On the one hand, the State criminal-law machinery, including detention, prosecution and sentencing to imprisonment terms, is used for the purpose of immigration enforcement[16] and, on the other hand, expulsion and deportation measures and detention for that purpose are imposed as a method of crime control[17]. This has been called the *crimmigration* trend. Tinged with the ignoble legacies of racism and xenophobia of the 20th

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migrants on Europe's southern shores; PACE Resolution 1509 (2006), Human rights of irregular migrants; PACE Recommendation 1755 (2006), Human rights of irregular migrants; PACE Resolution 1471 (2005) on Accelerated asylum procedures in Council of Europe member States; PACE Recommendation 1727 (2005) on Accelerated asylum procedures in Council of Europe member states; PACE Recommendation 1645 (2004) on access to assistance and protection for asylum-seekers at European seaports and coastal areas; PACE Recommendation 1547 (2002) on expulsion procedures in conformity with human rights and enforced with respect for safety and dignity; PACE Recommendation 1475 (2000) on the arrival of asylum-seekers at European airports; PACE Recommendation 1467 (2000) on clandestine immigration and the fight against traffickers; PACE Recommendation 1440 (2000) on restrictions on asylum in the member states of the Council of Europe and the European Union; and Recommendation 1327 (1997) of the PACE on the Protection and reinforcement of the human rights of refugees and asylum-seekers in Europe.

[11] Guidelines on human rights protection in the context of accelerated asylum procedures adopted by the Committee of Ministers on 1 July 2009; Committee of Ministers Recommendation (Rec) (2003) 5 on measures of detention of asylum-seekers; and Recommendation No. R (99) 12 of the Committee of Ministers to member States on the return of rejected asylum-seekers.

[12] See the CPT Standards, CPT/Inf/E (2002) 1 - Rev. 2015, pages 64 to 82.

[13] The Commissioner, Criminalisation of migration in Europe: Human rights implications, 2010, and The Human Rights of Irregular Migrants in Europe, 2007.

[14] See Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection, 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, and Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting or withdrawing refugee status.

[15] See FRA, Handbook on European law relating to asylum, borders and immigration, 2014, pp. 141 to 178; Detention of Third Country Nationals in Return Procedures, 2014; and Criminalisation of migrants in an irregular situation and of persons engaging with them, 2014.

[16] Quite exemplary of this trend, *Saadi v. the United Kingdom* [GC], no. 13229/03, §§ 50 and 64, ECHR 2008-I, which situates asylum-seekers' detention in the context of immigration control; and Court of Justice of the European Union, *Hassen El Dridi Soufi Karim*, Case C-61/11 PPU, 28 April 2011, paragraphs 58 to 62.

[17] WGAD, *Mr. Mustafa Abdi v. United Kingdom,* Opinion No. 45/2006, U.N. Doc. A/HRC/7/4/Add.1 at 40 (2007), paragraphs 27 to 29, is paradigmatic.

century, this policy perceives the migrant as the newest “enemy”, a social outcast whose presence is no longer a valuable contribution to the European melting pot and its booming economy, but instead endangers social order, the social-security balance and the organisation of the labour market, if not the continent’s ethnic and religious fabric. The facts of the present judgment are illustrative of this strong-armed social control strategy which demonizes irregular migrants as criminals[18]. Such a trend is far out of step with international human-rights law obligations. I take this opportunity to mark my disaccord with this trend and its reflection in the Court’s case law.

3. No better lens through which to observe the current fusion of criminal and immigration law exists than the detention of migrants. The number of refugees, asylum-seekers, rejected asylum-seekers, stateless persons, trafficked persons and irregular migrants who have been jailed is at unprecedented levels in Europe[19]. In some jurisdictions, detention is mandatory or based on presumptions in favour of detention[20]. When the domestic legal framework is vague and open-ended, immigration authorities rely on discretionary administrative practices[21]. Furthermore, detention is frequently applied as part of a policy to deter future asylum-seekers or to dissuade those who have commenced their claims from pursuing them[22]. Sometimes it is even used as a punitive measure for irregular entry or presence in the country, lack of documentation or failure to comply with administrative requirements or other restrictions related to residency in the host country[23]. Access to legal advice is virtually impossible, decisively affecting the asylum-seeker’s ability to present his or her case[24].

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[18] In its Resolution 1509 (2006), cited above, the PACE highlighted the importance of the language used: “the Assembly prefers to use the term ‘irregular migrant’ to other terms such as “illegal migrant”, “unlawful migrant” or “migrant without papers”. This term is more neutral and does not carry, for example, the stigmatisation of the term ‘illegal’. It is also the term increasingly favoured by international organisations working on migration issues.” The Special Rapporteur, Report to the General Assembly, cited above, paragraphs 28 and 29, made the same point.

[19] Special Rapporteur, Regional study: management of the external borders, cited above, paragraphs 37 and 47.

[20] For example, *Rahimi v. Greece*, no. 8687/08, § 108, 5 April 2011; and CPT Standards, cited above, page 71. Outside Europe, see UNHRC, *C v. Australia*, Communication No. 900/1999, CCPR/C/76/D/900/1999 (2002), 28 October 2002, paragraph 8.2, and *A v. Australia*, Communication No. 560/1993, CCPR/C/59/D/560/1993 (1997), 3 April 1997, paragraph 9.2.

[21] PACE Resolution 1707 (2010), cited above, paragraph 7.

[22] In certain countries the time-limit for submitting an application for asylum is limited by law to a number of days from the date of arrival in the country or in a detention facility; applications submitted after the deadline are not considered (CPT Standards, cited above, p. 74).

[23] Guideline 4.1.4 of the UNHCR 2012 Detention Guidelines, paragraph 32; Guideline 3 of the UNHCR 1999 Detention Guidelines, p. 5.

[24] For example, *Chahal v. the United Kingdom*, 15 November 1996, § 130, *Reports* 1996-V, and *Čonka v. Belgium*, no. 51564/99, §§ 44-45, ECHR 2002-I.

Possibilities of judicial review are in practical terms very limited, if available at all[25]. This scenario alone results in *en masse* and needless detention[26]. The human cost of the so-called "fortress Europe" needs no scientific demonstration; it is exposed unsparingly on the daily news.

4. Asylum-seekers are detained for indefinite or very prolonged periods of time, placed at best in mid-security, special detention centres, at worst in police stations and common prison facilities, but in any event treated as if they were convicted criminals[27]. Some States resort to double-speak such as labelling migration detention centres as "foreigners' admission and accommodation centres", "transit centres" or "guest houses" and detention as "retention"[28]. There are no clear legal provisions establishing the procedure for ordering and extending detention with a view to deportation and setting time-limits for such detention[29]. Where maximum periods in detention are established by law or administrative regulation, they are circumvented by ordering the release of asylum-seekers only to re-detain them on the same grounds shortly afterwards[30]. Detaining someone when there is no prospect of removal to the country of origin is not unusual[31].

5. Most worryingly, a practice of commodification and dehumanisation of migrants in general and asylum-seekers in particular is present in some countries[32]. States are either indifferent to or even condone the serious deleterious effects of such a policy on the health or well-being of migrants, causing long-lasting, psychological damage, among other things, especially in the case of children[33].

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[25] See for example, in Europe, *Amuur v. France*, 25 June 1996, § 43, Reports 1996‑III, and *Louled Massoud v. Malta*, no. 24340/08, § 71, 27 July 2010, and outside of Europe, UNHRC, *Danyal Shafiq v. Australia*, Communication No. 1324/2004, CCPR/C/88/D/1324/2004 (2006), 13 November 2006, paragraph 7.4, and *C. v. Australia*, cited above, paragraph 8.3.

[26] PACE Resolution 1707 (2010), cited above, paragraph 3.

[27] CPT Standards, cited above, pages 70 and 71; Special Rapporteur, Regional study: management of the external borders, cited above, paragraphs 49 and 50; and Detention of Migrants, cited above, paragraphs 21, 31, 33 and 38.

[28] For example, *Abdolkhai and Karimnia v. Turkey*, no. 30471/08, § 127, 22 September 2009, and Special Rapporteur, Report to the 7th session of the Human Rights Council, cited above, paragraph 47.

[29] Again as an example, *Abdolkhai and Karimnia*, cited above, § 135.

[30] See Guideline 6 of the UNHCR 2012 Detention Guidelines, cited above, paragraph 46.

[31] For example, *Mikolenko v. Estonia*, no. 10664/05, § 65, 8 October 2009, and Special Rapporteur, Regional study: management of the external borders, cited above, paragraphs 52 and 54.

[32] *Tabesh v. Greece*, no. 8256/07, §§ 38 to 44, 26 November 2009; UNHRC, *Danyal Shafiq*, cited above, paragraph 7.3; *C. v. Australia*, cited above, paragraphs 8.4 and 8.5; and Special Rapporteur, Recapitulation of main thematic issues, cited above, paragraph 17 ("a trend toward viewing migrants as commodities").

[33] Among many other appalling cases, see *Muskhadzhiyeva and Others v. Belgium*, no. 41442/07, 19 January 2010; *Abdolkhani and Karimnia v. Turkey* (No.2), no. 30471/08, 27 July 2010; and *A.A. v. Greece,* no. 12186/08, 22 July 2010; UNHCR 2014 Beyond

## Detention of asylum-seekers as a violation of international refugee law

6. Although States have the right to control the entry to and stay of persons on their territory, this right is limited by human rights, namely by the right to be accorded refugee status when the required international-law conditions obtain[34]. Under this light, *crimmigration* policy is impermissible. This is valid not only with regard to recognised refugees, regardless of whether individual or group recognition took place, but also to asylum-seekers. Recognised refugees and registered asylum-seekers are lawfully within the territory of the entry State, under international refugee law. Indeed, those who submit an application for refugee status are already lawfully present in the national territory. States should not indefinitely deny refugees their international-law rights simply by refusing or delaying to verify their status. This results from the declaratory nature of the refugee status determination.

7. Article 31 (1) of the Refugee Convention proscribes the criminalization, punishment and detention of asylum-seekers on the sole basis that they entered national territory undocumented or unauthorised or both[35]. Article 31 (2) of the same Refugee Convention also prohibits "restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularized or they obtain admission into another country"[36]. This means that States may impose restrictions on movement that "are necessary", and therefore subject to a purposive limitation, an objective standard and a thorough, independent review. The relevant maximum time limit is not the final recognition of the refugee status, but any measure putting an end to the irregular presence, such as the admission to the asylum procedure. Article 26 further provides for the freedom of movement and choice of residence for refugees lawfully in the territory, under the same restrictions that govern the freedom of

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Detention, cited above, paragraph 50; Special Rapporteur, Banking on mobility, cited above, paragraph 42; Detention of migrants, cited above, paragraph 48; Report to the General Assembly, cited above, paragraphs 47 to 51; and Jesuit Refugee Services Europe, Becoming Vulnerable in Detention, Civil Society Report on the Detention of Vulnerable Asylum Seekers and Irregular Migrants in the European Union (The DEVAS Project), Brussels, 2010.

[34] See my opinion in *Hirsi Jamaa and Others*, cited above.

[35] See Article 18(1) of the Council Directive 2005/85/EC, cited above, and recital 9 in the preamble to Directive 2008/115/EC of the European Parliament and of the Council, cited above; paragraph 6 and principle 9.1.2 of PACE Resolution 1707 (2010), cited above; principle 3 of Committee of Ministers Recommendation Rec (2003)5, cited above; CPT Standards, cited above, page. 69; WGAD, Annual Report 2007, cited above, paragraph 53 ("criminalizing illegal entry into a country exceeds the legitimate interest of States to control and regulate irregular immigration and leads to unnecessary detention"); and Special Rapporteur, Detention of Migrants, cited above, paragraph 13.

[36] Article 9 of the 1951 Convention also provides for "provisional measures" in time of war or other grave and exceptional circumstances. These are not in question in the case at hand.

internal movement and residence of other non-citizens[37]. Registered asylum-seekers are considered lawfully in the territory for the purposes of benefiting from this provision[38].

8. On 13 October 1986 the Executive Committee of the United Nations High Commissioner for Refugees' Programme adopted the Conclusion relating to the detention of asylum-seekers (no. 44 (XXXVII) – 1986), which was later approved by the General Assembly on 4 December 1986 (Resolution 41/124). The relevant part reads as follows:

> "If necessary, detention may be resorted to only on grounds prescribed by law to verify identity; to determine the elements on which the claim to refugee status or asylum is based; to deal with cases where refugees or asylum-seekers have destroyed their travel and/or identity documents or have used fraudulent documents in order to mislead the authorities of the State in which they intend to claim asylum; or to protect national security or public order."[39]

The UNHCR published Guidelines on the detention of asylum-seekers in 1995, which it revised and reissued on 1999 and again in 2012. These Guidelines follow closely the 1986 Executive Committee's position, in spite of some rephrasing of the text, such as:

> "Where there are strong grounds for believing that the specific asylum-seeker is likely to abscond or otherwise to refuse to cooperate with the authorities, detention may be necessary in an individual case...
>
> Detention associated with accelerated procedures for manifestly unfounded or clearly abusive cases must be regulated by law and, as required by proportionality considerations, must weigh the various interests at play...
>
> It is permissible to detain an asylum-seeker for a limited initial period for the purpose of recording, within the context of a preliminary interview, the elements of

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[37] See also Article 11 (6) of the 1969 Organisation of African Union Convention Governing the Specific Aspects of Refugee Problems and Article 9 of the 1954 Organisation of American States Convention on Territorial Asylum.

[38] See the UNHCR 2012 Detention Guidelines, cited above, paragraph 13, and International Migration Organisation, Information note on international standards on immigration detention and non-custodial measures, 2011; and, among scholars, Marx, annotation to Article 26, paragraphs 48, 56, 57 and 61, and Noll, annotation to article 31, paragraphs 90 to 93 and 115, in Zimmermann (ed.), The 1951 Convention relating to the Status of Refugees and its 1967 Protocol: a Commentary, 2011; Field and Edwards, Study on Alternatives to Detention, UNHCR, POLAS/2006/03, paragraph 18; Goodwill-Gill and McAdam, The Refugee in International Law, Third Edition, Oxford, 2007, pp. 266 and 267; Hathanay, The Rights of Refugees under International Law, Cambridge, 2005, p. 413, and Goodwin-Gill, 'Article 31 of the 1951 Convention Relating to the Status of Refugees: non-penalization, detention, and protection', in Feller, Türk & Nicholson (eds.), Refugee Protection in International Law: UNHCR's Global Consultations on International Protection, Cambridge, 2003, pp. 185 to 187.

[39] In paragraph 26 of the written submissions presented by UNHCR in the *Saadi* case, cited above, the position taken was stricter: "Art. 31 (2) (of the Refugee Convention) therefore authorizes necessary restrictions on movement for the purposes of investigation of identity, the circumstances of arrival, the basic elements of the claim and security concerns".

their claim to international protection. However, such detention can only be justified where that information could not be obtained in the absence of detention.”

9. Consequently, asylum-seekers who constitute a threat to national security, public order or public health may be detained until admission to and pending the asylum procedure[40]. But the sole fact that the asylum-seeker’s identity is undetermined or in dispute or that the basic elements on which the application for asylum, including the circumstances of arrival, are grounded are not immediately apparent does not justify detention during the entire status determination procedure[41]. Detention on these grounds may only be imposed up to and during the preliminary interview[42]. Hence, asylum-seekers may not be detained pending a procedure to decide on the right to enter the territory.

10. The situation is different when asylum-seekers act violently, use fraudulent documents, bribe or seek to bribe public authorities or resort to misleading conduct. Insofar as these *mala fidem* acts constitute *per se* criminal offences, they may justify prosecution and detention, in accordance with the applicable general norms of criminal law and procedure. But the merits of the asylum claim should not be necessarily determined by the asylum-seeker’s criminal liability for acts committed in the host country.

11. Detention is not always necessary when asylum-seekers constitute a threat to national security, public order or public health. The necessity principle requires a gradation of the measures to be taken which goes from the measure which allows the person concerned the greatest liberty, such as the deposit of documents, pecuniary guarantees (bail) and reporting requirements, to measures which most restrict that liberty, such as police or community supervision, designated residence, electronic monitoring, home

[40] National security differs from public order. The former concept refers to offences threatening the life of the nation as a whole. The latter concept refers traditionally to victimless offences, which typically include public drunkenness, driving while intoxicated, disorderly conduct, disturbing the peace, rioting, among others. In the 1999 version of the UNHCR Detention Guidelines, the risk to public order and national security was associated only to the asylum-seeker’s criminal antecedents and/or affiliations. The 2012 UNHCR Detention Guidelines include the need to prevent absconding and/or likelihood of non-cooperation among the public order interests that could justify detention, based on *A. v. Australia*, cited above, paragraph 9.4. It also adds, under the same public order heading, the need to carry out initial identity and security checks where identity is undetermined or in dispute or there are indications of security risks.

[41] Special Rapporteur, Report to the Commission on Human Rights, cited above, paragraph 17.

[42] UNHCR 2012 Detention Guidelines, cited above, paragraph 28; and *Mr. Ali Aqsar Bakhtiyari and Mrs. Roqaiha Bakhtiyari v. Australia*, Communication No. 1069/2002, U.N. Doc. CCPR/C/79/D/1069/2002 (2003), paragraph 9.3, and *F.K.A.G. et al. v Australia*, U.N. Doc. CCPR/C/108/D/2094/2011, and *M.M.M. et al. v Australia*, U.N. Doc. CCPR/C/108/D/2136/2012 (2013), 20 August 2013, paragraph 9.3.

curfew and detention in a specialised facility[43]. Less coercive alternatives should be given preference whenever possible, but they should not function as an alternative to release.

Alternative control measures may only be applied to asylum-seekers when and as long as they are necessary and proportionate to the objectives of furthering the purposes of the status determination procedure[44]. Moreover, asylum-seekers' legal entitlement to the right to be accorded refugee status does not change when they are required to comply with certain alternative control measures and fail to abide by them. The substantive right to be accorded refugee status, where the respective international-law conditions obtain, is not dependent on compliance with national law based procedural requirements.

12. Rejected asylum-seekers have no right to stay and move freely in the host country. As the 2012 UNHCR Detention Guidelines state, "Detention for the purposes of expulsion can only occur after the asylum claim has been finally determined and rejected"[45]. Yet rejected asylum-seekers should not be punished and imprisoned on the sole ground that they remain, without valid grounds, on the territory of the host State, contrary to an order to leave that territory within a given period[46]. Once their respective applications have been rejected in a lawful, fair and individualised procedure, asylum-seekers may be detained with a view to removal to the

[43] In Europe, see Article 8 (2) of the Directive 2013/33/EU of the European Parliament and of the Council, cited above; Article 15 (1) of Directive 2008/115/EC of the European Parliament and of the Council, cited above; FRA, Detention of Third Country Nationals, cited above, pp. 49 to 54; principle 9.3 of PACE Resolution 1707 (2010), cited above; and principle 6 of Recommendation Rec (2003)5, cited above. Within the United Nations, see General Assembly Resolution 63/184, which called upon all States "to respect the human rights and the inherent dignity of migrants and to put an end to arbitrary arrest and detention and, where necessary, to review detention periods in order to avoid excessive detention of irregular migrants, and to adopt, where applicable, alternative measures to detention" (A/RES/63/184, 17 March 2009); as well as UNHCR 2014 Beyond detention, cited above, p. 18; UNHRC, *A. v. Australia*, cited above, paragraph 9.2; *C v. Australia*, cited above, paragraph 8.2; *Omar Sharif Baban v. Australia*, Communication No. 1014/2001, CCPR/C/78/D/1014/2001 (2003), 18 September 2003, paragraph 7.2; WGAD, Annual Report 2009, cited above, paragraphs 59, 62 and 65; Special Rapporteur, Detention of Migrants, cited above, paragraph 68; De Bruycker (ed.), Alternatives to immigration and asylum detention in the EU, Time for implementation, Odysseus Academic Network, 2015, pp. 59 to 104; Field and Edwards, Study on Alternatives to Detention, cited above; and Costello Kaytaz, Building Empirical research into alternatives to detention: Perceptions of asylum-seekers and refugees in Toronto and Geneva, UNHCR, 2013.

[44] On the requirements of the status determination procedure, see my opinion joined to *Hirsi Jamaa and Others*, cited above.

[45] See UNHCR 2012 Detention Guidelines, cited above, paragraph 33.

[46] See also Articles 15 and 16 of Directive 2008/115/EC of the European Parliament and of the Council, cited above, as interpreted by the Court of Justice, *Hassen El Dridi Soufi Karim*, cited above, paragraph 58, and *Alexandre Achughbabian v. Préfet du Val-du-Marne*, C-329/11, 6 December 2011, paragraphs 39, 45 and 51.

country of origin, but detention should be ordered only in the event of danger to national security, public order or public health. For example, detention of rejected asylum-seekers may be justified when there is a clear risk of absconding and no other less intrusive measure would prevent this danger[47].

The legal situation of failed asylum-seekers changes as soon as it is apparent that they cannot be removed to their country of origin. From this moment on, the rejected asylum-seeker regains the right to stay and move freely in the host country and detention must cease immediately. An individual who is subject to a removal order but who cannot be removed is lawfully in the national territory[48]. States are not free to impose detention if removal of the person concerned fails, specifically on account of the applicant's hampering action, because such detention would be punitive in nature.

13. Hence, mere non-cooperation by the asylum-seeker is not a ground for rejection of the asylum claim, let alone for detention or extension of detention. Asylum seekers may neither be compelled to cooperate nor punished for non-cooperative conduct. Moreover, States have an *ex officio* obligation to investigate and clarify the circumstances surrounding the irregular entry and stay of non-nationals in their territories and the personal international protection needs of migrants when these are apparent[49]. *A fortiori*, detention should neither be imposed nor extended in case of delays in obtaining the necessary documentation from third countries, such as via the consular representation of the applicant's country of origin, because this would punish the applicant for the conduct of third parties[50]. Hence, lack of co-operation by the asylum-seeker or by third parties is not a justification for detention or extension of detention.

14. An important caveat to all of the above must be introduced. Any form of detention is ill-suited to the vulnerability of children, be it before or after the asylum application assessment decision has been taken[51]. Unaccompanied or separated children must never be detained.

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[47] See UNHCR 2012 Detention Guidelines, cited above, paragraph 22; Special Rapporteur, Detention of migrants, cited above, paragraph 8; Report to the General Assembly, cited above, paragraphs 90 and 92 (a).

[48] The UNHRC practice is clearly different from that of the Court (see *Celepli*, cited above, paragraph 9.2; and *Jalloh v. the Netherlands*, Communication No. 794/1998, 23 March 2002 ("Once a reasonable prospect of expelling [the author of the communication] no longer existed his detention was terminated")).

[49] *F.G. v. Sweden* [GC], no. 43611/11, § 115, ECHR 2016, and especially the joint separate opinion of Judges Ziemele, De Gaetano, Pinto de Albuquerque and Wojtyczek, and *J.K. v. Sweden (GC)*, no. 59166/12, §§ 87 and 90, 23 August 2016.

[50] Article 9 (1) of Directive 2013/33/EU of the European Parliament and of the Council, cited above; and WGAD, Annual Report 2008, cited above, paragraphs 67 and 82.

[51] Paragraph 9.6 of the PACE Resolution 1637 (2008), cited above; Principles 20 to 23 of the Committee of Ministers Recommendation Rec(2003)5, cited above; and FRA, Detention of Third Country Nationals, cited above, pp. 82 to 96.

Accompanied children and their primary caregivers must not be detained unless there is an absolute need for the latter's detention and where keeping the children with them is considered to be in the children's best interests[52].

15. Once lawfully in the territory of a State Party, refugees and asylum-seekers should be subject only to whatever restrictions govern the freedom of internal movement and residence of other non-citizens. Special restrictions *vis-à-vis* refugees and asylum-seekers are not permitted, since the enjoyment of Convention rights is not limited to citizens of States Parties but must also be available to all individuals, regardless of nationality or statelessness, such as asylum-seekers or refugees, who may find themselves in the territory or subject to the jurisdiction of the State Party[53].

## Detention of asylum-seekers as a violation of European human-rights law

16. In Europe, as elsewhere, the *crimmigration* trend has led to the excessive detention of asylum-seekers. Unfortunately the Court has also failed to resist this trend. *Saadi v. the United Kingdom*[54] is the regrettable landmark in this trend in the Court's case-law. According to that judgment, a State may detain an asylum-seeker to prevent unauthorised entry and to expedite the asylum claim, and it is not relevant whether detention is necessary in order to prevent that irregular entry. Efficiency considerations prevail over liberty, in the Grand Chamber's view.

17. In fact, the *Saadi* Grand Chamber read into Article 5 § 1 (f) a requirement of non-arbitrariness, which was supposed to replace the

[52] Article 37(b) of the Convention on the Rights of the Child (CRC) and CRC Committee, Report of the 2012 day of general discussion on the rights of all children in the context of international migration; General Comment No. 6 (2005), The Treatment of Unaccompanied and Separated Children Outside their Country of Origin, UN Doc. CRC/GC/2005/6, 1 September 2005, paragraph 61; Rules 1 and 2 of the United Nations Rules for the Protection of Juveniles Deprived of their Liberty (1990) and Rules 17(b) and (c) of the Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules) (1985); UNHCR 2014 Beyond Detention: A Global strategy, cited above, pp. 17 and 18; Guideline 9 of the UNHCR 2012 Guidelines on Detention, cited above; UNHCR 2012 Framework for the Protection of Children; UNHCR 1997 Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum; UNHCR 1994 Refugee Children: Guidelines on Protection and Care, Chapter 7; WGAD, Annual Report 2009, cited above, paragraph 60; Special Rapporteur, Regional study: management of the external borders, cited above, paragraph 92; Detention of migrants, cited above, paragraph 41; Recapitulation of main thematic issues, cited above, paragraphs 26 to 33; and Annual Report to the 11th Session, cited above, paragraph 43; and the Inter-Agency Working Group (IAWG) to End Child Immigration Detention, which launched the Global Campaign to End Immigration Detention of Children during the 19th Session of the UN Human Rights Council in 2012.

[53] CERD, General Recommendation No. 30: Discrimination against Non-Citizens, UN Doc. A/59/18, 10 January 2004, paragraph 19.

[54] *Saadi*, cited above.

necessity criterion. 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; and the length of the detention should not exceed that reasonably required for the purpose pursued[55]. Yet the non-arbitrariness requirement does not provide the same degree of protection as the necessity criterion. The divorce between the ground of detention and its necessity leads to a *chèque en blanc* given to State authorities to detain whenever they please, without assessing possible less intrusive alternatives, suited to each asylum-seeker. The alleged close connection to the ground of detention does not even avoid automatic application of detention to asylum-seekers[56], simply because it does not require an individualized assessment of the applicant's dangerousness to the national security or risk for public order. The requirement for the detention to be "reasonable" in length fails to consider the urgency of the matter and the need for fast-track or accelerated procedures for detained asylum-seekers. The bad-faith requirement of the arbitrariness criterion worsens even further the legal situation of the asylum-seeker, since it leaves the asylum-seeker's protection dependent on the Court's assessment of the state of mind of the detaining authorities. Safe for very special cases, the public authorities will always be in a position to argue that they acted in good faith in detaining asylum-seekers.

18. The *Saadi* Grand Chamber considered that the arbitrariness criterion should be applied under the first limb of Article 5 § 1 (f) in the same manner as it applies to detention under the second limb, because it would be artificial to apply a different proportionality test to cases of detention at the point of entry than that which applies to deportation, extradition or expulsion of a person already in the country. In *Chahal*, the Grand Chamber had also read Article 5 § 1 (f) as not demanding that detention be necessary[57]. Accordingly, there is no requirement that the detention be reasonably considered necessary, for example to prevent the person concerned from committing an offence or fleeing. The Grand Chamber further held in *Chahal* that the principle of proportionality applied to detention under Article 5 § 1 (f) only to the extent that the detention should not continue for an unreasonable length of time. Thus, it held that "any deprivation of liberty under Article 5 § 1 (f) will be justified only for as long as deportation proceedings are in progress. If such proceedings are not

[55] *Saadi*, cited above, § 74.
[56] See, for example, *Mahamed Jamaa v. Malta*, no. 10290/13, § 150, 26 November 2015, where automatic detention of an asylum-seeker, which lasted for seven months and two weeks, was considered to be closely connected to the ground relied on. In *Suso Musa v. Malta*, no. 42337/12, § 79, 23 July 2013, the same respondent Government even argued that there was no point in deciding cases on a case-by-case basis.
[57] *Chahal*, cited above, § 112.

prosecuted with due diligence, the detention will cease to be permissible"[58]. In other words, the length of the detention should not exceed that reasonably required for the purpose pursued[59]. For example, where deportation is no longer possible, it would cease to be valid, even if the person detained fails to cooperate in his or her removal[60].

19. Mr Saadi, who had applied for asylum prior to his detention, was considered by the Court as still not being lawfully within the territory[61]. As shown above, this interpretation contradicts the basic tenets of international refugee law and treats asylum-seekers like any other migrants. The same critique holds true for the Court's interpretation of the second limb of Article 5 § 1 (f). The due diligence standard is much less demanding than the necessity criterion. In sum, the current Court's case law on Article 5 § 1 (f) contradicts international refugee law. This situation is unacceptable for a number of reasons, the first being evidently that States should not be put in a position of having contradictory obligations under international human-rights and refugee law.

20. Moreover, the Court's strictly efficiency-oriented interpretation of Article 5 § 1 (f) runs counter to a systematic interpretation of the Convention. The necessity test is an inherent, built-in consideration of any interference with the Convention rights, including the right to liberty. The principle of necessity is enshrined in the basic norms of the Convention and all substantive norms of the Convention must be read in its light. The Convention rights and freedoms can only be derogated from to the extent strictly required by the exigencies of the situation (Article 15). The most important human right, the right to life, may only be restricted when it is absolutely necessary (Article 2 § 2). Restrictions to the rights and freedoms guaranteed by the Convention must be necessary in a democratic society (Articles 8-11). The restriction permitted under the Convention to its rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed (Article 18), which implies that purposeless restrictions or restrictions for purposes distinct from the Convention aims are not necessary.

21. Furthermore, the Grand Chamber's current interpretation is at variance with the overall purpose of Article 5. While purporting a not "too narrow" construction of Article 5 § 1 (7)[62], the Grand Chamber disregarded the exceptional nature of Article 5 itself, which requires precisely a strict interpretation. The Grand Chamber's proposition that all entry-seeking non-nationals are detainable transforms the "undeniable" right of sovereign States to control their territorial borders into a largely unfettered authority to

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[58] *Chahal*, cited above, § 113.
[59] *Amie and Others v. Bulgaria*, no. 58149/08 § 72, 12 February 2013.
[60] *Mikolenko*, cited above, § 65, and *Louled Massoud*, cited above, § 67.
[61] *Saadi*, cited above, § 65.
[62] *Saadi*, cited above, § 65.

detain non-nationals when and for how long as they please, which leads to an untenable differentiation of treatment between detainees under the various sub-paragraphs of paragraph 1 of Article 5 of the Convention.

22. Finally, according to a long-standing and consistent practice in Europe and around the world, restrictions to the right to liberty are only admissible if, when and as long as they are necessary. The necessity principle and the resulting pre-eminence of alternative measures over detention, irrespective of the asylum-seeker's vulnerability, have also been clearly spelt out by judicial and non-judicial institutions and authorities of the United Nations (the General Assembly, the Secretary General, the International Court of Justice, the UNHCR, the UNHCR, the WGAD, the Special Rapporteur[63]), the Council of Europe (PACE, the Committee of Ministers and the CPT[64]), the European Union (the European Parliament, the Council of the European Union, the Court of Justice and the Agency for Fundamental Rights[65]), the Organisation of American States (the

[63] Post-*Saadi* standards are set out in the General Assembly Resolution 63/184, cited above; the Secretary-General, Report, cited above; UNHCR 2014 Beyond Detention, cited above; the detailed Guidelines 4.3 and 6 of UNHCR 2012 Detention Guidelines, cited above, paragraphs 35 to 42; WGAD, Annual Report 2008, cited above, paragraphs 67 and 82; and Special Rapporteur, Detention of migrants, cited above, paragraphs 48 to 67. Pre-*Saadi* are the UNHCR 1999 Detention Guidelines, cited above, p. 4 ("Detention should therefore only take place after a full consideration of all possible alternatives"); WGAD, Annual Report 1998, cited above, paragraph 69, guarantee 13; Report on the visit to the United Kingdom on the issue of immigrants and asylum-seekers, cited above, paragraph 33; and already *C. v. Australia*, cited above, paragraph 8.2. UNHCR considers Article 9 of the ICCPR applicable to all deprivations of liberty, including as a measure for immigration control (Right to liberty and security of persons (Article 9), General Comment No. 8, 30 June 1982, paragraph 1), and applies the full range of guarantees such as the necessity principle to asylum-seekers. See also International Court of Justice, in this sense, *Ahmadou Sadio Diallo, Republic of Guinea v. Democratic Republic of Congo*, judgment of 30 November 2010, paragraph 77.

[64] Post-*Saadi* standards are set out in CPT Standards, CPT/Inf/E (2002) 1 - Rev. 2015, pages 64 to 82; Visiting immigration detention centres, cited above, page 28; Guidelines 5 to 7 of the 2011 Council of Europe standards and guidelines in the field of human rights protection of irregular migrants; PACE Resolution 1707 (2010), cited above, paragraph 8 and principle 9.1.1; PACE Recommendation 1900 (2010)1, cited above, paragraph 3; PACE Resolution 1637 (2008), cited above, paragraph 9.4; and Guideline XI.4 of the 2009 Committee of Ministers Guidelines on human-rights protection in the context of accelerated asylum procedures. Pre-*Saadi* are point 12.4 of PACE Resolution 1509 (2006), cited above; Guideline 6 of the 2005 Twenty Guidelines of the Committee of Ministers of the Council of Europe on Forced Return; Principles 4 and 8 of the Committee of Ministers Recommendation (Rec) (2003) 5, cited above, and paragraph 13 of PACE Recommendation 1547 (2002), cited above. It is important to note that the *Saadi* Grand Chamber ignored PACE Resolution 1509 (2006), the 2005 Twenty Guidelines of the Committee of Ministers and PACE Recommendation 1547 (2002).

[65] Article 15 of Directive 2008/115/EC of the European Parliament and of the Council, cited above, as interpreted by the Court of Justice, *Hassen El Dridi Soufi Karim*, cited above, paragraphs 37 to 39; and FRA, Handbook, cited above, pp. 141 to 178,

Inter-American Court of Human Rights and the Inter-American Commission of Human Rights[66]), as well as world-renowned legal and religious organisations such as the International Migration Organisation[67], the International Detention Coalition[68], the International Commission of Jurists[69], Amnesty International[70], the Jesuit Refugee Services Europe[71] and the Lutheran Immigration and Refugee Service[72].

23. To sum up, taking into account the standards set out by these institutions and authorities, the necessity principle is only satisfied when the following cumulative conditions are present:

1. a clearly-worded list of individual-based grounds for detention and alternatives to detention, i.e., danger to national security, public order and public health;
2. the requirement that detention may be ordered, on the basis of an individualized assessment of the applicant's dangerousness, when it is necessary to pursue such grounds and no other less intrusive alternative is available;
3. there must be a gradation of alternatives to detention, from withdrawal of documents to home curfew;
4. strict maximum time-limits for detention and alternatives to detention before the asylum claim is registered, during the asylum procedure and during the removal procedure (after a decision to reject an asylum claim);

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Criminalisation of migrants, cited above, and Detention of third-country nationals, cited above, pp. 21 to 38.

[66] In *Vélez Loor v. Panama (Preliminary Objections, Merits, Reparations and Costs)*, judgment of 23 November 2010, paragraph 171, the Inter-American Court stated that "those migratory policies whose central focus is the mandatory detention of irregular migrants, without ordering the competent authorities to verify in each particular case and by means of an individualized evaluation, the possibility of using less restrictive measures of achieving the same ends, are arbitrary". See in the same vein, the *Pacheco Tineo Family v. Plurinational State of Bolivia (Preliminary objections, merits, reparations and costs)*, judgment of 25 November 2013, paragraph 131. Prompted by the approval of the EU Return Directive, the Inter-American Commission on Human Rights Resolution 03/08 had already stated that "international standards establish that detention must be applied only as an exceptional measure and after having analysed the necessity in each case."

[67] International Migration Organisation, Information note on international standards on immigration detention and non-custodial measures, 2011.

[68] International Detention Coalition, There are alternatives, A Handbook for preventing unnecessary immigration detention (revised edition), 2011.

[69] International Commission of Jurists, Migration and International Human Rights Law, Updated version, Geneva, 2014, pp. 175 to 225.

[70] Migration-Related Detention: A research guide on human rights standards relevant to the detention of migrants, asylum-seekers and refugees, 2007.

[71] Jesuit Refugee Services Europe, Becoming Vulnerable, cited above, pp. 14 and 15.

[72] Lutheran Immigration and Refugee Service, Locking Up Family Values, Again, 2014, and Unlocking Liberty: A New Way Forward for U.S. Immigration Detention Policy, 2012.

5. the requirement that any period of detention or home curfew before registering the asylum claim and during the asylum procedure has to be discounted in the period of detention or home curfew for the purpose of removal;
6. the requirement that, when the respective grounds no longer obtain, detention and alternatives to detention must cease immediately; and
7. a fast-track procedure for detained or home-curfewed asylum-seekers.

24. The test of necessity is not to be confused with the test of proportionality[73]. The former assesses whether the interference with the right to liberty adequately advances the "social need" (such as the protection of public order, national security and public health) pursued and reaches no further than necessary to meet the said "social need"[74]. To attain the aim of the minimal impairment of the right or freedom at stake, the less intrusive measure should be given priority, by asking if there is an equally effective but less restrictive means available to further the same social need. The test of proportionality evaluates whether a fair balancing of the competing right to liberty and the legal interests of protection of public order, national security and public health has been achieved, whilst ensuring that the essence (or minimum core) of the right to liberty is respected[75].

## The Chambers' departure from *Saadi*

25. In *A. and Others v. the United Kingdom*[76], the Grand Chamber extended the applicability of the *Saadi* arbitrariness criterion to the second limb of Article 5 § 1 (f). The eighth and ninth applicants were recognised refugees and the fifth, tenth and eleventh applicants claimed asylum but their applications were turned down. Yet these facts played little role in the Court's reasoning. The Court preferred to approach the case from another perspective: "The Court does not accept the Government's argument that Article 5 § 1 permits a balance to be struck between the individual's right to liberty and the State's interest in protecting its population from terrorist threat. This argument is inconsistent not only with the Court's case-law under sub-paragraph (f) but also with the principle that sub-paragraphs (a) to (f) amount to an exhaustive list of exceptions and that only a narrow

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[73] Guideline 4.2 for the UNHCR 2012 Detention Guidelines, cited above.
[74] The "adequacy" test verifies whether there is a "rational connection" between the interference and the social need, by establishing a plausible instrumental relationship between them, as the Court first stated in *Ashingdane v. the United Kingdom*, 28 May 1985, § 57, Series A no. 93.
[75] On the protection of the "essence" or the minimum core, see *Ashingdane*, cited above, § 57.
[76] *A and Others v. the United Kingdom (GC)*, no. 3455/05, § 164, ECHR 2009.

interpretation of these exceptions is compatible with the aims of Article 5. If detention does not fit within the confines of the sub-paragraphs as interpreted by the Court, it cannot be made to fit by an appeal to the need to balance the interests of the State against those of the detainee."[77] Contradictorily, the Grand Chamber purported a narrow interpretation of Article 5 § 1, but at the same time admitted the applicability of the not "too narrow" *Saadi* interpretation to the second limb of Article 5 § 1 (f), and this by way of a *mutatis mutandis* at the end of paragraph 164.

26. In other words, *A. and Others* updated *Chahal* in the light of *Saadi*. Both limbs of Article 5 § 1 (f) of the Convention were submitted to the same erroneous interpretative criterion. *Saadi* not only confuses the test of necessity and the test of proportionality, but worse still restricts the proportionality test to a mere arbitrariness test. The Grand Chamber's interpretation of the first limb of Article 5 § 1 (f) does not do justice to the particular situation of asylum-seekers and, even less so, to that of recognised refugees. In the light of *A. and Others*, the same must be said of its interpretation of the second limb.

27. Quite remarkably, some Chambers of the Court have departed from such rationale in what has now become a silent but growing revolt against *Saadi* and its spill-over effect on *Chahal*. In a succession of cases, various Cambers of the Court held the view that detention of asylum-seekers and, in general, of migrants breaches Article 5 § 1 (f) when it is applied automatically and no other less drastic measure was sought. In *Louled Massoud*, which concerned a detention which lasted for more than eighteen months after the determination of applicant's asylum claim, the Court found "it hard to conceive that in a small island like Malta, where escape by sea without endangering one's life is unlikely and fleeing by air is subject to strict control, the authorities could not have had at their disposal measures other than the applicant's protracted detention to secure an eventual removal in the absence of any immediate prospect of his expulsion."[78] In *Suso Musa*, the Chamber cited the passage of Recommendation Rec (2003) 5 of the Committee of Ministers referring to the "careful examination of their necessity in each individual case", in order to conclude that it had "reservations as to the Government's good faith in applying an across-the-border detention policy (save for specific vulnerable categories) with a maximum duration of eighteen months."[79] Oddly enough, the necessity principle implicitly came into play in the assessment of the Government's good faith and the Court held that the applicant's detention up to the date of the determination of his asylum application was not compatible with the first limb of Article 5 § 1 (f)[80].

[77] *A. and Others*, cited above, § 171.
[78] *Louled Massoud*, cited above, § 68.
[79] *Suso Musa*, cited above, § 100.
[80] *Suso Musa*, cited above, § 103.

In *Rahimi*, a case concerning the detention pending his expulsion of an unaccompanied minor who had presented a request for political asylum, the Chamber reproached the national authorities because "they [had] not [sought] to establish whether the applicant's placement in the Pagani detention centre had been a measure of last resort or whether another less drastic measure might have sufficed to secure his deportation"[81]. In *Raza*, a case concerning the detention of an adult pending deportation, the Court noted that "[i]t should also be observed that after his release on 15 July 2008 Mr Raza was placed under an obligation to report to his local police station at regular intervals... This shows that the authorities had at their disposal measures other than the applicant's protracted detention to secure the enforcement of the order for his expulsion."[82] In *Mikolenko*, another case concerning the detention of an adult pending deportation, the Court concluded that the grounds for the applicant's detention, imposed with a view to his deportation, did not remain valid for the whole period of his detention because the Estonian authorities had at their disposal measures other than the applicant's protracted detention in the deportation centre, since after his release he was obliged to report to the Board at regular intervals[83].

28. If the primordial role of the necessity principle has been explicitly acknowledged by the Chambers in the application of the second limb of Article 5 § 1 (f) of the Convention to the detention of rejected asylum-seekers in *Louled Massoud* and *Rahimi* and, in general, of migrants in *Raza* and *Mikolenko*, *a fortiori* it should also be affirmed in the application of its first limb when the asylum claimant has been detained pending the asylum assessment procedure, as occurred in *Suso Musa*. It is high time that the Grand Chamber revisited the infelicitous *Saadi* approach in the light of international refugee and human-rights law and stated unequivocally, as the Chamber has done in the present case[84] and other Chambers have done previously, that the detention of asylum-seekers is, as a matter of principle, a measure of last resort and may only be applied when no less intrusive alternative is possible.

29. Furthermore, as in *N. v. the United Kingdom*[85], the strictly utilitarian, efficiency-oriented *Saadi* logic is profoundly inhuman, conceiving detention as a "benefit for asylum-seekers" and for "those increasingly in the queue"[86]. The logic is deeply entrenched in some quarters: one need only

[81] *Rahimi*, cited above, § 109, unofficial translation.
[82] *Raza*, cited above, § 74.
[83] *Mikolenko*, cited above, § 67.
[84] See paragraph 146 of the judgment. The judgment refers, *mutatis mutandis*, to § 119 of *Popov v. France*, no. 39472/07 and 39474/07, § 119, 19 January 2012, which in its turn, refers to *Muskhadzhivyeva and Others*, cited above.
[85] *N. v. the United Kingdom*, no. 26565/05, 27 Mai 2008. For an analysis of this judgment, see my opinion joined to *S.J. v. Belgium* [GC], no. 70055/10, 19 March 2015.
[86] *Saadi*, cited above, paragraph 77.

remember the shocking logo “In the UK illegally? Go home or face arrest”[87]. Treating asylum-seekers as criminals who lurk in wait for an opportunity to wreak havoc on European soil and should thus be locked up for the safety of the wider public, and in general portraying migrants as a non-white, non-Christian menace to European societies and as a life-threatening “poison” shows that Europe has not yet learned the lesson of the two world wars, and the many others that followed, during the twentieth century[88]. The plight of people running away from war and other sorts of bestial, inhuman treatment is still not sufficient to touch the conscience of Europeans.

## The Maltese situation

30. The applicants complain about their detention after they applied for asylum. In Malta, any prohibited immigrant subject to a removal order has to be detained until he or she is removed from Malta[89]. The detention of undocumented migrants is the rule and not the exception[90]. The application of the law is blind and is not carried out on a case-by-case basis. Deprivation of liberty is not a measure of last resort, but a measure of first and sole resort.

Furthermore, an irregular immigrant is entitled to apply for recognition of refugee status by means of an application 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 up to eighteen months, which may be extended if, upon rejection of the application, he or she refuses to cooperate in respect of his or her repatriation[91].

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[87] This was the message of a Home Office campaign in London, 2013, which caused uproar in society and the media (see, for example, The Guardian, 8 September 2013 and 31 October 2013).

[88] See The Guardian, 27 July 2016, referring to statements by a European Prime Minister that “every single migrant poses a public security and terror risk” and “For us migration is not a solution but a problem ... not medicine but a poison, we don’t need it and won’t swallow it”.

[89] The most recent external assessment of the situation in Malta was produced by the Report of the Special Rapporteur, A/HRC/29/36/Add.3, 12 May 2015, paragraph 70: “The immigration authorities in Malta systematically issue removal orders to all irregular migrants. The removal orders issued typically refer to the lack of means to sustain themselves or to their irregular entry. The irregular migrants are typically not informed of the considerations leading to the removal order, or given an opportunity to present information, documentation and/or other evidence in support of a request for a period of voluntary departure. They are consequently held in detention for maximum period of 18 months until they are granted protection status or until they are to be removed from Malta.” See also the older Reports mentioned in paragraphs 45 to 57 of the judgment.

[90] Article 14 (2) of Chapter 217 of the Laws of Malta.

[91] *Aden Ahmed v. Malta*, no. 55352/12, § 33, 23 July 2013.

31. A period of 18 months is *per se* contrary to the exceptional character of detention under Article 5 § 1 (f), as no deportation procedure lasting that long can be said to have been undertaken with due diligence. If additional evidence of the excessive nature of the Maltese legal regime were still needed, the prolonged temporal extension of the detention, with unlimited prolongation possibilities in case of non-cooperating rejected asylum-seekers, shows the Maltese regime at its worst. The time has come for the Maltese legislature to reshape the migration-related detention regime, among other things, by getting rid of the infamous Article 14 (2) of the Chapter 217 of the Laws of Malta[92].

32. The applicants, minors of sixteen and seventeen years of age respectively when they entered Malta, were subjected to routine detention by the immigration authorities. Not even the vague governmental policy on "vulnerable" irregular migrants helped them. Entering Malta as irregular migrants, all odds were against them. They were placed under detention in the Safi Barracks Detention Centre. Their situation was not different from that of thousands of other migrants in Malta, the aggravating factor in their case being their age. This is the first case in which the Court finds that the conditions of detention at the above-mentioned detention centre breach Article 3. As in *Suso Musa*, the Court also found that the placement in detention itself breached Article 5, but the important novelty in the present case is that the Court explicitly has applied the necessity test to the interpretation of the first limb of Article 5 § 1 (f), which it did not do in *Suso Musa*. This is the added value of the present case.

## Conclusion

33. The Maltese Government are entitled to request that the present case be referred to the Grand Chamber. They have good reason to do so, since the present judgment ostensibly contradicts the rationale of *Saadi*. In fact, following the lead of other cases in the past, this case was explicitly decided on the basis of the necessity principle[93], which *Saadi* rejects.

The United Nations General Assembly, the Secretary-General, the International Court of Justice, the United Nations Human Rights Committee, the United Nations High Commissioner for Refugees, the United Nations Commissioner for Human Rights, the Working Group on Arbitrary Detention, the Special Rapporteur for the Human Rights of Migrants, the Parliamentary Assembly and the Committee of Ministers of the Council of Europe, the Committee for the Prevention of Torture, the

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[92] Already in *Suso Musa*, cited above, § 99, the Court asked for clarification of the Maltese legal framework. The PACE has also, at least since 2008, asked for reform of the Maltese "policy of systematic and excessive periods of detention" (PACE Resolution 1637 (2008), cited above, paragraph 9.4). Both calls have so far remained unheeded.

[93] See paragraph 146 of the present judgment.

European Parliament, the Council of the European Union, the Court of Justice of the European Union and the Agency for Fundamental Rights, the Inter-American Court of Human Rights and the Inter-American Commission of Human Rights, all have repudiated the utterly outrageous *Saadi* rationale. Even the Chambers of the Court have embarked in a silent revolt against such a rationale. A detention order for the sole reason of State bureaucratic convenience equates the targeted people with commodities. The Grand Chamber's interpretation of Article 5 (1) (f) of the Convention must be reviewed for the sake of bringing coherence to the Court's messy case-law and aligning it with international human-rights and refugee law. The Court cannot remain deaf to the worldwide call that *Saadi* must go.