Detention of asylum seekers in Malta - a study of Malta and Strasbourg Jurisprudence

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1. Introduction

> *'... the Court finds 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.'*[1]

This article outlines the developments of the legal policy regime that has regulated the detention of asylum-seekers in Malta. The possible avenues to challenge detention will be explained with reference to the relevant jurisprudence from local courts, from 2004 to as recent as 2018. In addition, this article will make reference to the complete body of case-law from the European Court of Human Rights (the 'ECtHR') that examined the Maltese detention system to date[2].

2. International Instruments regulating restrictions of movement and deprivation of liberty

Article 31 (1) of the Geneva Convention[3] stipulates that refugees should not be penalized for their illegal entry or stay, and recognises that seeking asylum may require refugees to breach immigration rules in order for them to gain access to a safe territory, especially where regular access is effectively impossible due to restrictive immigration policies, or where there are difficulties procuring travel documentation and permits:

[1] *Louled Massoud v. Malta*, Application No. 24340/08, ECHR 2010, 27 October 2010, paragraph 68.

[2] This article is a summary of Chapter III on Detention of the *Compendium of Asylum Jurisprudence, Law and Policy – A Collection of Maltese Case-law*, authored by Carla Camilleri, published by aditus foundation in 2018. The full publication is available free of charge from the offices of aditus foundation.

[3] Convention relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137, referred to in this article as the Geneva Convention.

> '*The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened … enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence*.'

The Article further provides that restrictions on movement shall not be applied to such asylum-seekers or refugees other than those which are necessary and, such restrictions shall only be applied until their status is regularised[4]. Therefore, a straightforward reading of the right to seek asylum, the non-penalisation for irregular entry or stay, the right to liberty and security of person, and freedom of movement, means that the detention of asylum-seekers should be an exceptional measure of last resort, with liberty being the default position[5]. Any restriction or deprivation of liberty must be in accordance with and authorised by national law in order for it not to be unlawful as well as arbitrary[6].

Article 5 of the European Convention for the Protection of Human Rights and Fundamental Freedoms[7] (hereinafter referred to as the 'ECHR') provides for the right to liberty and its aim is to ensure that no one be deprived of that liberty in an arbitrary fashion. Article 5(f)[8]

[4] The Geneva Convention, Article 31:(2) 'The Contracting States shall not apply to the movements of such refugees 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. The Contracting States shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country.'

[5] UN High Commissioner for Refugees (UNHCR), *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, 2012, <http://www.unhcr.org/publications/legal/505b10ee9/unhcr-detention-guidelines.html> accessed on 5 July 2018.

[6] Arbitrariness has been given a broad interpretation to include not only unlawfulness, but also elements of inappropriateness, injustice and lack of predictability.

[7] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR)

[8] Article 5(f) '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

allows for the lawful arrest or detention in an immigration context, however such detention must be compatible with the overall purpose of Article 5, which is to safeguard the right to liberty and ensure that no-one should be dispossessed of his or her liberty in an arbitrary fashion. Notwithstanding that Article 5(f) allows for detention, Article 5(4) provides detainees with the right to actively seek an effective remedy to challenge the lawfulness of their detention and states that anyone '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.'[9]

3. Grounds for Detention under Maltese Law

The Maltese reception and detention systems were completely overhauled in 2015 with the intention of bringing them in line with European Union law and also as a consequence of a number of ECtHR judgements finding Malta in breach of Article 5 ECHR, on the right to liberty and security of person. The reform led to the removal of automatic and mandatory detention of asylum-seekers entering Malta irregularly or found to be in an irregular situation, the introduction of exhaustive criteria required for detaining asylum-seekers, a mandatory system of review of the lawfulness of detention and stronger identification procedures for vulnerable persons.

The reception, including detention, of asylum-seekers is regulated by the *Reception of Asylum-seekers (Minimum Standards) Regulations* (the 'Reception Regulations')[10]. These Regulations were amended as part of the transposition of the recast *Reception Conditions*

action is being taken with a view to deportation or extradition.'

[9] It should be noted that the ECHR was incorporated into national law, thus making it enforceable in Malta, through the European Convention Act, CAP 319 of the Laws of Malta.

[10] Reception of Asylum-seekers (Minimum Standards) Regulations, Subsidiary Legislation 420.06.

Directive[11] and the recast *Asylum Procedures Directive*[12] into Maltese law. In addition to amendments to the law, a new *Strategy for the Reception of Asylum-seekers and Irregular Migrants* was published in 2015[13].

The amended Reception Regulations provide for the possibility to detain asylum-seekers on six limited grounds, which mirror the ones listed in the Regulation 6 of the recast Reception Conditions Directive:

a. In order to determine or verify the person's identity or nationality;

b. In order to determine those elements on which the application is based which could not otherwise be obtained in the absence of detention, in particular when there is a risk of absconding on the part of the applicant;

c. In order to decide, in the context of a procedure, in terms of the Immigration Act, on the applicant's right to enter Maltese territory;

d. When the applicant is subject to a return procedure and that there are reasonable grounds to believe that the applicant is making the application for international protection merely to delay or frustrate the enforcement of the return decision;

e. When protection of national security or public order so require;

f. When the applicant is subject to a Dublin procedure and there is a significant risk of absconding.

[11] Directive 2013/33/EU laying down standards for the reception of applicants for international protection (recast).

[12] Directive 2013/32/EU on common procedures for granting and withdrawing international protection (recast).

[13] Ministry for Home Affairs and National Security, '*Strategy for the Reception of Asylum Seekers and Irregular Immigrants*', 2015.

4. Review of Administrative Detention of Asylum-Seekers

4.1 Review under the Reception Regulations and appeals under Article 25A of the Immigration Act

Asylum-seekers who, following an individual assessment, are determined to fall under a ground of detention under Regulation 6(1) of the Reception Regulations will be detained. They will have the right to an automatic review of the lawfulness of their detention by the Immigration Appeals Board (IAB) after 7 working days from the Detention Order, which may be extended by another 7 working days by the Board for duly justified reasons. If the applicant is still detained, a new review would be conducted after periods of 2 months thereafter.

In addition, Regulation 16 of the Reception Regulations also allows for a parallel review under the Article 25A(7) Immigration Act with the possibility to challenge deportation or return decision and removal orders before the IAB within 3 working days from the Order. The Immigration Act stipulates that the Board shall grant release from custody where the detention of a person is not required under the same Act or under the Refugees Act, or where, in the case of a person detained with a view to being returned, there is no reasonable prospect of return within a reasonable time-frame[14]. Nevertheless, it extremely difficult for asylum-seekers to access this procedure as the vast majority of asylum-seekers do not have the capacity to submit an appeal in such a tight timeframe.

It should be noted that decisions relating to the review of detention and appeals under Article 25A(7), as all other IAB decisions, are neither published nor publicly available[15] and it is therefore impossible to even attempt a complete assessment of this review procedure, including the elements the IAB takes into consideration whilst conducting it. This lack of transparency presents a number of problems, for

[14] Article 25A(10) of the Immigration Act, op cit.

[15] Decisions of the Refugee Appeals Board are also not published or publicly available.

legal practitioners it is impossible to assess the jurisprudence when representing a client and at a higher level it results in an absence of accountability of decision-makers when making detention related orders and of the Boards when deciding on challenges or appeals of detention orders. These problems are acerbated by the fact that IAB decisions are final and there is no possibility of further appeal to the Courts.

4.2 Application under Article 409A of the Criminal Code – Habeas Corpus

Any detained person may file a *habeas corpus* application to challenge the lawfulness of detention before the Court of Magistrates, under Article 409A of the Criminal Code which lays down that 'Any person who alleges he is being unlawfully detained under the authority of the Police or of any other public authority not in connection with any offence with which he is charged or accused before a court may at any time apply to the Court of Magistrates, which shall have the same powers which that court has as a court of criminal inquiry, demanding his release from custody'.

The *habeas corpus* procedure is based on an assessment of the legality of the person's detention and is both a speedy and a judicial remedy. However, it does not allow for the examination of the lawfulness of detention in terms of the ECHR, as the Maltese Courts have interpreted their mandate under Article 409A to be strictly bound to examining the legality of detention only under provisions of Maltese law[16]. Prior to the 2015 amendments to Malta's reception legislation, this stance was proved to be problematic to asylum-seekers attempting to secure their right to liberty through the *habeas corpus* procedure, since the automatic and mandatory imposition of administrative detention did not allow for an assessment on the

[16] The fact that the *habeas corpus* is not an effective remedy for the purposes of breaches of the Constitution or the ECHR was confirmed by the Constitutional Courts in *Essa Maneh v the Commissioner of Police as Principal Immigration Officer, and the Minister for Justice and Home Affairs*, 53/2008/1, 29 April 2013: 'il-Qorti Kriminali ddecidiet li l-kompetenza tal-Artikolu 409A ma testendix ghall-ezami tal-aspetti kostituzzjonali tal-kaz'.

legality of administrative detention, or on its conformity with the Convention's strict standards and requirements. However, with the inclusion of the grounds of detention in the new Regulation 6 of the Reception Regulations the Maltese Courts are now empowered to examine alleged illegal detention against those provisions of national law.

In Karim Barboush[17], the applicant had filed a *habeas corpus* whilst he was in detention pending the determination of his asylum appeal. The Court of Magistrates ordered the release of Barboush and found his prolonged detention illegal. However, this was overturned on appeal and the Criminal Court ordered his re-arrest. The Court held that its jurisdiction under Article 409A is limited to examining whether the continued detention is one which is based or founded on some provision of national law. Judge De Gaetano, presiding over the Criminal Court, held that it is not the competence of the Court of Magistrates nor of the Criminal Court to examine whether there are other circumstances that would make the detention illegal, if there are clear provisions allowing for the continuation of detention, and this also where there is an allegation that;

> '*dik il-liġi tkun tikkozza mal-Kostituzzjoni jew mad-disposizzjonijiet dwar id-Drittijiet u Libertajiet Fondamentali mħarsa mill-istess Kostituzzjoni, jew għax tkun tikkozza mad-disposizzjonijiet tal-Konvenzjoni Ewropea; jew jekk il-fatt tad-detenzjoni fih innifsu, u cioe` indipendentement mill-liġi li tkun tawtorizza dik id-detenzjoni, ikunx b'xi mod jilledi d-drittijiet fondamentali ta' dak li jkun. Għal tali sindakar* hemm proċeduri *oħra quddiem qrati oħra li huma vestiti bil-liġi biex jagħmlu proprju tali stħarrig u, f'każ li jsibu li hemm ksur ta' xi dritt fondamentali jew isibu li hemm malamministrazzjoni da parti ta' l-Eżekuttiv, jaghtu rrimedju skond il-liġi*.'

Ultimately, the Court concluded that the fact that Barboush was

[17] *Karim Barboush v Kummissarju tal-Puluzija*, 2/2004, 5 November 2004.

an asylum-seeker did not make his detention illegal, as the Refugees Act made provision for both legal and illegal presence in Malta and made this distinction in the assessment of whether a person may be detained or not[18].

However, with the inclusion of provisions containing an exhaustive list of grounds for detaining asylum-seekers in the Reception Regulations[19] in 2015, the *habeas corpus* remedy has now become relevant. In a 2018 case, *Rana Ghulam Akbar*[20], the Court of Magistrates examined Regulation 6 in relation to a claim of illegal detention. Akbar was returned from Germany to Malta and on being returned he was detained on the basis of Regulation 6(1)(b) of the Reception Regulations and issued with a Detention Order. Regulation 6(1)(b) allows for the detention of asylum-seekers 'in order to determine those elements on which the application is based which could not be obtained in the absence of detention, in particular when there is a risk of absconding on the part of the applicant'. On 14 February 2018 Akbar appealed his Detention Order before the IAB, on the grounds that under Regulation 6(1)(b) detention may not be resorted to in situations where the applicant had already provided the authorities with the required elements of the asylum claim, that the risk of absconding *per se* cannot be relied upon as an independent detention ground, and that the Immigration Police failed to conduct an individual assessment as to whether administrative detention was reasonable and necessary. In particular, the appellant highlighted that the Police failed to explore any less coercive measures to detention.

On 15 February 2018 the IAB rejected the appeal on the basis that 'the risk of absconding does exist' and that 'detention is also legal on the basis that the reasons stated for international protection might

[18] See also *Napoleon Merbrahtu vs Kummissarju tal-Puluzija*, 25 June 2003, as referred to in *Essa Maneh and three others v the Commissioner of Police as Principal Immigration Officer and the Minister for Justice and Home Affairs*, 16 December 2009, the Court of Magistrates decided that 10 months in detention was not illegal as Merbrahtu was a 'prohibited migrant' in terms of Article 5(1) and detained legally on the basis of Article 14(2) of the Immigration Act.

[19] Regulation 6 of the Reception of Asylum-seekers (Minimum Standards) Regulations, op. cit.

[20] *Rana Ghulam Akbar vs Kummissarju tal-Pulizija*, 26 February 2018.

have been incorrect.'[21] On 23 February 2018 Akbar filed a *habeas corpus* under Article 409A of the Criminal Code. The Court of Magistrates ruled that 'the guiding principles are that detention is only a measure of last resort and that less coercive measures should always be sought before going for detention'. The Court noted that the applicant had satisfied those elements, or most of those elements, that had to be determined in order to process his application for asylum. The 'risk of absconding' had emanated principally from the fact that the applicant had originally obtained a visa to Malta for study purposes, whereas he was not intending to study and that therefore the reasons for requesting asylum might have been incorrect. The Court held that his detention was in breach of Maltese law, as the 'declaration that the applicant's 'risk of absconding' is one that is not sustainable within the strict parameters of Regulation 6(1)(b)'. The Court ordered his immediate release from detention.

In an earlier case filed in 2016, *Aboya Boa Jean*[22], the applicant was detained when he filed an application under Article 409A for his immediate release. The Court of Magistrates upheld the legality of the applicant's detention, as it found that the applicant was raising the same issues he had raised before the IAB. The court agreed with the IAB that the 'risk of absconding' under Regulation 6(1)(b) of the Reception Regulations should be seen in the light of the entire sub-regulation, allowing the detention of asylum-seekers in order to establish the elements on which such application was based. Aboya filed a complaint before the ECtHR claiming a breach of Article 5(1)(f) ECHR, claiming that the deprivation of his liberty had been unlawful and arbitrary for the following reasons: (i) Regulation 16(2) of the Procedural Standards Regulations authorised entry of asylum-seekers into Malta, thereby rendering his Detention Order contrary to the Convention and (ii) the Detention Order had also been contrary to domestic law as the applicant had provided all the relevant documentation and information regarding his asylum application upon his arrival. Furthermore, no individual assessment

[21] *Appeal of Rana Ghulam Akbar – Detention Order*, Immigration Appeals Board Division II, 15th February 2018.

[22] *Aboya Boa Jean v. Malta*, Application No 62676/16, Communicated on 10 July 2017 (pending).

as to the necessity of his detention had been carried out by the immigration authorities. The applicant also complained under Article 5(4) ECHR that the remedy afforded to him to challenge his detention had not been speedy and effective, owing to the violation of the deadline provided by law in order for the Board to carry out an automatic mandatory review of his detention, as not only had the IAB reviewed the detention only one month late[23], but they had also failed to convene in order to discuss whether there were any duly justified reasons to postpone the review. The case is currently pending a decision at the ECtHR.

4.3 Constitutional action before the national courts and the ECtHR

A detainee may file an application claiming a breach of Article 34 of the Constitution together with Article 5 ECHR (protection from arbitrary arrest or detention), and 36 of the Constitution in conjunction with 3 ECHR (prohibition of inhuman and degrading treatment) through a constitutional application filed in the Civil Courts. However, concerns relating to the severe delays in national Court proceedings have led the ECtHR to find that such constitutional actions fail the effective remedy test under Article 5(4) ECHR.

4.3.1 Article 34 of the Constitution and Article 5 ECHR: Protection from Arbitrary Arrest or Detention

In a 2009 case, *Essa Maneh*[24], the applicants were being held at

[23] '*...the Board informed the applicant that it had not been able to comply with the deadline provided by the law for the review of his detention since on the date required by the Reception Regulations ... a Board member was attending a conference overseas and therefore he could not take part in the hearing. Furthermore, the Board stressed that since its members were merely part-time employees meeting once a week and lacking administrative support while being responsible for a vast array of immigration related appeals, it was simply unable to meets its legal obligation and determine the lawfulness of his detention on time*', *Aboya Boa Jean v. Malta*, Application No. 62676/16.

[24] *Essa Maneh and three others v the Commissioner of Police as Principal Immigration Officer*

Safi Barracks Detention Centre. At the time of the first decision they had been in detention for over 14 months and were still awaiting a decision on their application for asylum. Government policy in force at the time stated that migrants could only be held in detention for a maximum period of 12 months pending the determination of their claim for asylum, and for a maximum period of 18 months if their claim for asylum had being finally rejected. The applicants claimed that, although their initial detention was authorised by the Immigration Act, their prolonged detention was illegal and arbitrary and contrary to Article 34 of the Constitution and Article 5 ECHR. The applicants requested the Court to declare that the length and conditions of detention breached their fundamental rights, as protected by the Constitution and the ECHR.

The first Court dismissed their pleas and found that their detention as 'prohibited migrants' was according to law. In examining the length of time prescribed by Maltese policy, Judge Tonio Mallia stated that the Court understood the need to balance the liberty of the individual with the right of the State to protect the socio-cultural aspects of society:

> *'F'każijiet bħal dawn il-Qorti tifhem il-ħtieġa li jinżamm bilanċ bejn il-liberta' tal-individwu, u d-dritt tal-istat li jipproteġi u jħares l-aspett soċio-kulturali ta' pajjżna. Malta tinsab fiċ-ċentru tar-rotta li persuni minn diversi stati anqas żvilluppati minna fl-Africa jieħdu biex b'mod illegali, jaqsmu għall-Ewropa bl-isperanza li jsibu livell ta' għixien aħjar.*
>
> *Fil-każ ta' Malta, it-tul ta' żmien hu, għalhekk, determinat mhux biss bin-numru kbir ta' persuni li jiżbarkaw fuq l-ixtut tagħna, iżda bil-fatt li ħafna minn dawn il-persuni, jekk mhux kollha, ma jikkoraborawx mal-awtoritajiet billi ma jfornuwhomx bid-dokumenti personali taghħom.'*

and the Minister for Justice and Home Affairs, 16 December 2009.

On appeal, the Constitutional Court [25]established that their detention was legal and the actions of the authorities did not lack *bona fede* seeing that the applicants had entered Malta irregularly. In addition, the applicants did not appeal their Detention Order as allowed by Article 25A of the Immigration Act. The Constitutional Court quoted the ECtHR's *Louled v. Malta*[26] judgement where it held that '...the Maltese legal system did not provide for a procedure capable of avoiding the risk of arbitrary detention pending deportation'. The Maltese Constitutional Court however held that the situation, in this particular case, was different as the applicants had been released after 12 months, whereas Louled was held in detention for 18 months following the rejection of his refugee application. The Constitutional Court also considered the balance between the rights protected by the ECHR and the interests of society and national security 'in-nuqqas da parti tal-applikant li japplika ghar-rilaxx provvizorju, ikkunsidrati wkoll il-bilanc gust li ghandu jsir bejn l-interessi tas-socjeta` in generali u lhtiega li jigi protett id-dritt sancit bl-Artikolu 5, ma jistax jinghad li d-detenzjoni tieghu kienet teccedi dak li hu ragjonevoli fic-cirkostanzi.' This case was decided a few months before the ECtHR found that Malta had breached Article 5 in *Suso v. Malta*[27] and *Aden Ahmed v. Malta*[28], examined below in further detail.

Louled Massoud v. Malta[29] was the first of a string of Strasbourg judgements that consistently found breaches of Article 5 ECHR in relation to the detention of irregular migrants and asylum-seekers in Malta. Massoud had arrived in Malta by boat in June 2006 and was immediately detained at Safi. He was subsequently charged and found guilty of aiding others to enter Malta. On completing his sentence of imprisonment, he was released but immediately placed in a Detention Centre for a little more than 18 months. In his application he claimed a breach of Article 5(1)(f) and (4), the latter relating to a

[25] *Essa Maneh v the Commissioner of Police as Principal Immigration Officer, and the Minister for Justice and Home Affairs*, 53/2008/1, 29 April 2013.

[26] *Louled Massoud v. Malta*, Application No. 24340/08, ECHR 2010, 27 October 2010.

[27] *Suso Muso v. Malta*, Application No. 42337/12, ECHR 2013, 9 December 2013.

[28] *Aden Ahmed v. Malta*, Application No. 55352/12, ECHR 2013, 9 December 2013.

[29] *Louled Massoud v. Malta*, Application No. 24340/08, ECHR 2010, 27 October 2010.

lack of access to an effective remedy to challenge the lawfulness of his detention. The ECtHR noted that the entire duration of his detention was subsequent to the rejection of his asylum claim at first instance, due to this previous imprisonment, and that the final decision on his asylum claim was delivered three weeks after the commencement of his detention in the detention centre. The Court expressed:

> '*grave doubts as to whether the grounds for the detention – action taken with a view to his deportation – remained valid for the whole period of his detention, namely, more than eighteen months following the rejection of his asylum claim, owing to the probable lack of a realistic prospect of his expulsion and the possible failure of the authorities to conduct the proceedings with due diligence*'

The ECtHR also considered whether Maltese law offered any safeguards to protect persons from arbitrariness, noting that the Immigration Act did not contain any provisions limiting detention and that the policy in force at the time had no legal force. The absence of procedural safeguards within the Maltese legal system was decisive, and the Court established that the applicant did not have access to any effective remedy under Article 25A of the Immigration Act, Article 409A of the Criminal Code, nor through constitutional proceedings. It followed, for the Court, that the Maltese legal system failed to provide a procedure intended to avoid arbitrary detention, finding a violation of the Convention.

Suso Musa v. Malta[30] and *Aden Ahmed v. Malta*[31] were both decided a few months after the *Essa Maneh* Constitutional judgement examined above. In both cases the ECtHR found that the detention of the applicants breached Articles 5(1) and 5(4) of the Convention.

In *Suso Musa*, a Sierra Leone national who entered Malta by boat in an irregular manner, was placed in detention throughout his asylum process, including the appeal stage. Meanwhile, he challenged

[30] *Suso Muso v. Malta*, Application No. 42337/12, ECHR 2013, 9 December 2013.

[31] *Aden Ahmed v. Malta*, Application No. 55352/12, ECHR 2013, 9 December 2013.

the legality of his detention, under Article 25A of the Immigration Act before the IAB and to which he was given a decision rejecting his challenge more than a year after its filing. The ECtHR noted that the applicant's detention up until he received a final rejection from the RAB had as a legal basis Article 5 in conjunction with Article 14 of the Immigration Act, and therefore fell under the first limb of Article 5(1)(f): 'to prevent his effecting an unauthorised entry into the country'. However, even accepting that the applicant's detention had been closely connected to the purpose of preventing his unauthorised entry to the country, the Court noted a series of odd practices on the part of local authorities, and it also raised concerns about the appropriateness of the place and the conditions of detention endured 'for persons who have not committed criminal offences but who, often fearing for their lives, have fled from their own country'. The Court revised its previous thinking in stating the following: 'where a State which has gone beyond its obligations in creating further rights or a more favourable … enacts legislation (of its own motion or pursuant to European Union law) explicitly authorising the entry or stay of immigrants pending an asylum application… an ensuing detention for the purpose of preventing an unauthorised entry may raise an issue as to the lawfulness of detention under Article 5 (1)(f)'.

In relation to the period of detention after the final asylum decision, the Court held that this fell under the second limb of Article 5(1)(f) 'with a view to deportation or extradition', and that detention under the present article could be justified only for as long as deportation proceedings were in progress. The Court considered that a detention period of 10 months could not be considered as serving the purposes of deportation. It finally concluded that 'the national system failed as a whole to protect the applicant from arbitrary detention, and that his prolonged detention following the determination of his asylum claim cannot be considered to be compatible with the second limb of Article 5(1)(f) of the Convention.'

Similarly, in *Aden Ahmed*[32] the Court found that the applicant's 14 months in detention subsequent to the rejection of her asylum claim

[32] *Aden Ahmed v. Malta*, ibid.

could only be justified as long as deportation proceedings were in progress. It held that 'the total failure of the domestic authorities to take any steps to pursue removal' confirmed that no such deportation was in progress, finding a breach of Article 5(1). The applicant, who had requested release on grounds of vulnerability, also claimed a violation of Article 3 of the Convention as explained in further detail in the section relating to inhuman and degrading treatment below.

In 2016, the ECtHR in *Abdi Mahamud v. Malta*[33], ruled that Malta violated Article 3 and Article 5 ECHR due to Malta's prolonged detention of Abdi Mahamud while she awaited decisions on her asylum application and her request for provisional release from immigration detention based on ill-health and her status as a vulnerable person. During her time in detention, she developed a number of physical and psychological conditions and applied for release on medical grounds. Whilst reteirating the Court's assessment in *Suso Musa* and *Aden Ahmed* in relation to Article 5, it also examined the Government's policy in relation to its vulnerability assessment policy, observing that:

> '*...the applicant's vulnerability assessment took eleven months to be... No explanation has been given as to why it took two months from the lodging of her request for the applicant to be interviewed, or why it took another eight months to indicate to the applicant that she may be released..., and yet another month to actually release her on the basis of a decision stating that her claim was acceded to...The examples referred to by the applicant... and not rebutted by the Government, go to show that this is often a lengthy procedure, which has reached deplorable delays in the present case*.'

The Court took into consideration the detention and age assessment procedures of two Somali asylum-seeking children in Abdullahi Elmi & Aweys Abubakar.[34] Whereas the Court observed

[33] *Abdi Mahamud v Malta*, Appplication No. 56796/13 ECHR 2016, 3 August 2016.

[34] *Abdullahi Elmi & Aweys Abubakar v Malta*, Application No. 25794/13 and 28151/13, ECHR 2017, 22 February 2017. This judgement is examined in further detail in Chapter V on Age Assessment.

that the detention had a sufficiently clear legal basis, it was deemed arbitrary due to the severe delays in the age assessment process, which raised serious doubts as to the Maltese authorities' good faith. This situation was further exacerbated due to the lack of procedural safeguards, as well the failure of the authorities to ascertain that immigration detention was a measure of last resort for which no alternative was available.

Further to the pronouncement of the above ECtHR judgements, the local Civil Court in its Constitutional jurisdiction found a breach of Article 34 of the Constitution and Article 5 ECHR in *Tafarra Besabe Berhe*,[35] which was decided ten years after the original application was filed. The Court held that in order for the arrest to be legal, the deprivation of liberty must be imposed in conformity with the substantive and procedural rules of national law. It explained that Article 14(2) of the Immigration Act allowed for the detention of persons who arrived in Malta in an irregular way, and that the detention of these persons may be compatible with Article 5(1)(f) of the Convention. However, it stressed, certain conditions have to be safeguarded in order for such arrest or detention not to become arbitrary or illegal.

The Constitutional Court noted how the notion of arbitrariness in Article 5(1) extends beyond a lack of conformity with national law, so that a deprivation of liberty may be lawful in terms of domestic law but still arbitrary and contrary to the Convention, and held that:

> *'l-Qorti hija tal-fehma li hekk kif ir-rikorrent ressaq it-talba tiegħu mal-awtoritajiet Maltin biex jingħata kenn f'Malta, ma setax jingħad aktar li hu kien qed jinżamm f'Malta bil-ħsieb li jitreġġa' lura mnejn kien ġie... il-fatt li, minkejja li ressaq talba biex jingħata kenn f'Malta, ir-rikorrent inżamm fiċ-Ċentru ta' Detenzjoni jqajjem ukoll element ieħor li dik iż-żamma kienet arbitrarja minħabba li ż-żmien meħud mill-awtorita' kompetenti biex tqis it-talba tiegħu kienet tmur lil hinn minn dak*

[35] *Tafarra Besabe Berhe v the Commissioner of Police as Principal Immigration Officer and the Minister for Justice and Home Affairs*, Case No.12, 27/07JRM, 9 March 2017.

meqjus raġonevoli.'

The Court found for the applicant in relation to his claim of a breach of Article 5, but not of Article 3 ECHR.

4.3.2 Article 36 of the Constitution and Article 3 ECHR: Inhuman and Degrading Treatment

The applicants in the above-mentioned case, *Essa Maneh*[36], also claimed that length of their detention and the uncertainty of the period for which they would have been held constituted inhuman and degrading treatment. The Civil Court in its Constitutional jurisdiction held that being detained in Safi Barracks for a period of 12 to 18 months does not meet the intense physical and mental suffering threshold required by law for such treatment to fall within the definition of inhuman or degrading treatment. In addition, the object of the detention was not to humiliate and debase them but rather it was a measure needed to ensure stability of the country 'fiċ-ċirkostanzi partikolari ta' pajjiżna, bħala miżura meħtiega għall-istabbilita' ta' pajjiż biex kemm jista' jkun, jiġi evitat duluvju ta' nies 'irregolari' jiġġerrew ma' Malta'. On appeal, the Constitutional Court[37] agreed with the first Court and, though it understood the anxiety migrants felt when being held in detention, it decided that their detention conditions did not amount to inhuman and degrading treatment.

Following the local *Essa Maneh* judgement, in 2013, the Strasbourg Court made reference to reports by the *European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or*

[36] *Essa Maneh and three others v the Commissioner of Police as Principal Immigration Officer and the Minister for Justice and Home Affairs*, 16 December 2009.

[37] *Essa Maneh v the Commissioner of Police as Principal Immigration Officer, and the Minister for Justice and Home Affairs*, 53/2008/1, 29 April 2013.

Punishment[38] and the *International Commission of Jurists*[39] in *Suso Musa*[40], although the applicant did not lodge a complaint for a breach of Article 3 ECHR. The reports expressed concern on the conditions in detention and considered that the conditions in question could amount to inhuman and degrading treatment under Article 3 of the Convention. 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'.

In *Aden Ahmed*[41], also decided in 2015, the ECtHR reiterated that, according to its case-law, ill-treatment must attain a minimum level of severity for it to fall within the scope of Article 3 of the ECHR. The assessment of this minimum level of severity is relative and 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. The Court held that States 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. The Court noted the overcrowded dormitories which lacked heating, proper blankets during the winter months, and lack of access to the recreation yard and fresh air for 3 months. In addition, the absence of female staff in the centre caused discomfort to the female detainees, particularly the applicant who suffered from specific medical conditions related to a miscarriage.

The Court considered that her situation was vulnerable due to a combination of her irregular migrant status, her past, her personal emotional circumstances and her fragile health. Furthermore, these conditions persisted for a continuous period of 14 and a half

[38] *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.

[39] *Not here to stay*, Report of the International Commission of Jurists on its visit to Malta on 26-30 September 2011, May 2012.

[40] *Suso Muso v. Malta*, Application No. 42337/12, ECHR 2013, 9 December 2013.

[41] *Aden Ahmed v. Malta*, Application No. 55352/12, ECHR 2013, 9 December 2013.

months. Finally, it held that 'the cumulative effect of the conditions complained of diminished the applicant's human dignity and aroused in her feelings of anguish and inferiority capable of humiliating and debasing her and possibly breaking her physical or moral resistance. In sum, the Court considers that the conditions of the applicant's detention in Hermes Block amounted to degrading treatment within the meaning of Article 3 of the Convention.'

In contrast, in *Moxamed Ismaaciil & Abdirahman Warsame*[42], the ECtHR was concerned with the applicants' allegations of suffering from the cold and with the lack of female staff, but noted that there had been various improvements to the centres. The Court found that the applicants had not shown that they were denied adequate medical assistance. Consideration was given to the fact that access to an outdoor yard was given to the applicants for them to exercise in the open air, as well as to the provision of indoor recreational activities. The Court concluded that the cumulative effect of the conditions of detention did not amount to degrading treatment and found no violation of Article 3.

In a case similar to *Aden Ahmed*, the Court found a violation of Article 3 due to the applicant's vulnerability. In *Abdi Mahamud*[43], the Court considered that the specific circumstances 'no access to outdoor exercise for anything between eight and twelve weeks, the poor environment for outdoor exercise in the remaining period, the lack of specific measures to counteract the cold, the lack of female staff, the little privacy offered in the centre, and the fact these conditions persisted for over sixteen months' had the cumulative effect of diminishing the applicant's human dignity. It found that the conditions of the applicant's detention in Hermes Block amounted to degrading treatment within the meaning of Article 3 of the Convention.

More recently, and following the above ECtHR judgement, the local Courts were asked to examine detention in the light of Article

[42] *Moxamed Ismaaciil and Abdirahman Warsame v Malta*, Application Nos. 52160/13 and 52165/13, ECHR 2016 12 April 2016.

[43] *Abdi Mahamud v Malta*, Application No. 56796/13 ECHR 2016, 3 August 2016.

36 of the Constitution and 3 ECHR in the *Tafarra Besabe Berhe*[44] case. Judge Micallef noted that there is an unqualified prohibition to subject any person to inhuman and degrading treatment. The Court commented that the treatment must be of a certain level and gravity, and it must be proved to be such that is not merely an inconvenience or discomfort. The Court did not find a breach of Article 3 due to the recent improvements in the centres, the regular attendance of doctors and nurses, and that the detainees themselves vandalised the centres.

The applicant filed an appeal in the Constitutional Court[45], challenging the first Court's ruling of the non-violation of Article 3. The Court examined the elements of Article 3 and the concept of ill-treatment. It considered that showing a lack of respect for, or diminishing the human dignity of detainees, or actions that arouse feelings of fear, anguish or inferiority capable of breaking an individual's moral and physical resistance, may also fall within the definition of Article 3. The Constitutional Court took into consideration the allegations of overcrowding and lack of access to fresh air. It noted that there were improvements to the centres and that detainees had access to the recreational area a few hours a day:

> *'għalkemm qed jiġi rikonoxxut illi din il-konċessjoni hija 'l bogħod mill-istandards internazzjonali bażici għal dak li jirrigwarda aċċess ta' detenuti għall-arja, jirriżulta wkoll illi fil-perijodu ta' tliet xhur li r-rikorrent kien ġie akkomodat ġewwa t-tent compound, ma kien hemm ebda limitazzjoni tal-ħin li seta' jqatta' barra fl-arja aperta.' The Court did not find that limitations of communication, health services nor the conditions of sanitary facilities amounted to inhuman and degrading treatment.'*

Finally, the Court made reference to the *Aden Ahmed* and

[44] *Tafarra Besabe Berhe v the Commissioner of Police as Principal Immigration Officer and the Minister for Justice and Home Affairs*, Case No.12, 27/07JRM, 9 March 2017.

[45] *Tafarra Besabe Berhe v the Commissioner of Police as Principal Immigration Officer and the Minister for Justice and Home Affairs*, 27/07JRM, 24 November 2017.

Abdullahi Elmi judgements, and held that:

> *'ma jirriżultax illi l-fattispeċje ta' dawk il-każijiet jistghu jsibu riskontru fiċ-ċirkostanzi tal-kaz odjern. Infatti, huwa evidenti illi l-element determinanti għas-sejba ta' ksur tal-Artikolu 3 tal-Konvenzjoni fil-kaz ta' Aden Ahmed v. Malta kienet il-pożizzjoni vulnerabbli tal-applikant minħabba l-istat ta' saħħa prekarja tagħha, kemm fiżika kif ukoll mentali, kif ukoll il-passat tagħha u ċ-ċirkostanzi emozzjonali marbutin miegħu.'*

As mentioned above, in *Abdullahi Elmi & Aweys Abubakar v Malta*[46] the ECtHR found a violation of Article 3 ECHR due to the cumulative effects of the conditions in detention on the applicants. The applicants were minors detained for a period of around 8 months. The ECtHR noted that the applicants complained of limited light and ventilation and that international reports:

> *'…considered that Warehouse 2 was not intended to host people, and that it was not suitable to accommodate people for prolonged periods'. Importantly, the ECtHR highlighted that a child's extreme vulnerability should be the decisive factor in any assessment, and should take precedence over considerations relating to the status of irregular migrant. In relation to the reception of children in an asylum setting, the Court held that '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…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…The lack of any support mechanism for the*

[46] *Abdullahi Elmi & Aweys Abubakar v Malta*, Application No. 25794/13 and 28151/13, ECHR 2017, 22 February 2017.

applicants, as minors, as well as the lack of information concerning their situation, must have exacerbated their fears.'

5. Effective Remedy

The possibility of challenging or reviewing the legality of administrative detention at the national level can be a cumbersome, complex and at times ineffective process. Malta's system of challenging or assessing detention and it's the compatibility with the Convention came under the ECtHR scrutiny in several cases. This resulted in the ECtHR consistently finding the regime to violate the right to an effective remedy enshrined in Article 5(4)[47].

As earlier as 2010, the ECtHR in *Louled Massoud*[48] established that detainees did not have any effective remedy by which to contest the lawfulness and length of their detention in Malta. In relation to the habeas corpus procedures, the Court held that 'the remedy under Article 409A did not provide a review of the 'lawfulness' of detention in the light not only of the requirements of domestic law but also of the Convention, the general principles embodied therein and the aim of the restrictions permitted by Article 5 (1).

In consequence, it cannot be considered as an effective remedy for the purposes of Article 5 (4). It follows that the Court cannot agree with the Government that the applicant should have tried such a remedy.' On the proceedings before the IAB, the Court held that even if it considered the IAB a judicial authority competent to grant release from detention, Article 25A of the Immigration Act (as drafted at the time of the facts of this case) was limited by the fact that a request for release from custody had no prospect of success in the event that

[47] '*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*' Article 5(4), Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended)

[48] *Louled Massoud v. Malta*, Application No. 24340/08, ECHR 2010, 27th October 2010.

the identity of the detainee had yet to be verified. The Court also noted that the duration of proceedings before the IAB could not be considered speedy, as required by the Convention. Finally, in relation to constitutional proceedings, the Court held that 'in Malta [they] are rather cumbersome for Article 5(4) purposes and that lodging a constitutional application could not ensure a speedy review of the lawfulness of an applicant's detention.'

Three years after the *Massoud* judgement, in *Suso Musa v. Malta*[49] the Court highlighted that the circumstances had not changed, and commented that it remained of the view that the remedies present in Maltese law did not constitute an effective remedy guaranteeing the detainee's right to challenge his detention speedily, as required by Article 5(4) ECHR. In this particular case, the IAB had taken more than a year to determine Suso's challenge to his detention. In *Aden Ahmed v Malta*[50] the ECtHR used the example brought by the applicant to highlight the shortcomings inherent in national constitutional proceedings:

> *'It cannot be ignored that the example submitted by the applicant (Tefarra Besabe Berhe) concerning the lawfulness of immigrants' detention and the conditions of such detention was still pending six years after it was lodged. The Government's argument that in that case the request had been only for the case to be set down for hearing with urgency and had not been a request for hearing with urgency is out of place and cannot suffice to convince the Court that six years to hear a case about conditions of detention can in any event satisfy Convention standards under any relevant provision. Similarly, the Court notes that the second example submitted by the applicant, namely the Essa Maneh case, concerning conditions of detention, which was lodged in 2008, was not concluded until May 2013. Against this background, little comfort can be found in the subsidiary*

[49] *Suso Muso v. Malta*, Application No. 42337/12, ECHR 2013, 9 December 2013.

[50] *Aden Ahmed v. Malta*, Application No. 55352/12, ECHR 2013, 9 December 2013.

> *legislation cited by the Government which states that constitutional cases* 'shall be expeditious'.'

Similarly in 2016, in *Abdi Mahamud v Malta*[51], the Court held again that 'none of the remedies put forward 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.' This was again confirmed in *Abdullahi Elmi & Aweys Abubakar*[52] where the ECtHR found a breach of Article 5(4).

[51] *Abdi Mahamud v Malta*, Appplication No. 56796/13 ECHR 2016, 3 August 2016.

[52] *Abdullahi Elmi & Aweys Abubakar v Malta*, Application No. 25794/13 and 28151/13, ECHR 2017, 22 February 2017. Also, in *Moxamed Ismaaciil & Abdirahman Warsame v Malta*, Application Nos. 52160/13 and 52165/13, ECHR 2016 12 April 2016.