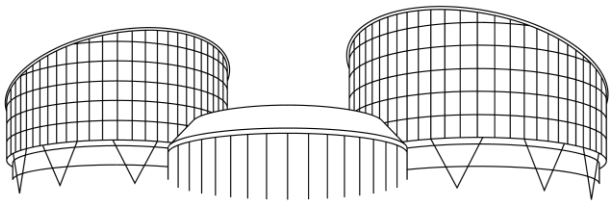

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

CASE OF LOULED MASSOUD v. MALTA

(Application no. 24340/08)

JUDGMENT

STRASBOURG

27 July 2010

FINAL

27/10/2010

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

In the case of Louled Massoud v. Malta,

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

Nicolas Bratza, *President,*
Lech Garlicki,
Giovanni Bonello,
Ljiljana Mijović,
Päivi Hirvelä,
Ledi Bianku,
Nebojša Vučinić, *judges,*
and Lawrence Early, *Section Registrar,*

Having deliberated in private on 6 July 2010,

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

PROCEDURE

1. The case originated in an application (no. 24340/08) against Malta lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by an Algerian national, Mr Khaled Louled Massoud ("the applicant"), on 6 March 2008.

2. The applicant was represented by Dr Michael Camilleri, a lawyer practising in Valletta. The Maltese Government ("the Government") were represented by their Agent, Dr Silvio Camilleri.

3. The applicant alleged that his detention had been unlawful in terms of Article 5 § 1, that he had not been provided with the legal and factual grounds for his detention as required by Article 5 § 2 and that he had not had a remedy by which to challenge the lawfulness of his detention in accordance with Article 5 § 4 of the Convention.

4. On 21 September 2009 the President of the Fourth Section decided to give notice of the complaints under Article 5 §§ 1, 2 and 4 to the Government. It was also decided to examine the merits of the application at the same time as its admissibility (Article 29 § 3).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant is an Algerian national who was born in 1960 and was, at the time of the introduction of the application being detained in Safi Military Barracks, Safi.

6. The facts of the case, as submitted by the parties, may be summarised as follows.

A. Background

7. The applicant arrived in Malta on 24 June 2006 without documents, having travelled by boat from Libya in an irregular manner. Upon his arrival he was served with a removal order in accordance with Article 14 of the Immigration Act ("the Act"). The reason for his detention was given as being that under Article 5 of the Act, he was in Malta without leave. He was consequently detained at the police headquarters.

8. On 26 June the applicant was questioned by the police and he gave a statement. On 28 June 2006 he was arraigned in court charged with aiding, assisting, counselling or procuring other persons to enter or to attempt to enter Malta or having conspired to that effect. He was remanded in custody.

9. On 1 October 2006, pending proceedings, the applicant made a late preliminary application for refugee status, which was considered by the Refugee Commissioner as expressing his desire for recognition of refugee status.

10. On 25 October 2006 the Court of Magistrates found the applicant guilty and sentenced him to eighteen months' imprisonment.

11. While in prison, on 17 April 2007, the applicant made a formal application for asylum and was interviewed on the same day.

12. After serving his sentence, the applicant was released from prison on 27 June 2007 and was placed in a detention centre pending the determination of his asylum claim.

13. The applicant's asylum application was rejected on 24 April 2007 and subsequently on appeal on 18 July 2007 as he had failed to provide convincing evidence that he would face a real risk or had a well-founded fear of persecution.

14. The applicant remained in detention awaiting removal under the Government's immigration policy until 6 January 2009 when his removal order was lifted in view of the lack of prospects of his eventual deportation. The applicant claimed that the conditions of detention in Blocks C and B had been inappropriate. Both facilities had been overcrowded, particularly in the summer months, with inadequate sanitary and other facilities, limited

medical care, no possibility of constructive activities and limited recreational opportunities. The applicant made reference to reports of the CPT, the Council of Europe Human Rights Commissioner and the LIBE Committee of the European Parliament documenting such conditions.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Asylum Procedures

15. Asylum procedures are regulated by the Immigration Act ("the Act"), Chapter 217 of the Laws of Malta. Article 5 of the Act in so far as relevant reads as follows:

> "Any person, other than one having the right of entry, or of entry and residence, or of movement or transit ..., may be refused entry, and if he lands or is in Malta without leave from the Principal Immigration Officer, he shall be a prohibited immigrant."

In practice, upon being apprehended, a prohibited immigrant is issued with a removal order, in accordance with Article 14 (2) of the Act, which, in so far as relevant, reads as follows:

> "If any person is considered by the Principal Immigration Officer to be liable to removal as a prohibited immigrant under any of the provisions of article 5, the said Officer may issue a removal order against such person who shall have a right to appeal against such order in accordance with the provisions of article 25A: ...
>
> (2) Upon such order being made, such person against whom such order is made, shall be detained in custody until he is removed from Malta."

16. An "irregular" immigrant is entitled to apply for recognition of refugee status by means of an application (in the form of a Preliminary Questionnaire) to the Commissioner for refugees within two months of arrival. While the application is being processed, in accordance with a Maltese policy document of 2005 entitled "Irregular Immigrants, Refugees and Integration", the immigrant will remain in detention, but no immigrant shall be kept in detention for longer than eighteen months. Length of detention may depend on the immigrant's will to cooperate in respect of his or her repatriation. However, the Immigration Act does not define a limit to the period of detention. Article 10 of Legal Notice 320 of 2005, transposing into national legislation Directive 2003/9 EC of 27 January 2003 of the European Union on laying down minimum standards for the reception of asylum seekers, which came into force by means of Legal Notice 383 of 2005 on 22 November 2005, provides as follows:

> (2) If a decision at first instance has not been taken within one year of the presentation of an application for asylum and this delay cannot be attributed to the applicant or his legal representative, the Ministry responsible for issuing employment

licences shall decide the conditions for granting access to the labour market for the applicant.

(3) Where an appeal is lodged against a negative decision, access to the labour market shall not be withdrawn during the appeal stage.

17. In accordance with the Maltese authorities' reply to the CPT report 2005 (cf. CPT/Inf (2005) 16, p. 24), and the United Nations General Assembly Report of the Working Group on Arbitrary Detention of 8 January 2010, this provision introduced a twelve month time-limit on detention. Thus, if within that time the asylum application has not yet been examined, the asylum seeker will be given access to the labour market and will have the right to an appropriate document from the Refugee Commissioner or the Refugee Appeals Board. An asylum seeker may remain in Malta until a final decision on the application is taken, unless the application is considered to be manifestly ill-founded by the Refugee Commissioner at first instance.

Directive 2008/115/EC of the European Union on common standards and procedures in Member States for returning illegally staying third-country nationals provides that in situations where deportation is blocked by the failure of a third country to deliver the necessary travel documents, detention cannot exceed eighteen months.

B. Remedies to challenge detention under Maltese law

1. Article 409A of the Criminal Code

18. An application in terms of Article 409A of the Criminal Code, Chapter 9 of the Laws of Malta, consists of a request to the Court of Magistrates to examine the lawfulness of detention and order release from custody. In so far as relevant, the Article reads as follows:

"(1) 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. Any such application shall be appointed for hearing with urgency and the application together with the date of the hearing shall be served on the same day of the application on the applicant and on the Commissioner of Police or on the public authority under whose authority the applicant is allegedly being unlawfully detained. The Commissioner of Police or public authority, as the case may be, may file a reply by not later than the day of the hearing.

(2) On the day appointed for the hearing of the application the court shall summarily hear the applicant and the respondents and any relevant evidence produced by them in support of their submissions and on the reasons and circumstances militating in favour of or against the lawfulness of the continued detention of the applicant.

(3) If, having heard the evidence produced and the submissions made by the applicant and respondents, the court finds that the continued detention of the applicant is not founded on any provision of this Code or of any other law which authorises the arrest and detention of the applicant it shall allow the application. Otherwise the court shall refuse the application.

(4) Where the court decides to allow the application the record of the proceedings including a copy of the court's decision shall be transmitted to the Attorney General by not later than the next working day and the Attorney General may, within two working days from the receipt of the record and if he is of the opinion that the arrest and continued detention of the person released from custody was founded on any provision of this Code or of any other law, apply to the Criminal Court to obtain the re-arrest and continued detention of the person so released from custody. The record of the proceedings and the court's decision transmitted to the Attorney General under the provisions of this sub-article shall be filed together with the application by the Attorney General to the Criminal Court."

2. Article 25A of the Immigration Act

19. The second remedy existing under domestic law is an application to the Immigration Appeals Board ("IAB") if an asylum seeker feels that his or her detention is no longer reasonable. It entails requesting release from custody pending the determination of an individual's asylum claim or his or her deportation in accordance with Article 25A of the Immigration Act, Chapter 217 of the Laws of Malta. The same article regulates the manner in which and when such release may be granted. The relevant provisions read as follows:

(6) During the course of any proceedings before it, the Board, may, even on a verbal request, grant provisional release to any person who is arrested or detained and is a party to proceedings before it, under such terms and conditions as it may deem fit, and the provisions of Title IV of Part II of Book Second of the Criminal Code shall, *mutatis mutandis* apply to such request.

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

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

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

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

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

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

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

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

3. Constitutional Proceedings

20. An alternative remedy is a constitutional application before the Civil Court (First Hall), followed, if necessary, by an appeal to the Constitutional Court. However, in *Sabeur Ben Ali v. Malta* (no. 35892/97, 29 June 2000, § 40) and *Kadem v. Malta* (no. 55263/00, § 53, 9 January 2003), the European Court held that this procedure was rather cumbersome and therefore lodging a constitutional application would not have ensured a speedy review of the lawfulness of the applicants' detention. Consequently, the Court held in the cited cases that the applicants had not had at their disposal, under domestic law, a remedy for challenging the lawfulness of their detention under Article 5 § 4 (see also *Stephens v. Malta (no. 2)*, no. 33740/06, § 90, 21 April 2009).

C. Domestic judgments relevant to the circumstances of the case**:**

1. Karim Barboush v. Commissioner of Police, (Judgment of the Criminal Court of 5 November 2004)

21. The domestic court, referring to the competence of the court under Article 409A, held that:

"it is not within the competence of the Court of Magistrates or the Criminal Court to examine whether, beyond the fact that there is a clear law authorising continued detention, there are other circumstances which could render it illegal, such as an incompatibility with the rights granted by the Constitution or the Convention. There exist other proceedings before other courts vested by law to take cognisance of such cases and which may give adequate remedies if they find a violation of human rights. Article 409A is shaped in accordance with the legislator's words and no court should exceed the limits of the jurisdiction conferred upon it."

2. Tafarra Besabe Berhe v. Commissioner of Police (Preliminary decree of the Civil Court (First Hall) acting in its constitutional jurisdiction of 20 June 2007)

22. In circumstances similar to the present one, the first-instance constitutional jurisdiction did not reject the claims for non-exhaustion of ordinary remedies but took cognisance of the case. It held that the remedy provided by the Immigration Act could not, even in the best possible scenario, grant a complete fair and certain remedy in cases where a person had been deprived of the right to liberty even for a short while.

The case is currently adjourned for judgment to June 2010.

23. At the hearing of 24 May 2007 concerning these proceedings, an NGO lawyer who regularly lodges applications for release with the IAB was asked about the longest and shortest time span he has had to wait for a decision on an application. He testified as follows:

> "The shortest would be twenty-eight days and the longest eighty-six days for a decision, but there are cases which are pending which have been over three months or where the client has been released because the eighteen month period had expired."

24. At the same hearing the Chairman of the IAB was asked to outline the criteria applied when determining if detention was reasonable or not in the circumstances. His testimony reads as follows:

> "We take all circumstances into account but obviously you have to consider the situation from a management point of view as well, and you have to consider as well that releasing somebody from detention is not just a matter concerning the applicant himself, because once he is released and he goes into society, if he is of bad character, you have to check his physical and medical condition and that is why we impose certain conditions because otherwise you would be, sort of doing, a good thing in favour of the applicant and not such a good thing *vis a vis* society at large. So we have to take into account everything but each case is dealt on its own merits."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

25. The applicant complained that he had been subject to inhuman and degrading treatment arising from the conditions of his detention, in violation of Article 3 of the Convention, which reads as follows:

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

26. The Court reiterates that, under Article 35 § 1 of the Convention, it may only deal with a matter after all domestic remedies have been

exhausted. Article 35 § 1 requires that the complaints intended to be made subsequently before the Court should have been made, at least in substance, to the appropriate domestic body (see *Bezzina Wettinger and Others v. Malta*, no. 15091/06, § 102, 8 April 2008).

27. The Court observes that the applicant failed to institute proceedings raising the Article 3 complaint before the Civil Court (First Hall) acting in its constitutional jurisdiction and if necessary to lodge an appeal before the Constitutional Court.

28. It follows that this complaint must be rejected for non-exhaustion of domestic remedies pursuant to Article 35 §§ 1 and 4 of the Convention.

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

29. The applicant complained that the Maltese legal system had not provided him with a speedy and efficient remedy, contrary to Article 5 § 4 of the Convention, which reads as follows:

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

30. The Government contested that argument.

A. Admissibility

1. The Government's objection of non-exhaustion of domestic remedies

31. The Government submitted that the applicant had not exhausted domestic remedies as he had failed to take up any of the available remedies.

32. The applicant submitted that none of the available remedies satisfied the requirements of Article 5 § 4.

33. The Court considers that this objection is closely linked to the substance of the applicant's complaint and that its examination should therefore be joined to the merits. It notes that the applicant's complaint is not manifestly ill-founded within the meaning of Article 35 § 3 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

34. The applicant submitted that there were no effective domestic remedies complying with the requirement of Article 5 § 4. Article 409A of the Criminal Code, as interpreted by the domestic courts, excluded the

examination of other circumstances making detention unlawful when detention had a clear legal basis (see paragraph 21 above).

35. Article 25A of the Immigration Act did grant the possibility of release. However, this was restricted and not available to, *inter alia*, individuals whose identity and nationality were still to be verified or who had destroyed their identity or travel documents (see paragraph 19 above). The applicant further submitted that the IAB was not a judicial authority, that it failed to determine proceedings speedily as they could take between twenty-eight and eighty-six days to be determined (see relevant testimony paragraph 23 above) and that it was not in conformity with Convention requirements (see relevant testimony paragraph 24 above). Indeed, proceedings had been successful only in very limited circumstances when the individual was in a vulnerable situation.

36. Lastly, constitutional proceedings could not be envisaged in view of their excessive length which the Court had previously found not to be compatible with the requirements of Article 5 § 4.

37. The Government submitted that after the relevant law had been introduced in 2002, there had not been many decisions giving effect to or interpreting Article 409 of the Criminal Code. However, they acknowledged that the courts had, to date, established that if it was found that detention was authorised by law, they were precluded from examining constitutional issues in respect of that detention. This was on the basis that there existed a specific remedy in this respect, namely one of a constitutional nature. The Government submitted that nothing precluded an individual from taking up a constitutional remedy in order to allege that the detention was in violation of the Constitution or the Convention on account of its length. This having been said, the Government were of the view that the latter did not preclude such a complaint being brought under Article 409A on the basis that the detention became arbitrary in view of its excessive length.

38. As to the IAB the Government submitted that the latter was fully competent to grant release from custody where, in its opinion, the continued detention of a person was, taking into account all the circumstances of the case, unreasonable as regards duration or because there was no reasonable prospect of deportation within a reasonable time. They further submitted four examples of cases alleging unreasonable length of detention in view of the circumstances of the case, in which the IAB had granted release. The latter dealt with applications made by persons who were of old age, medically unfit or disabled and who had been detained in inadequate conditions of detention. The Government further provided a decision by the IAB where, notwithstanding the person's age, conditions of detention and probable problems in respect of an eventual repatriation, the request was refused in the absence of medical certification.

2. General principles

39. Article 5 § 4 entitles an arrested or detained person to institute proceedings bearing on the procedural and substantive conditions which are essential for the "lawfulness" of his or her deprivation of liberty. The notion of "lawfulness" under paragraph 4 of Article 5 has the same meaning as in paragraph 1, so that the arrested or detained person is entitled to a review of the "lawfulness" of his detention in the light not only of the requirements of domestic law but also of the Convention, the general principles embodied therein and the aim of the restrictions permitted by Article 5 § 1. Article 5 § 4 does not guarantee a right to judicial review of such a scope as to empower the court, on all aspects of the case including questions of pure expediency, to substitute its own discretion for that of the decision-making authority. The review should, however, be wide enough to bear on those conditions which are essential for the "lawful" detention of a person according to Article 5 § 1 (see *E. v. Norway*, 29 August 1990, § 50, Series A no. 181). The remedies must be made available during a person's detention with a view to that person obtaining speedy judicial review of the lawfulness of his or her detention capable of leading, where appropriate, to his or her release. The accessibility of a remedy implies, *inter alia*, that the circumstances voluntarily created by the authorities must be such as to afford applicants a realistic possibility of using the remedy (see *Čonka v. Belgium*, no. 51564/99, §§ 46 and 55, ECHR 2002-I). Article 5 § 4 of the Convention refers to domestic remedies that are sufficiently certain, otherwise the requirements of accessibility and effectiveness are not fulfilled (see *Kadem v. Malta*, cited above, § 41).

40. The requirement of procedural fairness under Article 5 § 4 does not impose a uniform, unvarying standard to be applied irrespective of the context, facts and circumstances. Although it is not always necessary that an Article 5 § 4 procedure be attended by the same guarantees as those required under Article 6 for criminal or civil litigation, it must have a judicial character and provide guarantees appropriate to the type of deprivation of liberty in question (see *A. and Others v. the United Kingdom* [GC], no. 3455/05, § 203, ECHR 2009-...).

41. Article 5 § 4, in guaranteeing to persons arrested or detained a right to take proceedings to challenge the lawfulness of their detention, also proclaims their right, following the institution of such proceedings, to a speedy judicial decision concerning the lawfulness of detention (see *Musial v. Poland* [GC], no. 24557/94, § 43, ECHR 1999-II). The question whether a person's right under Article 5 § 4 has been respected has to be determined in the light of the circumstances of each case (see *Rehbock v. Slovenia*, no. 29462/95, § 84, ECHR 2000-XII). While Article 5 § 4 of the Convention does not impose an obligation on a judge examining an appeal against detention to address every argument contained in the appellant's submissions, its guarantees would be deprived of their substance if the

judge could treat as irrelevant, or disregard, particular facts invoked by the detainee which could cast doubt on the existence of the conditions essential for the "lawfulness", in the sense of the Convention, of the deprivation of liberty (see *Nikolova v. Bulgaria* [GC], no. 31195/96, § 91, ECHR 1999-II).

The Court's assessment

42. The Court notes that the parties are in disagreement as to the effectiveness of the remedies invoked. It will therefore consider each remedy on the basis of the available information and the parties' submissions.

43. The Court notes that the applicant claimed that Article 409A was not an effective remedy for the purposes of the Convention in that it stopped short of examining lawfulness in the light of the requirements of the Convention. Indeed, the Court observes that the relevant courts entrusted with hearing applications under the said Article have acknowledged their limited competence, holding that they were not competent to look into other circumstances which could render detention illegal, such as an incompatibility with the rights granted by the Constitution or the Convention when there was a clear law authorising continued detention (see paragraph 21 above). The Government have also acknowledged that this was the ordinary interpretation of the relevant domestic courts (see paragraph 35 above). In these circumstances the Court is of the view 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.

44. As to the remedy before the IAB, the Court considers that, even assuming that it could be considered as a judicial authority competent to grant release, the relevant legal provision is limited by the fact that a request for release from custody has no prospect of success in the event that the identity of the detainee, including his nationality, has yet to be verified, in particular where he has destroyed his travel or identification documents or used fraudulent documents in order to mislead the authorities (see paragraph 19 above). Moreover, the Court cannot ignore the fact that, notwithstanding the high number of irregular immigrants arriving on Maltese shores, being detained and taking up this procedure, over recent years the Government have only submitted four cases where the remedy was successful. The Court observes that in each of these cases the individuals making the request were vulnerable, either because of their age, their medical condition or disability, and it was in view of the latter reasons that release was granted on the basis that the length of their detention had become unreasonable. Furthermore, it

appears from the applicant's submissions substantiated by the relevant testimony (see paragraph 23 above) that these proceedings take at least one month to be decided and may last as long as three months or more. Indeed, it appears that there have been cases where the decision was not rendered before the actual release date of the detainee according to Government policy, rendering such a remedy devoid of any legal or practical effect (see, *mutatis mutandis*, *Frasik v. Poland*, no. 22933/02, § 66, 5 January 2010). The Government have not denied any of the above evidence or at least brought proof of other cases which were decided promptly by the IAB. It follows that these proceedings cannot be considered to determine requests speedily as required by Article 5 § 4 of the Convention (see, *mutatis mutandis*, *Rehbock v. Slovenia*, cited above §§ 82-86, in which the Court considered that a delay of twenty-three days in deciding on the applicant's claims for immediate release was excessive, *Khudyakova v. Russia*, no. 13476/04, § 99, 8 January 2009 and *Kadem v. Malta*, cited above, §§ 43-45, where the Court held that periods of fifty-four and seventeen days respectively for examining an appeal against proceedings concerning detention pending extradition had been too long). For all the above reasons the Court considers that the proceedings before the IAB cannot be considered as satisfying the requirements of Article 5 § 4 of the Convention.

45. Lastly, the Government submitted that there also existed a constitutional remedy of which individuals could avail themselves to complain about the length of their detention. In this respect the Court reiterates that constitutional proceedings in Malta 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 (see *Sabeur Ben Ali v. Malta*, cited above, § 40, and *Kadem v. Malta*, cited above § 53). The Government have not submitted any information or case-law capable of dispelling this conclusion. In these circumstances, the Court remains of the view that pursuing a constitutional application would not have provided the applicant with a speedy review of the lawfulness of his detention.

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

47. Article 5 § 4 of the Convention has therefore been violated and the Government's objection based on non-exhaustion of domestic remedies (see paragraph 31 above) must accordingly be rejected.

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

48. The applicant complained that his detention following the determination of his asylum claim had been arbitrary and unlawful, in terms of Article 5 of the Convention, which in so far as relevant reads as follows:

> "1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
>
> (f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

49. The Government contested that argument.

A. Admissibility

50. The Government submitted that the applicant had remained passive and even if the remedies available were limited the applicant should have pursued them. It followed that it was not for the Court to speculate on the outcome that such proceedings might have had, had they been undertaken.

51. In so far as the Government's contention may be understood as an objection of non-exhaustion of domestic remedies, the Court has already held that the applicant did not have at his disposal an effective and speedy remedy for challenging the lawfulness of his detention (see paragraphs 46-47 above). It follows that any such objection must be dismissed.

52. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 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

53. The applicant submitted that his detention for more than eighteen months after the determination of his asylum claim had been arbitrary, unlawful and not in compliance with the requirements of the Convention as established in the Court's case-law. The Government had in place two policies regulating detention, namely, a policy for the release of asylum seekers after a period of twelve months from, according to the applicant, their arrival (see paragraph 17 above, which states that the period starts to run from detention) if their asylum claim is still pending, and secondly, the 2005 general policy on rejected asylum seekers or immigrants who do not request asylum which held that no immigrant shall be kept in detention for

longer than eighteen months (see paragraph 16 above). These policies and the one relating to exceptions to detention were subject to change by Government at their discretion. Moreover, the unclear procedures in this respect were devoid of procedural safeguards, they could not therefore be considered as accessible and precise. Thus, the limited review of detention and the extremely poor conditions of detention also needed to be considered.

54. The applicant further submitted that the duration of his detention had been excessive and not determined by an assessment of the effective possibility of return but by a pre-established policy which applied independently of the individual circumstances of the case. Moreover, while in detention he had never been approached by the immigration authorities about the subject of his removal or informed of the stage of the removal procedure. Neither had the Government demonstrated in any way that removal proceedings had been undertaken with due diligence. Indeed, in 2010, although released from detention, the applicant was still in Malta.

55. The Government submitted that from 27 June 2007 to 6 January 2009 the applicant had been detained under Article 5 § 1(f) in accordance with Articles 5 (1) and 14 of the Immigration Act (see relevant domestic law above), provisions which were both accessible and precise. Consequently, the detention had been lawful. Indeed, according to the Government the twelve-month limit started to run from the date when an individual applied for asylum. Thus, the asylum claim having been decided on 18 July 2007, the decision was taken within the one-year time-limit provided by European law. Therefore, the relevant provisions of the Directive 2003/9EC of 27 January 2003 of the European Union did not apply to the case in question as the applicant had ceased to be an "asylum seeker" on 18 July 2007. However, even if this were not the case, the Government argued that access to the labour market did not entail freedom from detention, as both were not incompatible. The Government further submitted that both its policies on detention (mentioned by the applicant above) were reasonable in respect of duration considering the intricate problems involved in the removal of undocumented immigrants. The applicant's allegation of a blanket application of these policies to all immigrants was untrue as Malta had no desire to keep irregular immigrants in detention on its territory if it could repatriate them. However, this proved difficult because of the lack of cooperation between immigrants and their countries of origin.

56. Moreover, individuals did have the possibility of review by an independent judicial authority, with the assistance of legal counsel. Furthermore, conditions of detention were adequate considering the large influx of migrants on such a small island which had limited financial and human resources.

57. The Government submitted that the applicant had landed in Malta without any documentation and although his nationality and identity had been established, it had not been possible to arrange his removal. The police had unsuccessfully tried to obtain travel documents for the applicant from the Algerian authorities through the intervention of the Ministry of Foreign Affairs. Moreover, the applicant had not shown any interest in being repatriated or sent to another destination. Thus, the Government submitted that his detention of eighteen months (in accordance with Government policy) pending removal had been due to the applicant's lack of cooperation and had therefore been necessary, justified and not excessive.

2. General principles

58. Article 5 enshrines a fundamental human right, namely the protection of the individual against arbitrary interference by the State with his or her right to liberty (see *Aksoy v. Turkey*, 18 December 1996, § 76, *Reports of Judgments and Decisions* 1996-VI). The text of Article 5 makes it clear that the guarantees it contains apply to "everyone".

59. Sub-paragraphs (a) to (f) of Article 5 § 1 contain an exhaustive list of permissible grounds on which persons may be deprived of their liberty and no deprivation of liberty will be lawful unless it falls within one of those grounds (see *Saadi v. the United Kingdom* [GC], no. 13229/03, § 43, ECHR 2008-...). One of the exceptions, contained in sub-paragraph (f), permits the State to control the liberty of aliens in an immigration context.

60. Article 5 § 1 (f) does not demand that detention be reasonably considered necessary, for example to prevent the individual from committing an offence or fleeing. Any deprivation of liberty under the second limb of Article 5 § 1 (f) will be justified, however, only for as long as deportation or extradition proceedings are in progress. If such proceedings are not prosecuted with due diligence, the detention will cease to be permissible under Article 5 § 1 (f) (see *Chahal v. the United Kingdom*, 15 November 1996, § 113, *Reports* 1996-V).

61. The deprivation of liberty must also be "lawful". Where the "lawfulness" of detention is in issue, including the question whether "a procedure prescribed by law" has been followed, the Convention refers essentially to national law and lays down the obligation to conform to the substantive and procedural rules of national law. The words "in accordance with a procedure prescribed by law" do not merely refer back to domestic law; they also relate to the quality of this law, requiring it to be compatible with the rule of law, a concept inherent in all Articles of the Convention. Quality in this sense implies that where a national law authorises deprivation of liberty, it must be sufficiently accessible and precise in order to avoid all risk of arbitrariness (see *Dougoz v. Greece*, no. 40907/98, § 55, ECHR 2001-II, citing *Amuur v. France*, 25 June 1996, § 50, *Reports* 1996-III).

62. Compliance with national law is not, however, sufficient: Article 5 § 1 requires in addition that any deprivation of liberty should be in keeping with the purpose of protecting the individual from arbitrariness. It is a fundamental principle that no detention which is arbitrary can be compatible with Article 5 § 1 and the notion of "arbitrariness" in Article 5 § 1 extends beyond 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 thus contrary to the Convention (see *Saadi v. the United Kingdom*, cited above, § 67). 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 (see *A. and Others v. the United Kingdom* [GC], cited above, § 164).

3. The Court's assessment

63. The Court notes that the applicant's detention in prison fell initially under Article 5 § 1 (c), namely, the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence. It subsequently fell under sub-paragraph (a), namely, the lawful detention of a person after conviction by a competent court. These periods do not raise an issue before the Court.

64. After he served his sentence, the applicant was transferred to a detention centre and detained "with a view to deportation" within the meaning of Article 5 § 1 (f). It follows that the period of detention to be considered for the purposes of this complaint is that from 27 June 2007, the date when the applicant was placed in a detention centre pending the processing of his asylum claim, to 6 January 2009, when he was released. The duration of the detention therefore amounted to eighteen months and nine days. The Court notes that the entire duration of the detention was subsequent to the rejection of his asylum claim at first instance, on 24 April 2007, and that the final decision on his asylum claim was delivered three weeks after the commencement of his detention in the detention centre.

65. The Court must determine whether the duration of the detention was excessive and whether the authorities pursued the deportation proceedings with due diligence.

66. The Court observes that the delay in the present case is not as striking as that in other cases (see *Chahal*, cited above, and *Raza v. Bulgaria*, no. 31465/08, 11 February 2010, where the duration was of more than three and two and a half years respectively). However, the delay was not due to the need to wait for the courts to determine a legal challenge, the applicant's asylum claim having been determined before his

detention. Although the identity and nationality of the applicant had been determined, the Government submitted that repatriation had been difficult as the applicant was undocumented, the Algerian authorities had refused to issue the relevant documents and the applicant had been unwilling to cooperate. The Court notes that the Government have not submitted any details as to the procedures initiated save that the police had attempted to obtain such documents through the intervention of the Ministry of Foreign Affairs. They have not submitted information about the frequency of such requests or whether any other avenues were explored. The Court considers that while it is true that the Maltese authorities could not compel the issuing of such a document, there is no indication in the Government's observations that they pursued the matter vigorously or endeavoured entering into negotiations with the Algerian authorities with a view to expediting its delivery (see *Raza v. Bulgaria*, cited above, § 73; *Tabesh v. Greece*, no. 8256/07, § 56, 26 November 2009; and, conversely, *Agnissan v. Denmark* (dec.), no 39964/98, 4 October 2001).

67. The Government blamed the applicant for his unwillingness to cooperate. However, assuming the Government were right in their allegation, the Court considers that it must have become clear quite early on that the attempts to repatriate him were bound to fail as the applicant had refused to cooperate and/or the Algerian authorities had not been prepared to issue him documents. Detention cannot be said to have been effected with a view to his deportation if this was no longer feasible (see *Mikolenko v. Estonia*, no. 10664/05, §§ 64-65, 8 October 2009). Indeed, the Court notes that to date, a year and a half after his release, the applicant is still in Malta.

68. Moreover, 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.

69. In the light of the above, the Court has grave doubts as to whether the grounds for the applicant's 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 domestic authorities to conduct the proceedings with due diligence.

70. In such circumstances the Court will move on to determine whether the detention was lawful under national law, effected "in accordance with a procedure prescribed by law" and, in particular, whether there existed sufficient guarantees against arbitrariness.

71. The Court is ready to accept that notwithstanding the various policies, the accessibility and precision of which are doubtful, the applicant's detention was based on Articles 5 and 14 of the Immigration Act. However, the Court must consider whether Maltese law guaranteed a particular procedure to be followed which could offer safeguards against arbitrariness. The Court primarily notes that the Immigration Act applied no limit to detention and that the Government policies have no legal force. In consequence, the applicant was subject to an indeterminate period of detention (see, *mutatis mutandis*, *Muminov v. Russia*, no. 42502/06, § 122, 11 December 2008). In such circumstances the necessity of procedural safeguards becomes decisive. However, the Court has already established that the applicant did not have any effective remedy by which to contest the lawfulness and length of his detention (see paragraphs 46-47 above), and the Government have not pointed to any other normative or practical safeguard. It follows that the Maltese legal system did not provide for a procedure capable of avoiding the risk of arbitrary detention pending deportation (see, *mutatis mutandis*, *Soldatenko v. Ukraine*, no. 2440/07, § 114, 23 October 2008).

72. In these circumstances the Court finds it unnecessary to examine the applicant's conditions of detention, which it reiterates must be compatible with the purposes of detention.

73. The foregoing considerations are sufficient to enable the Court to conclude that the national system failed to protect the applicant from arbitrary detention, and his prolonged detention cannot be considered to have been "lawful" for the purposes of Article 5 of the Convention.

74. There has accordingly been a violation of Article 5 § 1 of the Convention.

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

75. The applicant complained that upon being apprehended after a long sea journey he had not been provided with the legal and factual grounds for his detention in terms of Article 5 § 2 of the Convention, which reads as follows:

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

76. The Government contested that argument.

A. Admissibility

77. The Court has already held that it is not open to it to set aside the application of the six-month rule, solely because a Government have not

made a preliminary objection to that effect (see *Blečić v. Croatia* [GC], no. 59532/00, § 68, ECHR 2006-III).

78. The Court reiterates that where there is no effective remedy, the six-month period runs from the date of the omission complained of, or from the date when the applicant learned about the omission *(*see *Moroko v. Russia*, no. 20937/07, § 34, 12 June 2008). Applied to the present case, this means the date when the applicant was first arrested, namely on 24 June 2006 (see paragraph 7 above) and therefore more than six months before the lodging of this application with the Court on 6 March 2008.

79. It follows that this complaint is inadmissible for non-compliance with the six-month rule set out in Article 35 § 1 of the Convention, and is rejected pursuant to Article 35 § 4.

V. APPLICATION OF ARTICLE 41 OF THE CONVENTION

80. 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

81. The applicant claimed 300,000 euros (EUR) in respect of non-pecuniary damage in respect of the alleged violations of Articles 3 and 5 §§ 1, 2, and 4 of the Convention.

82. The Government submitted that the claim was exorbitant and could only be equated to serious Article 3 violations dealing with torture.

83. The Court notes that it has found a violation of Article 5 §§ 1 and 4. The Court therefore awards the applicant EUR 12,000 in respect of non-pecuniary damage.

B. Costs and expenses

84. The applicant did not submit a claim for costs and expenses.

C. Default interest

85. The Court considers it appropriate that the default interest 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. *Joins* to the merits the Government's preliminary objection based on non-exhaustion of domestic remedies in respect of the complaint under Article 5 § 4 of the Convention and *declares* the complaints concerning Article 5 §§ 1 and 4 of the Convention admissible and the remainder of the application inadmissible;

2. *Holds* that there has been a violation of Article 5 § 4 of the Convention and *dismisses* the above-mentioned objection;

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

4. *Holds*

(a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 12,000 (twelve thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

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

Done in English, and notified in writing on 27 July 2010, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Lawrence Early Registrar	Nicolas Bratza President