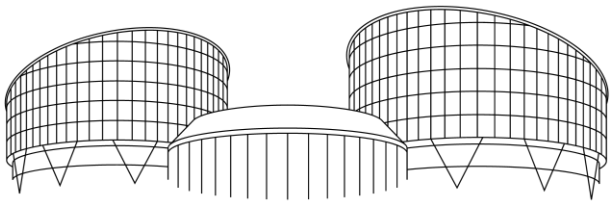

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

CASE OF AL HUSIN v. BOSNIA AND HERZEGOVINA

(Application no. 3727/08)

JUDGMENT

STRASBOURG

7 February 2012

FINAL

09/07/2012

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

In the case of Al Husin v. Bosnia and Herzegovina**,**

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

Lech Garlicki, *President,*
Päivi Hirvelä,
Ledi Bianku,
Zdravka Kalaydjieva,
Nebojša Vučinić,
Vincent A. De Gaetano,
Ljiljana Mijović, *judges,*

and Lawrence Early, *Section Registrar,*

Having deliberated in private on 17 January 2012,

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

PROCEDURE

1. The case originated in an application (no. 3727/08) against Bosnia and Herzegovina lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Syrian national, Mr Imad Al Husin ("the applicant"), on 22 January 2008.

2. The applicant was represented by Mr O. Mulahalilović and Vaša prava, a local non-governmental organisation. The Bosnian-Herzegovinian Government ("the Government") were represented by their Agent, Ms M. Mijić.

3. The applicant alleged, in particular, that his deportation would expose him to the risk of treatment contrary to Article 3 of the Convention and that his detention amounted to a breach of Article 5 § 1 of the Convention.

4. On 29 January 2008 a Chamber of the Fourth Section of the Court decided, in the interests of the parties and the proper conduct of the proceedings, to indicate to the Government that the applicant should not be expelled pending the final decision of the Constitutional Court of Bosnia and Herzegovina in his case (AP 1222/07) and for a period of at least seven days following notification of that decision (Rule 39 of the Rules of Court). After the Constitutional Court had rendered its decision, the applicant filed a request for another interim measure on 27 October 2008. Having regard to the fact that the applicant was not subject to expulsion (notably, because a deportation order had not yet been issued), on 29 October 2008 the Acting President of the Fourth Section of the Court decided to refuse that request.

5. On 12 October 2010 the Fourth Section of the Court decided to give notice of the application to the Government and to rule on the admissibility and merits of the application at the same time (Article 29 § 1).

6. On 13 January 2011 the President of the Fourth Section of the Court granted leave to Human Rights Watch to submit third-party comments (Article 36 § 2 of the Convention and Rule 44 § 3 (a) of the Rules of Court).

7. On 15 March 2011, after a deportation order against the applicant had been issued and become final, the Fourth Section decided, in the interests of the parties and the proper conduct of the proceedings, to indicate to the Government that the applicant should not be expelled to Syria until further notice.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

A. Relevant background to the present case

8. It would appear from the case file that the salient fact in the domestic proceedings was the applicant's association with the mujahedin in Bosnia and Herzegovina ("BH")[1]. The term mujahedin has been widely used to refer to foreigners – mainly from the Arab world – who came to BH during the war in support of Bosnian Muslims[2]. However, the same term has been used to describe local Muslims who joined the foreign mujahedin, endorsed their ideology and adjusted to their way of dressing. The phenomenon has been explained by the International Criminal Tribunal for the former Yugoslavia ("ICTY") in *Hadžihasanović and Kubura*, IT-01-47-T, §§ 411-18, 15 March 2006, and *Delić*, IT-04-83-T, §§ 166-199, 15 September 2008, as follows.

9. The first foreign mujahedin arrived in BH in the summer of 1992 via Croatia and with the assistance of the Croatian authorities. It would appear that their arrival was welcomed by the BH authorities. While the presence of at least some foreign mujahedin seems to have been motivated by a desire to provide humanitarian assistance to the Bosnian Muslim population, most of them actively supported the military struggle against the Bosnian Muslims' adversaries, ready to conduct a jihad or "holy war". As stated by Ali Hamad, an ICTY witness of Bahraini origin who came to BH in 1992, some of the mujahedin were members of al-Qaeda who had the aim of "creating a base that would allow them to increase their area of operations". Some of them also came to perform missionary work.

10. Upon arrival, foreign mujahedin settled in various locations and did not form a homogeneous entity. Towards the end of 1992, Bosnian Muslims started to join the foreign mujahedin. The locals were provided with military

1. While the respondent State was called "the Republic of Bosnia and Herzegovina" during the 1992-95 war, the name "Bosnia and Herzegovina" is nevertheless also used in this judgment when referring to that period.

2. Bosnian Muslims are also known as Bosniacs. The term "Bosniacs" should, however, not be confused with the term "Bosnians", which is used to denote BH citizens irrespective of their ethnic origin.

training and participated in combat action. They were also given religious instruction. A number of groups comprising foreign and/or local mujahedin were active. Notwithstanding instances of participation in combat alongside each other, it appears that these groups were anxious to maintain their distinct identities. There were religious and ideological differences between them, which resulted in occasional violent clashes.

11. On 13 August 1993 the foreign mujahedin were organised into a unit within the local ARBH (Army of the Republic of Bosnia and Herzegovina) forces[3]. The unit, named "*El Mujahedin*", was based in Zenica. Following its establishment, the unit significantly grew in size. By 1995, it consisted of around 1,000 fighters. Although the original idea had been to replenish the unit with foreign mujahedin only, locals soon outnumbered its foreign members. The factors that motivated locals to join it included: its stricter regimental discipline; a better degree of organisation; superior equipment and combat morale; its religious dedication; and material benefits. The unit received funds and assistance from many organisations and individuals from the Islamic world, including the Al-Haramain Islamic Foundation[4] and the Benevolence International Foundation[5]. The Islamic Cultural Institute in Milan provided logistical support.

12. *El Mujahedin* had a number of features setting it apart from regular ARBH units. It was led by foreign mujahedin who were not appointed by the ARBH. At the top of the hierarchy was an *emir*, who has been described as the highest-ranking person within the unit. Abu Haris, a Libyan, was its first *emir*. In December 1993, he was succeeded by an Algerian, Abu Maali, who remained in that position until the end of the war. A different person from the *emir*, the military commander, headed the military council and was responsible for the conduct of combat operations. In 1993, this post was held by an Egyptian named Vahidin or Wahiuddin. After his death in October 1993, another Egyptian, Muatez, succeeded him. Muatez was killed in September 1995. The unit had a religious council, the *shura*, which was its supreme decision-making body. It consisted of approximately twenty prominent members of the unit, mostly of Arab origin. The *emir* was elected by and answerable to the *shura*. At the end of 1994, Sheikh Shaban joined the leadership of the unit. He was the head of the Islamic Cultural Institute in Milan and known to be an extremist who was well-connected with Islamic fundamentalists all over the world (the ICTY relied in that regard on a judgment of the Milan Criminal Court of 1 January 2006). He facilitated

3. The ARBH forces, mostly made up of the Bosnian Muslim population, were loyal to the central authorities of BH.

4. On 13 March 2002 the Al-Haramain Islamic Foundation was placed on the list of entities associated with al-Qaeda maintained by the United Nations.

5. On 21 November 2002 the Benevolence International and *Bosanska idealna futura*, its office in BH, were placed on the list of entities associated with al-Qaeda maintained by the United Nations. On 10 February 2003 Enaam M. Arnaout, its director, was convicted in the United States after he pleaded guilty to a racketeering conspiracy. In the plea agreement, he admitted that for a decade the Benevolence International Foundation had been defrauding donors by leading them to believe that donations were being used for strictly peaceful, humanitarian purposes, while some of that money was being diverted to mujahedin in BH.

the recruitment of volunteers from Arab countries for the struggle in BH. Although Sheikh Shaban did not hold an official function within the unit, its members considered him to be the political authority and even the real *emir* within the unit. He could issue binding rulings (*fatwa*) and his authority was never challenged by the *shura*. Sheikh Shaban was killed, together with Abu Haris, at an HVO (Croatian Defence Council)[6] military checkpoint on 14 December 1995.

13. The General Framework Agreement for Peace, which ended the war in BH, was initialled at a military base near Dayton, the United States, on 21 November 1995 and signed in Paris, France, on 14 December 1995. Article III of Annex 1A to that Agreement called for the withdrawal of all foreign forces, including individual advisors, freedom fighters, trainers, volunteers, and personnel from neighbouring and other States, irrespective of whether they were legally and militarily subordinated to any of the local forces. In view of that, on 14 December 1995 the ARBH disbanded *El Mujahedin* and ordered its foreign members to leave the country by 10 January 1996. Despite initial resistance, the *shura* accepted that the unit be disbanded. It would appear that awards, such as the "Golden Lily", were given to its members as an incentive for foreigners to leave. Members of the unit were also provided with ARBH certificates of service, which assisted its foreign members to acquire BH citizenship. Whereas most of the unit's foreign members left BH, some of them (such as the present applicant) applied for BH citizenship and continue to live in BH to date.

14. After the attacks of 11 September 2001, the official attitude towards foreign mujahedin changed dramatically. Many lost their BH citizenship or were deported from BH after being declared a threat to national security.

B. The present case

15. The applicant was born in Syria in 1963.

16. In 1983 he went to the then Socialist Federal Republic of Yugoslavia to pursue his studies. He first studied at Belgrade University, in Serbia, and then at Rijeka University, in Croatia.

17. It would appear that the last time the applicant was in Syria was in January 1993. He stayed one month and obtained a new Syrian passport.

18. In 1993, having returned from Syria, the applicant met a refugee from BH in Croatia. They were married in a Muslim wedding ceremony in 1993 and then in a civil ceremony in 1995 (the applicant had previously been married). They have three children together, born in 1994, 1997 and 1999. The applicant's wife also has three children from her first marriage (her first husband was killed at the beginning of the war). The applicant has no children from his previous marriage.

6. The HVO forces were mostly made up of the local Croatian population. They were loyal to the authorities of neighbouring Croatia (see the ICTY judgments in *Blaškić*, IT-95-14-T, §§ 95-123, 3 March 2000, and IT-95-14-A, §§ 167-78, 29 July 2004).

19. While it is certain that the applicant was a member of *El Mujahedin*, the ARBH unit described above, it is not clear for how long. According to a certificate issued to the applicant, his service in the ARBH lasted from May 1993 until December 1995, but this is not consistent with the applicant's version of events. Neither is it clear when he obtained BH citizenship. He was first issued a national identification number on 15 April 1995 on the basis of a naturalisation decision of 22 November 1994 and again on 28 December 1995 on the basis of a naturalisation decision of 23 March 1992. However, the applicant claims that the naturalisation decision of 23 March 1992 did not exist. Indeed, it has never been delivered to him, despite his numerous requests.

20. In the immediate aftermath of the war, the applicant acted as leader of a group of foreign mujahedin and their local supporters based in Bočinja. The group advocated the Saudi-inspired Wahhabi/Salafi[7] version of Islam. In his role as the group's leader, he interrogated two local Serbs for a couple of hours in 1998. This led to his conviction for false imprisonment in May 2000 and a suspended prison sentence.

21. On 14 November 2001 the relevant administrative authority quashed the naturalisation decision of 23 March 1992. On 7 June 2006 the Supreme Court of the Federation of BH[8] quashed that decision and remitted the case for reconsideration. On 9 January 2007 the relevant administrative authority quashed the naturalisation decisions of 23 March 1992 and 22 November 1994. They held that the applicant had acquired BH citizenship by means of fraudulent conduct, false information and concealment of relevant facts. As a result of this decision, the applicant became an unlawful resident in BH. On 5 April 2007 the State Court and on 4 October 2008 the Constitutional Court upheld the decision (see paragraph 27 below).

22. On 19 April 2007 the applicant applied for a residence permit. On 18 May 2007 the Aliens Service rejected his application. It held, on the basis of confidential intelligence reports, that the applicant was a threat to national security. He was granted a period for voluntary departure of fifteen days. On 27 July 2007 the Ministry of Security, after having assessed the

7. According to International Crisis Group, the Salafiyya began as a movement of modernist reform in the Middle East in the late nineteenth century. Its founders, the Persian Shiite Jamal al-Din al-Afghani (1838-1897) and the Egyptian Sunni Mohammed Abduh (1849-1905), were concerned above all to enable the Muslim world to rise to the challenge of Western power. This reformist combination of selective "back to basics" fundamentalism and selective modernism (accepting Western science and political ideas, notably liberal democracy and constitutional government) went into eclipse following the First World War. In the political turmoil in the Middle East following the destruction of the Ottoman empire, the abolition of the Caliphate, the expansion of Jewish settlement in Palestine and the establishment of British and French protectorates (Iraq, Palestine, Syria, Transjordan), the Salafiyya movement evolved in a markedly anti-Western and conservative direction under the guidance of Rashid Rida (1865-1935). This involved an explicit rapprochement from the late 1920s onwards between the Salafiyya movement and the Wahhabi doctrines championed by the triumphant Al-Saud dynasty in Arabia (see International Crisis Group's report *Understanding Islamism* of 2 March 2005, p. 9).

8. BH consists of two Entities (the Federation of BH and the Republika Srpska) and the Brčko District.

national security evidence, upheld that decision. On 21 January 2008 the State Court dismissed an application for judicial review. On 14 March 2008 another bench of the same court upheld that decision. On 4 October 2008 the Constitutional Court set aside the State Court's decision of 14 March 2008 and remitted the case for a retrial (see paragraph 27 below).

23. On 1 June 2007 the applicant claimed asylum. He maintained that he would be perceived by the Syrian authorities as a member of the outlawed Muslim Brotherhood (in view of his involvement in rallies organised by that organisation in the 1980s) or as an Islamist (given his association with the mujahedin movement advocating the Saudi-inspired Wahhabi/Salafi version of Islam). The applicant claimed that the Syrian authorities were aware of his activities in BH, as he had always been outspoken about them (for example, he had given a number of interviews to the *Al Jazeera* television channel and the *Asharq Alawsat* newspaper between 1996 and 2001). Those authorities had allegedly interviewed his father and brothers on several occasions in this connection and, furthermore, had held one of his brothers in detention for nine months because of his refusal to spy on the applicant. He referred to the situation of Muhammad Zammar, a mujahedin of Syrian origin, who had reportedly been tortured in Syria and sentenced to twelve years' imprisonment for membership of the Muslim Brotherhood (although no proof of his membership in that organisation had been presented at trial), belonging to an organisation formed with the purpose of changing the economic or social structure of the state, carrying out activities that threatened the state or might damage its relationship with a foreign country and weakening national feeling and inciting sectarian strife. The applicant claimed that he might also be targeted because of his draft evasion. Given all the above and the general political and human rights situation in Syria, the applicant argued that his deportation to Syria would expose him to a risk of being subjected to ill-treatment. Lastly, he submitted that his deportation would be contrary to Article 8 of the Convention in view of his family situation.

24. On 8 August 2007 the Asylum Service refused the asylum claim and granted the applicant a fifteen-day period for voluntary departure. It held that the applicant did not face a real risk of being subjected to ill-treatment given that he had never been a member of the Muslim Brotherhood (unlike Muhammad Zammar mentioned above). It further held that it had not been shown that he would be ill-treated solely because of his fighting with the foreign mujahedin in BH (in view of the fact that none of the parties to the war in BH were either an ally or an enemy of Syria) or because of his draft evasion. As regards the applicant's allegations about his father and brothers, the Asylum Service rejected them as unsubstantiated. Lastly, the Asylum Service considered the Article 8 complaint to be irrelevant in an asylum case. On 21 January 2008 the State Court upheld that decision. On 4 October 2008 the Constitutional Court set aside the part of the State Court's decision concerning Article 8 and remitted it for a retrial. It upheld the remainder of that decision (see paragraph 27 below).

25. On 29 January 2008 the Court decided to indicate to the Government that the applicant should not be expelled pending the final decision of the Constitutional Court in the applicant's case (AP 1222/07) and for a period of at least seven days following notification of that decision (see paragraph 4 above).

26. On 4 June 2008 the US Department of State edited its 2007 Country Report on Terrorism in BH, in which the applicant (known as Abu Hamza al-Suri) had been wrongly identified as convicted terrorist Abu Hamza al-Masri (who had also fought with the foreign mujahedin in BH).

27. On 4 October 2008 the Constitutional Court rendered its decision in the applicant's case (AP 1222/07). It set aside the State Court's decision of 14 March 2008 (see paragraph 22 above) and the State Court's decision of 21 January 2008 in part (see paragraph 24 above). It upheld the remainder of the State Court's decision of 21 January 2008 and the State Court's decision of 5 April 2007 in its entirety (see paragraph 21 above).

28. On 6 October 2008 the Aliens Service placed the applicant in an immigration centre on security grounds, pursuant to section 99(2)(b) of the Aliens Act 2008. On 10 October 2008 the State Court, after having assessed the national security evidence, upheld that decision. In his constitutional appeal, the applicant maintained that even if he indeed constituted a security threat, that factor would not be sufficient in itself to justify his detention (he relied on *Lawless v. Ireland (no. 3)*, 1 July 1961, Series A no. 3; *Guzzardi v. Italy*, 6 November 1980, Series A no. 39; and *Ciulla v. Italy*, 22 February 1989, Series A no. 148). On 28 March 2009 the Constitutional Court held that the applicant's custody was lawful and consistent with the Convention. The initial detention period was extended monthly on security grounds until February 2011 (see paragraph 32 below). All extension orders were upheld by the State Court and some of them also by the Constitutional Court (constitutional appeals concerning the remaining orders are pending).

29. On 17 October 2008 Amnesty International, the Helsinki Committee in BH and Human Rights Watch called upon the BH authorities not to deport the applicant to Syria because of a serious risk of ill-treatment.

30. Further to the Constitutional Court's decision of 4 October 2008 (see paragraph 27 above), on 17 November 2008 the State Court quashed part of the Asylum Service's decision of 8 August 2007 mentioned in paragraph 24 above and instructed that service to examine whether the indication of a period for voluntary departure was contrary to Article 8 of the Convention. On 6 March 2009 the Asylum Service held that the impugned measure was consistent with Article 8. On 17 August 2009 the State Court quashed that decision. On 17 September 2009 the Asylum Service again held that the impugned measure was consistent with Article 8. On 15 December 2009 the State Court quashed that decision. On 15 January 2010 the Asylum Service again held that the impugned measure was consistent with Article 8. On 17 December 2010 the State Court upheld that decision. It emphasised that the indication of a period for voluntary departure should not be confused with a deportation order and that the issue of whether the applicant's departure would be contrary to Article 8 should more

appropriately be examined within the context of deportation proceedings. It would appear that a constitutional appeal against that decision is pending.

31. Further to the Constitutional Court's decision of 4 October 2008 (see paragraph 27 above), on 17 November 2008 the State Court assessed the national security evidence and upheld the Ministry of Security's decision of 27 July 2007 mentioned in paragraph 22 above. It relied on the applicant's conviction of May 2000 (see paragraph 20 above), his public threats against State authorities, his standing in the mujahedin community which allowed him to issue a binding ruling (*fatwa*), his lectures at a mosque in Sokolović kolonija, a Sarajevo suburb, advocating the Saudi-inspired Wahhabi/Salafi version of Islam and his attempts to obtain ammunition illegally. It also took into account some secret evidence. Following a constitutional appeal, on 31 January 2009 the Constitutional Court ordered as an interim measure that the applicant should not be expelled pending the proceedings before the Constitutional Court. On 28 March 2009 the Constitutional Court quashed the State Court's decision of 17 November 2008 and remitted the case for a retrial. It further ordered that its interim measure remain in force until the State Court had examined the application under Article 8 of the Convention. On 22 May 2009 the State Court quashed the first- and second-instance administrative decisions and remitted the case to the Aliens Service for reconsideration. On 17 June 2009 the Aliens Service rejected the application for a residence permit and granted the applicant a period for voluntary departure of fifteen days. On 27 July 2009 the Ministry of Security upheld that decision. On 23 December 2009, after having assessed the national security evidence, the State Court upheld that decision. It relied, among other things, on the fact that the applicant's name appeared on a list of international criminals maintained by the International Criminal Police Organisation (INTERPOL). On 1 July 2010 another bench of the same court upheld that decision. It would appear that the applicant has lodged a constitutional appeal in that regard which is still pending.

32. On 1 February 2011 the Aliens Service issued a deportation order: it decided to expel the applicant and to prohibit his re-entry for five years. On 2 March 2011 and 29 November 2011 the Ministry of Security and the State Court, respectively, upheld that decision. The applicant has ever since been detained with the intention of deportation pursuant to section 99(1)(a) of the Aliens Act 2008.

33. On 15 March 2011 the Court decided to indicate to the Government that the applicant should not be expelled to Syria until further notice (see paragraph 7 above).

II. RELEVANT DOMESTIC LAW

A. Aliens Acts 2003 and 2008

The Aliens Act 2003 (*Zakon o kretanju i boravku stranaca i azilu*, Official Gazette of BH nos. 29/03 and 4/04 – "the 2003 Act") was in force

from 14 October 2003 until 14 May 2008. On the latter date the Aliens Act 2008 (Official Gazette of BH no. 36/08 – "the 2008 Act") entered into force. The 2003 Act was applied to the present applicant's claim for asylum and application for a residence permit because the proceedings had started before the entry into force of the 2008 Act. On the other hand, the 2008 Act was applied to the applicant's detention.

1. Asylum and leave to remain on humanitarian grounds

34. Section 72 of the 2003 Act provided that asylum had to be granted to an alien who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, political opinion or membership of a particular social group, was outside his or her country of nationality and was unable or, owing to such fear, was unwilling to benefit from the protection of that country. The principle of *non-refoulement* was incorporated in section 60 of that Act, which read as follows:

> "An alien shall not be returned or expelled in any manner whatsoever to the frontiers of territories where his or her life or freedom would be threatened on account of race, religion, nationality, membership of a particular social group or political opinion, regardless of whether or not the person concerned has been granted asylum. The prohibition of return or expulsion shall also apply to persons in respect of whom there is a reasonable suspicion for believing that they would be in danger of being subjected to torture or other inhuman or degrading treatment or punishment. An alien may not be returned or expelled to a country where he or she is not protected from being sent to such a territory."

Pursuant to section 79 of the 2003 Act, aliens whose claims for asylum had been refused had to be granted leave to remain on humanitarian grounds if their removal would breach the principle of *non-refoulement*.

2. Deportation order and removal directions

35. Under section 57(1)(i) of the 2003 Act, the authorities were entitled to issue deportation orders against aliens constituting a threat to public order or national security. The 2008 Act contains a similar provision (section 88(1)(h) of that Act). While it is not clear whether an appeal against a deportation order had suspensive effect under the 2003 Act (see section 58 of that Act), such an appeal suspends deportation under section 87 of the 2008 Act. Under both acts, a claim for asylum and an application for judicial review against a refusal of such a claim suspend deportation (sections 61 and 78 of the 2003 Act and sections 92, 109(9) and 117 of the 2008 Act). Pursuant to section 62 of the 2003 Act and section 93 of the 2008 Act, once an alien has become subject to expulsion, removal directions shall be issued within seven days. An appeal does not suspend deportation.

3. Detention of aliens

36. In accordance with section 99(2)(b) of the 2008 Act, an alien must be detained if it has been established that he or she constitutes a threat to public order or national security, irrespective of whether a deportation order has been issued. Once a deportation order has been issued, the alien

concerned may also be detained under section 99(1)(a) of that Act. An initial detention order is valid for 30 days (section 100(3) of that Act). It may be extended any number of times for up to 30 days at a time. However, the total period of detention may only exceed 180 days in exceptional circumstances, such as if an alien prevents his or her removal or if it is impossible to remove an alien within 180 days for other reasons (see section 102 of that Act).

B. Secret Data Act 2005

37. The Secret Data Act 2005 (*Zakon o zaštiti tajnih podataka*, Official Gazette of BH nos. 54/05 and 12/09) entered into force on 17 August 2005. In accordance with section 5 of that Act, the judges of the State Court and the Constitutional Court have access to all levels of secret data without any formalities (for example, security clearance or special authorisation), if such access is required for exercising their duties.

III. INTERNATIONAL TEXTS

A. Concerning Bosnia and Herzegovina

38. The relevant part of the latest concluding observations on BH of the United Nations Committee against Torture reads as follows (see document CAT/C/BIH/CO/2-5 of 20 January 2011, § 14):

> "Notwithstanding [section 91 of the Aliens Act 2008] with regard to the principle of prohibition of return, the Committee remains concerned at reports that the competent authorities of BH have failed to properly assess the risk of refoulement faced by those who apply for international protection and that persons considered to be a threat to national security are subject to being expelled or returned to another State where there are substantial grounds for believing that they would be in danger of being subjected to torture. It is also concerned at the very low rate of successful asylum applications."

39. The Commissioner for Human Rights, an independent institution within the Council of Europe, has been mandated to promote the awareness of and respect for human rights in the 47 Council of Europe member states. His recent report on BH (document CommDH(2011)11 of 29 March 2011, § 97) reads, in the relevant part, as follows:

> "According to UNCHR, of the 180 recognised refugees in Bosnia and Herzegovina, 163 are from Kosovo[9]. Most of them were recognised prior to the handover of refugee status determination by UNHCR to the authorities of BH in 2004. Since 2004, refugee status has been granted only to eight persons, none of whom is from Kosovo (five Palestinians, one Serb, one Saudi Arabian and one Sri Lankan). In addition, the Ministry of Security granted subsidiary protection to four Roma minors from Kosovo in June 2009, and one Bosniac from Kosovo."

9. All references to Kosovo, whether to the territory, institutions or its population, shall be understood to be in full compliance with United Nations Security Council Resolution 1244 (1999) and without prejudice to the status of Kosovo.

B. Concerning Syria

40. According to many reliable and objective sources, torture and other forms of ill-treatment have been used extensively and with impunity in police stations and security agencies' detention centres. The relevant part of the United States Department of State's 2010 Country Report on Human Rights Practices in Syria reads as follows:

> "Under article 28 of the constitution, 'no one may be tortured physically or mentally or treated in a humiliating manner'. Nevertheless, security forces reportedly continued to use torture frequently. Local human rights organizations continued to cite numerous credible cases of security forces allegedly abusing and torturing prisoners and detainees and claimed that many instances of abuse went unreported. Individuals who suffered torture or beatings while detained refused to allow their names or details of their cases to be reported for fear of government reprisal.
>
> Former prisoners, detainees, and reputable local human rights groups reported that methods of torture and abuse included electrical shocks; pulling out fingernails; burning genitalia; forcing objects into the rectum; beatings while the victim is suspended from the ceiling and on the soles of the feet; alternately dousing victims with freezing water and beating them in extremely cold rooms; hyperextending the spine; bending the body into the frame of a wheel and whipping exposed body parts; using a backward-bending chair to asphyxiate the victim or fracture the spine; and stripping prisoners naked for public view. In previous years Amnesty International documented 38 types of torture and mistreatment used against detainees in the country. Amnesty International reported that torture was most likely to occur while detainees were held at one of the many detention centers operated by the various security services in the country, particularly while authorities attempted to extract a confession or information. Courts systematically used 'confessions' extracted under duress as evidence, and defendants' claims of torture were almost never investigated."

The relevant part of the most recent concluding observations on Syria of the United Nations Committee against Torture reads as follows (document CAT/C/SYR/CO/1 of 25 May 2010, §§ 7 and 15):

> "The Committee is deeply concerned about numerous, ongoing and consistent allegations concerning the routine use of torture by law enforcement and investigative officials, at their instigation or with their consent, in particular in detention facilities. It is also concerned at credible reports that such acts commonly occur before formal charges are laid, as well as during the pre-trial detention period, when the detainee is deprived of fundamental legal safeguards, in particular access to legal counsel."
>
> "The Committee is also concerned at reports that the State has established secret detention facilities under the command of intelligence services, such as the Military Intelligence service, the Political Security Directorate, the Directorate General of Intelligence Services and the Directorate of Air Force Intelligence Services. The centres controlled by these services are not accessible by independent monitoring and inspection bodies, and are not subject to review by the authorities. The Committee is further concerned that detainees are deprived of fundamental legal safeguards, including an oversight mechanism in regard to their treatment and review procedures in respect to their detention. The Committee is also concerned at allegations that those detained in such facilities could be held for prolonged periods without any judicial review, in practice in incommunicado detention and subject to torture or cruel, inhuman or degrading treatment."

41. Reportedly, actual or suspected Islamists and members of the banned Muslim Brotherhood have been subject to particularly harsh abuse. According to Amnesty International's Annual Report 2011, they have faced arbitrary arrest, prolonged detention, torture and other forms of ill-treatment, and unfair trials (see also Human Rights Watch's report *Far From Justice: Syria's Supreme State Security Court* of February 2009, pp. 4-5). Those convicted of belonging to the Muslim Brotherhood were sentenced to death but their sentences were immediately commuted to twelve-year prison terms. Hundreds of convicted Islamist prisoners were held at Saydnaya Military Prison, where conditions are harsh.

42. According to the UK Home Office's Operational Guidance Note on Syria of November 2011, § 3.7.10, the authorities have cracked down on all expression of political opposition with increasing brutality since the onset of political protest and civil unrest in March 2011 (see also the United Nations High Commissioner for Human Rights' report on the human rights situation in Syria of 15 September 2011, document A/HRC/18/53, suggesting that the scale and nature of the ongoing human rights abuses may amount to crimes against humanity). Therefore, if an applicant has previously been involved in opposition political activity, or whose beliefs make it likely that he will in future take part in such activity, or who could be perceived to hold opposing views if returned to Syria, a grant of asylum is likely to be appropriate.

43. Following a fact-finding mission to Syria, Lebanon and the Kurdistan Region of Iraq, the Austrian Red Cross and the Danish Immigration Service published a report on human rights issues concerning Kurds in Syria in May 2010. Its general remarks about punishment for draft evasion (p. 65) read as follows:

> "A Western diplomatic source found it likely that if a person has been drafted for military service while residing abroad, he would be identified by the immigration authorities upon return to Syria as his name will then appear on a list of wanted persons. The immigration authorities will instruct him to report to the military usually within two weeks or up to one month. However, if he does not report to the military within the specified time, he will be called to the Military Court and he will be charged with draft evasion. Any prison sentence issued in absentia by a Military Court will be commuted to an additional three months of service in the army. It was added that in reality nobody goes to prison for draft evasion.
>
> Based on information from a Syrian lawyer, the Swedish embassy reported in 2004 that: 'Military courts decide penalty for matters related to the defence forces. The punishment for not showing up to service varies between 2-6 months. However, due to the issuance of amnesty decrees regularly and annually by the President it is not applied in practice. In addition, since these sentences are issued in absence, they are subject to objection and then cancellation. In this way, a person would be free within one day of arrest or surrender. Later the trial is repeated at the time when a person is free. The verdict would be either found innocent or the crime is covered by the amnesty law. ...'
>
> According to Amnesty International men who evade compulsory military service (21 months' duration) reportedly face different levels of penalty according to the circumstances of the case:

Persons who were abroad and failed to report when summoned for military service face arrest by the military police immediately upon return to Syria and sentence of two to three months of imprisonment (usually at Tadmur Prison);

Persons who fail to report for military service while in Syria face arrest and a prison term of three months, then further imprisonment for six months if they fail to undertake military service after completing the first term of imprisonment."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

44. The applicant alleged that his deportation to Syria would expose him to the risk of treatment contrary to Article 3, which reads as follows:

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

A. Admissibility

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

B. Merits

46. The applicant, in substance, repeated what he had said in the context of his asylum proceedings (see paragraph 23 above).

47. The Government maintained that the applicant's claim for asylum had been considered carefully and had been rejected by the domestic authorities because the applicant had failed to demonstrate that the risk to him was real. In their opinion, the assessment at the domestic level had been adequate and sufficiently supported by domestic materials and by materials originating from a variety of reliable and objective sources.

48. Human Rights Watch, in its submissions of 2 March 2011, stressed the peremptory (*jus cogens*) nature of the prohibition of torture and the related principle of *non-refoulement* (they relied on United Nations General Assembly resolution 62/159 of 11 March 2008 – *Protection of human rights and fundamental freedoms while countering terrorism* – and the case-law of the United Nations Human Rights Committee and Committee against Torture). As regards Syria, it submitted that over the years, individuals accused of being Islamist had suffered unfair trials and torture.

49. The Court reiterates that as a matter of well-established international law and subject to its treaty obligations, including those arising from the Convention, a Contracting State has the right to control the entry, residence

and expulsion of aliens (see, among many other authorities, *Üner v. the Netherlands* [GC], no. 46410/99, § 54, ECHR 2006-XII). The right to asylum is not contained in either the Convention or its Protocols (*Salah Sheekh v. the Netherlands*, no. 1948/04, § 135, 11 January 2007). Expulsion by a Contracting State may, however, give rise to an issue under Article 3, and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person concerned, if expelled, faces a real risk of being subjected to ill-treatment. In such a case, Article 3 implies an obligation not to expel that person to the country in question (see *Saadi v. Italy* [GC], no. 37201/06, § 125, 28 February 2008). Since the prohibition of torture or inhuman or degrading treatment or punishment is absolute, the conduct of applicants, however undesirable or dangerous, cannot be taken into account (ibid., §§ 127 and 138).

50. The assessment of the existence of a real risk must be rigorous (see *Chahal v. the United Kingdom*, 15 November 1996, § 96, *Reports of Judgments and Decisions* 1996-V). As a rule, it is for applicants to adduce evidence capable of proving that there are substantial grounds for believing that, if the measure complained of were to be implemented, they would be exposed to a real risk of being subjected to treatment contrary to Article 3 (*N. v. Finland*, no. 38885/02, § 167, 26 July 2005). Where such evidence is adduced, it is for the Government to dispel any doubts about it. The Court will take as its basis all the material placed before it or, if necessary, material obtained on its own initiative. It will do so particularly when an applicant – or a third party within the meaning of Article 36 of the Convention – provides reasoned grounds which cast doubt on the accuracy of the information relied on by the respondent Government. The Court must be satisfied that the assessment made by the authorities of the Contracting State is adequate and sufficiently supported by domestic materials, as well as by materials originating from other reliable and objective sources such as, for instance, other Contracting or non-Contracting States, the United Nations' agencies and reputable non-governmental organisations (*NA. v. the United Kingdom*, no. 25904/07, § 119, 17 July 2008).

51. If an applicant has not yet been deported when the Court examines the case, the relevant time will be that of the proceedings before the Court (*Saadi v. Italy*, cited above, § 133). A full and up-to-date assessment is called for, as the situation in a country of destination may change in the course of time. While the historical position is of interest in so far as it may shed light on the current situation and its likely evolution, it is the present conditions which are decisive and it is hence necessary to take into account information that has come to light after the final decision taken by domestic authorities (see *Salah Sheekh*, cited above, § 136).

52. Turning to the present case, the Court considers that the domestic authorities did not sufficiently take into account the nature of the mujahedin movement to which the applicant undoubtedly belonged. It has been noted in paragraph 9 above that although some foreign mujahedin came to BH with the intention of providing humanitarian assistance and/or performing

missionary work, many of them had jihadist goals. They had links with fundamentalists all over the world (notably, through the Islamic Cultural Institute in Milan) and with charities which have been placed on the United Nations list of entities associated with al-Qaeda (such as the Al Haramain & Al Masjed Al Aqsa Charity Foundation, the Al Haramain Islamic Foundation, Taibah International, Igasa, Al Furqan and the Benevolence International Foundation). It is also well-known that some mujahedin were members of al-Qaeda (for example, Nasser Al Bahri, also known as Abu Jandal, was admitted to Osama bin Laden's inner circle after having fought in BH and Somalia[10]).

53. In addition, in the aftermath of the war in BH the applicant gave a number of interviews to some of the leading Arabic media outlets, the *Al Jazeera* television channel and the *Asharq Alawsat* newspaper, revealing his association with the mujahedin movement and advocating the Saudi-inspired Wahhabi/Salafi version of Islam. Even assuming that this remained unnoticed by the Syrian authorities, the applicant was again made the centre of attention when he was wrongly identified as convicted terrorist Abu Hamza al-Masri in the US Department of State's Country Report on Terrorism in BH (see paragraph 26 above) and arrested in BH on national security grounds. The Court is of the view that these factors would be likely to make him a person of interest for the Syrian authorities. In fact, the applicant submitted a document issued by the Syrian security services on 16 August 2002 indicating that he should be arrested upon the moment of his entering the country and a document issued by the Syrian armed forces on 15 October 2009 indicating that the security services were holding a file containing information about the applicant. The respondent Government did not contest the authenticity of those documents.

54. Having regard to the foregoing, Syria's human rights record (set out in paragraphs 40-41) and the fact that the situation in Syria has deteriorated since the onset of political protest and civil unrest in March 2011 (paragraph 42 above), the Court considers that there is a real risk that the applicant, if deported to Syria, would be subjected to ill-treatment.

Therefore, his deportation to Syria would violate Article 3 in the present circumstances.

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

55. The applicant contested the lawfulness of his detention. He relied on Article 5 § 1 of the Convention, the relevant part of which 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:
>
> ...

10. In 2000 he was arrested in Yemen; in 2002 he was released as part of a Yemeni jihadist rehabilitation programme.

(c) 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 or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;

...

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

A. Admissibility

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

B. Merits

57. The applicant maintained that his detention was arbitrary, given that a deportation order had been issued only on 1 February 2011 (more than two years and three months after his arrest). He further complained about the duration of his detention (more than three years to date).

58. The Government submitted that the applicant's detention was in keeping with domestic law, pursuant to which an alien must be detained if it has been established that he or she constitutes a threat to national security (see paragraph 36 above), and with Article 5 § 1 (f) of the Convention. They further argued that it was in the interest of the applicant that his claims be thoroughly examined by the domestic courts and, accordingly, that the duration of his detention could not be regarded as excessive (they referred to *Chahal*, cited above, § 117). Lastly, they added that the period complained of was partly covered by the Court's interim measure under Rule 39 of the Rules of Court.

59. Human Rights Watch, in its submissions of 2 March 2011, asserted that the right to liberty and security and freedom from arbitrary arrest and detention protected all individuals in all circumstances, including aliens in the immigration and national security context (they relied on *A. and Others v. the United Kingdom* [GC], no. 3455/05, 19 February 2009).

60. Article 5 enshrines a fundamental human right: the protection of the individual against arbitrary interference by the State with his or her right to liberty. The text of Article 5 makes it clear that the guarantees it contains apply to "everyone". 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. One of the exceptions, contained in sub-paragraph (f), permits the State to control the liberty of aliens in an immigration context (see, among other authorities, *A. and Others*, cited above, §§ 162-63).

61. Sub-paragraph (f) of Article 5 § 1 does not demand that the detention be reasonably considered necessary, for example to prevent a person from committing an offence or fleeing. In this respect, it provides a different level of protection from sub-paragraph (c) of Article 5 § 1. All that is required under this provision is that deportation proceedings be in progress and prosecuted with due diligence (see *Chahal*, cited above, §§ 112-13). 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. Compliance with national law is not, however, sufficient: any deprivation of liberty should, in addition, be in keeping with the purpose of protecting the individual from arbitrariness – and the notion of "arbitrariness" in Article 5 § 1 extends beyond lack of conformity with national law, so that a deprivation of liberty may be lawful in terms of domestic law but still arbitrary and contrary to the Convention (see *Saadi v. the United Kingdom* [GC], no. 13229/03, § 67, 29 January 2008).

62. The Government contended that the present applicant was lawfully detained as a person against whom action was being taken with a view to deportation under the second limb of Article 5 § 1 (f). However, the Court notes that deportation proceedings against the applicant were instituted on 1 February 2011, whereas the applicant was arrested on 6 October 2008. Since detention under Article 5 § 1 (f) is justified only for as long as deportation proceedings are pending, the first period of the applicant's detention (lasting from 6 October 2008 until 31 January 2011) was clearly not justified under Article 5 § 1 (f) of the Convention.

63. While it is true that a voluntary departure period had already been indicated to the applicant in 2007 within the context of his asylum and residence proceedings, the Court agrees with the finding of the domestic authorities that this did not amount to a deportation order (see, for example, the State Court's decision of 17 December 2010 mentioned in paragraph 30 above).

64. The Government emphasised that it had been established that the applicant posed a threat to national security and that the domestic authorities had therefore had no other option but to detain him pursuant to section 99(2)(b) of the Aliens Act 2008 (see paragraph 36 above). However, the Court has held that sub-paragraphs (a) to (f) of Article 5 § 1 amount to an exhaustive list of exceptions and that only a narrow interpretation of these exceptions is compatible with the aims of Article 5: detention on security grounds only is accordingly not permitted (*A. and Others*, cited above, § 171). In any event, at the time of his arrest the domestic authorities had the ability to issue a deportation order against the applicant under section 88(1)(h) of the Aliens Act 2008 and then detain him for deportation purposes under section 99(1)(a) of that Act (see paragraphs 35 and 36 above). The Government failed to offer any explanation as to why this was not done.

65. The matter has also been examined under the other sub-paragraphs of Article 5 § 1, which were not pleaded by the Government. The Court reiterates in this connection that sub-paragraph (c) does not permit a policy of general prevention directed against a person or a category of persons who are perceived by the authorities, rightly or wrongly, as being dangerous or having propensity to unlawful acts. It does no more than afford the Contracting States a means of preventing offences which are concrete and specific as regards, in particular, the place and time of their commission and their victims (*Guzzardi*, cited above, § 102; *M. v. Germany*, no. 19359/04, §§ 89 and 102, 17 December 2009; and *Shimovolos v. Russia*, no. 30194/09, § 54, 21 June 2011). Detention to prevent a person from committing an offence must, in addition, be "effected for the purpose of bringing him before the competent legal authority" (see *Lawless v. Ireland (no. 3)*, cited above, § 14). Sub-paragraph (c) thus permits deprivation of liberty only in connection with criminal proceedings (see *Ciulla*, cited above, § 38, and *Schwabe and M.G. v. Germany*, nos. 8080/08 and 8577/08, § 72, 1 December 2011, not yet final). Since neither the domestic authorities nor the Government mentioned any concrete and specific offence which the applicant had to be prevented from committing, his detention was not covered by sub-paragraph (c). The other sub-paragraphs of Article 5 § 1 are obviously not relevant.

66. The Court therefore concludes that there was a violation of Article 5 § 1 of the Convention with regard to the period of the applicant's detention from 6 October 2008 to 31 January 2011.

67. As regards the subsequent period, the Court notes that a deportation order was issued on 1 February 2011. The domestic authorities dealt with an appeal against that order within a month. The Court does not consider this period to be excessive. Although the applicant has remained in custody until the present day, the period since 15 March 2011 must be distinguished, as during this time the Government have refrained from deporting the applicant in compliance with the request made by the Court under Rule 39 of the Rules of Court (see *Chahal*, cited above, § 114). The Court reiterates in that regard that the Contracting States are obliged under Article 34 of the Convention to comply with interim measures indicated under Rule 39 (see *Mamatkulov and Askarov v. Turkey* [GC], nos. 46827/99 and 46951/99, §§ 99-129, ECHR 2005-I).

68. That being said, the implementation of an interim measure following an indication by the Court to a State Party that it would be desirable not to return an individual to a particular country does not in itself have any bearing on whether the deprivation of liberty to which that individual may be subject complies with Article 5 § 1 (see *Gebremedhin [Gaberamadhien] v. France*, no. 25389/05, § 74, ECHR 2007-II). In other words, the domestic authorities must still act in strict compliance with domestic law (ibid., § 75). Since it has been established by the domestic authorities that the applicant constitutes a threat to national security, his detention has been authorised and is indeed mandatory pursuant to section 99(2)(b) of the Aliens Act 2008

(see paragraph 36 above). Furthermore, the applicant's detention has been extended on a monthly basis, as envisaged by domestic law.

69. Having regard to the above, the Court concludes that the deportation proceedings, although temporarily suspended pursuant to the request made by the Court, have nevertheless been in progress since 1 February 2011 and in strict compliance with domestic law (compare *S.P. v. Belgium* (dec.), no. 12572/08, 14 June 2011; contrast *Ryabikin v. Russia*, no. 8320/04, § 132, 19 June 2008, and *Abdolkhani and Karimnia v. Turkey*, no. 30471/08, § 134, ECHR 2009-...). As there is no indication that the authorities have acted in bad faith, that the applicant has been detained in unsuitable conditions or that his detention has been arbitrary for any other reason (see *Saadi v. the United Kingdom*, cited above, §§ 67-74), there has been no violation of Article 5 § 1 of the Convention as regards the period of the applicant's detention after 1 February 2011.

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

70. The applicant in essence complained that during the period when he had been detained on security grounds only (that is, from 6 October 2008 to 31 January 2011), the procedure before the domestic courts to challenge the lawfulness of his detention had not complied with the requirements of Article 5 § 4 of the Convention, which states:

> "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."

71. The Government contested that argument.

72. The Court notes that this complaint is linked to the complaint under Article 5 § 1 and must therefore likewise be declared admissible.

73. Having regard to its finding under Article 5 § 1 (see paragraph 66 above), the Court considers that it is not necessary to examine separately whether, in this case, there has also been a violation of Article 5 § 4 (see, among other authorities, *Tokić and Others v. Bosnia and Herzegovina*, nos. 12455/04, 14140/05, 12906/06 and 26028/06, § 70, 8 July 2008).

IV. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

74. The applicant also contested the fairness of the asylum proceedings. He relied on Article 6 § 1, the relevant part of which reads as follows:

> "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law..."

75. The Court reiterates that decisions concerning the entry, stay and deportation of aliens do not involve the determination of an applicant's civil rights or obligations or of a criminal charge against him for the purposes of

Article 6 § 1 (see *Maaouia v. France* [GC], no. 39652/98, §§ 36-40, ECHR 2000-X). This complaint is accordingly incompatible *ratione materiae* with the provisions of the Convention and must be rejected pursuant to Article 35 §§ 3 (a) and 4 of the Convention.

V. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

76. The applicant further complained that the decision to expel him and to prohibit his re-entry for five years had amounted to a breach of his right to respect for his family life. He relied on Article 8 of the Convention, which provides:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

77. The Government contested that argument.

78. The Court notes that this complaint is linked to the complaint under Article 3 and must therefore likewise be declared admissible.

79. The Court recalls its finding that the applicant's deportation to Syria would constitute a violation of Article 3 of the Convention (see paragraph 54 above). Having no reason to doubt that the respondent Government will comply with the present judgment, it considers that it is not necessary to decide the hypothetical question whether, in the event of expulsion to Syria, there would also be a violation of Article 8 of the Convention (see, among other authorities, *Saadi v. Italy*, cited above, § 170).

VI. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

80. Lastly, the Court has examined the other complaints submitted by the applicant under Articles 2, 13 and 14 of the Convention, Article 1 of Protocol No. 6 and Article 1 of Protocol No. 7. However, having regard to all the material in its possession, and in so far as these complaints fall within the Court's jurisdiction, it finds that they do not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols. It follows that this part of the application must be rejected as being manifestly ill-founded, pursuant to Article 35 §§ 3 (a) and 4 of the Convention.

VII. APPLICATION OF ARTICLE 41 OF THE CONVENTION

81. 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. Pecuniary damage

82. The applicant claimed that he had not been able to run his company as a result of his arbitrary detention and that he had suffered pecuniary damage in the amount of about 7,000 euros (EUR) plus EUR 1,000 per month.

83. The Government considered the claim to be unsubstantiated.

84. The Court agrees with the Government and rejects this claim for lack of substantiation.

B. Non-pecuniary damage

85. The applicant claimed EUR 300 per day spent in detention in respect of non-pecuniary damage. He further claimed EUR 80,000 on behalf of his wife and children.

86. The Government considered those amounts to be excessive.

87. The Court accepts that the applicant suffered distress as a result of the breaches found justifying an award in respect of non-pecuniary damage. Making its assessment on an equitable basis, as required by the Convention, the Court awards the applicant EUR 3,000 under this head, plus any tax that may be chargeable. As regards the applicant's wife and children, there is no doubt that they suffered as a result of the breaches found. However, they were not the applicants in this case and the Court, accordingly, rejects that part of the applicant's claim.

C. Costs and expenses

88. The applicant also claimed EUR 74,600 for costs and expenses incurred before the domestic courts and the Court.

89. The Government considered that amount to be excessive.

90. In accordance with the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. That is to say, the applicant must have paid them, or be bound to pay them, pursuant to a legal or contractual obligation, and they must have been unavoidable in order to prevent the breaches found or to obtain redress. The Court requires itemised bills and invoices that are sufficiently detailed to enable it to determine to what extent the above requirements

have been met. In the present case, regard being had to the fact that one of the applicant's representatives is a non-profit organisation providing free legal aid and that no bills and invoices have been submitted in relation to the other applicant's representative, the Court rejects the claim for costs and expenses.

D. Default interest

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

VIII. RULE 39 OF THE RULES OF COURT

92. In accordance with Article 44 § 2 of the Convention, the present judgment will not become final until: (a) the parties declare that they will not request that the case be referred to the Grand Chamber; or (b) three months after the date of the judgment, if referral of the case to the Grand Chamber has not been requested; or (c) the Panel of the Grand Chamber rejects any request to refer the case under Article 43 of the Convention. The Court considers that the indication made to the Government under Rule 39 (see paragraph 7 above) must continue in force until this judgment becomes final or until the Court takes a further decision in this connection.

FOR THESE REASONS, THE COURT

1. *Declares* unanimously the complaint concerning Articles 3, 5 §§ 1 and 4 and 8 admissible and the remainder of the application inadmissible;

2. *Holds* by six votes to one that there would be a violation of Article 3 of the Convention in the event of the applicant's deportation to Syria in the present circumstances;

3. *Holds* by six votes to one that there has been a violation of Article 5 § 1 of the Convention with regard to the period of the applicant's detention from 6 October 2008 to 31 January 2011;

4. *Holds* unanimously that there has been no violation of Article 5 § 1 of the Convention with regard to the period of the applicant's detention from 1 February 2011;

5. *Holds* by six votes to one that there is no need to examine separately the complaints under Articles 5 § 4 and 8 of the Convention;

6. *Holds* by six votes to one

(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 3,000 (three thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage to be converted into convertible marks at the rate applicable at the date of settlement;
(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;

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

Done in English, and notified in writing on 7 February 2012, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Lawrence Early	Lech Garlicki
Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the dissenting opinion of Judge Mijović is annexed to this judgment.

L.G.
T.L.E.

DISSENTING OPINION OF JUDGE MIJOVIĆ

1. General remarks

In the present case which concerns the applicant's detention at the Immigration Centre, the majority of judges has found that there would be a violation of Article 3 of the Convention in the event of the applicant's deportation to Syria; that there has been a violation of Article 5 § 1 of the Convention with regard to the period of the applicant's detention from 6 October 2008 to 31 January 2011; and that there was no need to examine separately the complaints under Articles 5 § 4 and 8 of the Convention. To my regret, my opinion differs significantly from the conclusion reached by the majority.

While I agree with the Chamber that the complaints concerning Articles 3, 5 §§ 1 and 4 and 8 are admissible, I am of the opposite opinion as regards the majority's decision that there would be a violation of Article 3 of the Convention in the event of the applicant's deportation and that there has been a violation of Article 5 § 1 of the Convention with regard to the period of the applicant's detention from 6 October 2008 to 31 January 2011.

Additionally, and contrary to the Chamber's decision, I am of the opinion that it is necessary to examine separately the complaint under Article 8 of the Convention.

My general remarks are related to the fact that the Chamber has neglected both the historical background to the presence of the paramilitary armed forces and the very particular post-war circumstances in which Bosnia and Herzegovina finds itself. In so doing, the Chamber decided to apply the Court's case-law strictly, even rigidly, paying no attention to the fact that the applicant in this case was not an ordinary illegal immigrant/crime suspect, but a person whose legal situation had to be seen in a broader context, quite different from that of the applicants in the cases relied on by the Chamber to reach its conclusion in the instant case. This case, in my opinion, should have been dealt with by the Grand Chamber because it is not only this applicant's case, but gives rise to the more general problem of Bosnia and Herzegovina's inability to deal with the consequences of the presence of paramilitary armed forces on its territory after the war. What has not been even mentioned in the judgment is the fact that the State authorities of Bosnia and Herzegovina are faced with about 20,000 potential cases of this kind[1].

1. The official data of the Bosnia and Herzegovina's Ministry of Security on 5 February 2012

2. Factual background

The facts of the case show that the applicant was a member of El Mujahedin, the ARBH unit as described in the judgment. As correctly pointed out in the judgment, Article III of Annex 1A to that Agreement called for the withdrawal of all foreign forces, irrespective of whether they were legally and militarily subordinated to any of the local forces. In view of that, on 14 December 1995 the ARBH disbanded El Mujahedin and ordered its foreign members to leave the country by 10 January 1996. The applicant decided not to do so. He stayed in the country and acted as leader of a group of foreign mujahedin and their supporters. In that self-proclaimed capacity he detained two civilians, which led to his conviction for false imprisonment in May 2000 and a suspended prison sentence.

In the meantime, the Bosnia and Herzegovina administrative authorities held that the applicant had acquired citizenship of Bosnia and Herzegovina by means of fraudulent conduct, false information and concealment of relevant facts. On 5 April 2007 the State Court and on 4 October 2008 the Constitutional Court upheld that decision.

In May 2007 the Aliens Service held, on the basis of confidential intelligence reports, that the applicant was a threat to national security. He was granted a period for voluntary departure of fifteen days.

In August 2007 the Asylum Service refused the applicant's asylum claim and granted the applicant a fifteen-day period for voluntary departure, based on the fact that the applicant did not face a real risk of being subjected to ill-treatment given that he had never been a member of the Muslim Brotherhood (unlike Muhammad Zammar mentioned in the judgment). It further held that it had not been shown that he would be ill-treated solely because he had fought with the foreign mujahedin in Bosnia and Herzegovina. In January 2008 the State Court upheld that decision. Officially and legally, from that moment on, the applicant became an unlawful resident.

On 6 October 2008 the Aliens Service placed the applicant in an immigration centre on security grounds, pursuant to section 99(2)(b) of the Aliens Act 2008. That decision was later upheld by the State Court and the Constitutional Court. The initial detention period was extended each month until February 2011. All the extension orders were upheld by the State Court, some of them also by the Constitutional Court (constitutional appeals concerning the remaining orders are still pending).

Although the State Court emphasised that the indication of a period for voluntary departure should not be legally confused with a deportation order and that the issue of whether the applicant's departure would be contrary to the Convention should more appropriately be examined within the context of deportation proceedings, the fact remains that the applicant in accordance with Article III of Annex 1A was ordered to leave the country a long time before that decision, precisely by 10 January 1996. However, it would

appear that a constitutional appeal against the State Court's decision is still pending, which renders this part of the applicant's complaint premature.

Further to the Constitutional Court's decision on 17 November 2008 the State Court assessed the national security evidence and upheld the Ministry of Security's decision, relying on the applicant's conviction of May 2000, his public threats against the State authorities, his standing in the mujahedin community which allowed him to issue a binding ruling (*fatwa*), his lectures at a mosque in a Sarajevo suburb, advocating the Saudi-inspired Wahhabi/Salafi version of Islam and his attempts to obtain ammunition illegally. In June 2009 the Aliens Service granted the applicant another period of fifteen days for his voluntary departure. On 27 July 2009 the Ministry of Security upheld that decision. On 23 December 2009, after having assessed the national security evidence, the State Court upheld that decision. It relied, among other things, on the fact that the applicant's name appeared on a list of international criminals maintained by the International Criminal Police Organisation (INTERPOL). On 1 July 2010 another bench of the same court upheld that decision. It would appear that the applicant has lodged a constitutional appeal in that regard which is still pending. Accordingly, once again, in my opinion this part of the applicant's complaint is premature.

Summarising these facts, it is clear that the applicant was previously ordered to leave the country; he was convicted for false imprisonment of civilians; he was proved to have been engaged in fraudulent conduct regarding his forged citizenship and, finally, as established by the domestic courts, he posed a serious threat to national security and public order. Furthermore, it is accepted, including by the Chamber, that none of the domestic authorities' decisions was arbitrary, which significantly distinguishes this case from the *Chahal* case on which the Chamber relied in its judgment**.**

3. Alleged violation of Article 3 of the Convention

As an unlawful resident, the applicant claimed asylum. The claim was rejected by the domestic authorities because the applicant, in the Government's view, had failed to demonstrate that the risk to him, if deported to Syria, was real. In their opinion, the assessment made at the domestic level had been adequate and sufficiently supported by domestic materials as well as by materials originating from a variety of reliable and objective sources.

Notwithstanding that assessment, the Chamber considered that the domestic authorities had not sufficiently taken into account the nature of the mujahedin movement to which the applicant undoubtedly belonged. Having regard to Syria's human rights record and the fact that the situation in Syria has deteriorated since the onset of political protest and civil unrest in March 2011, the Chamber considered that there was a real risk that the applicant, if

deported to Syria, would be subjected to ill-treatment. Therefore, the Chamber found that the applicant's deportation to Syria would violate Article 3.

As correctly pointed out in the judgment, the right to asylum is not contained in either the Convention or its Protocols (*Salah Sheekh v. the Netherlands*, no. 1948/04, § 135, 11 January 2007). An expulsion may, however, give rise to an issue under Article 3, and engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person concerned, if expelled, faces a real risk of being subjected to ill-treatment. The assessment of the existence of a real risk must be rigorous (see *Chahal v. the United Kingdom*, 15 November 1996, § 96). As a rule, it is for applicants to adduce evidence capable of proving that there are substantial grounds for believing that, if the measure complained of were to be implemented, they would be exposed to a real risk of being subjected to treatment contrary to Article 3 (*N. v. Finland*, no. 38885/02, § 167, 26 July 2005).

Turning to the facts of the case, it is clear that the applicant failed to prove that he was a member of the outlawed Muslim Brotherhood and that he would be perceived as such by the Syrian authorities. On the contrary, it had been proved that the applicant had gone to Syria in 1993, stayed there for one month and obtained a new Syrian passport. The domestic courts therefore upheld the Asylum Service's decisions not to grant the applicant asylum, which decisions, in my understanding, were correct and justified. Under the domestic legislation, a claim for asylum and an application for judicial review of a refusal of such a claim have a suspensive effect on the enforcement of a deportation order. It is clear from the facts of the case that the Constitutional Court has not yet decided on the applicant's appeal. That, obviously, did not prevent the Chamber from finding a violation of Article 3.

One of the arguments that the Chamber relied on in doing so was the fact that the political crisis in Syria has recently deteriorated. In my view, that is of no relevance since the applicant has never claimed refugee status on humanitarian grounds. I strongly believe that the European Court's role is not to increase the number of illegal immigrants or unlawful citizens across Europe, but to reiterate that as a matter of well-established international law and subject to its treaty obligations, including those arising from the Convention, a Contracting State has the right to control the entry, residence and expulsion of aliens, as established by the Court's case-law. (see *Üner v. the Netherlands* [GC], no. 46410/99, § 54, ECHR 2006-XII). I consider it wrong to find a violation of Article 3 of the Convention in the circumstances of the instant case.

4. Alleged violation of Article 5 § 1 of the Convention

The applicant, contesting the lawfulness of his detention, relied on Article 5 § 1 of the Convention.

My personal conviction is that this complaint should have been dealt with under Article 5 § 1 (c), whereas the Chamber decided to deal with it under Article 5 § 1 (f).

While it is true that Article 5 enshrines the protection of the individual against arbitrary interference by the State with his or her right to liberty, 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. One of the exceptions, contained in sub-paragraph (c), permits the State to control the liberty of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so. I find this to be a basis for the applicant's arrest and the initial period of his detention. The first period of the applicant's detention (lasting from 6 October 2008 until 31 January 2011) might not have been justified under Article 5 § 1 (f) of the Convention, but the fact is that he was arrested not in order to face deportation but on suspicion of posing a threat to national security. It was only later that the deportation order was issued (1 February 2011). I maintain my view that the initial period of his detention should have been dealt with under Article 5 § 1 (c).

As emphasised in paragraph 61 of the judgment, where the "lawfulness" of detention is in issue, including the question whether "a procedure prescribed by law" has been followed, the Convention refers essentially to national law and lays down the obligation to conform to the substantive and procedural rules of national law. Compliance with national law is not, however, sufficient: any deprivation of liberty should, in addition, be in keeping with the purpose of protecting the individual from arbitrariness – and the notion of "arbitrariness" in Article 5 § 1 extends beyond lack of conformity with national law, so that a deprivation of liberty may be lawful in terms of domestic law but still arbitrary and contrary to the Convention (see *Saadi v. the United Kingdom* [GC], no. 13229/03, § 67, 29 January 2008). The applicant was arrested in compliance with the domestic law, pursuant to which an alien must be detained if it has been established that he or she constitutes a threat to national security (see paragraph 36 of the judgment). The applicant's claims were thoroughly examined before the domestic courts. Accordingly, it cannot be said that his detention was arbitrary (contrast the position in *Chahal*, where the applicant's detention was decided not by a court, but by the Advisory Board).

In its judgment, the majority reiterated that sub-paragraph (c) does not permit a policy of general prevention directed against a person or a category

of persons who are perceived by the authorities, rightly or wrongly, as being dangerous or having propensity to unlawful acts. I agree, except for the fact that in this case the arrest was not a measure of general prevention, but a very individual measure directed at someone who was previously convicted and, as established by the domestic courts, who posed a threat to national security and was wanted by INTERPOL.

Turning to the Court's case-law principles, detention to prevent a person from committing an offence must, in addition, be "effected for the purpose of bringing him before the competent legal authority" (see *Lawless v. Ireland (no. 3)*, § 14). Sub-paragraph (c) thus permits deprivation of liberty only in connection with criminal proceedings (see *Ciulla*, § 38). Since the domestic authorities had not brought criminal proceedings against the applicant, the application of sub-paragraph (c) would necessarily lead to finding a violation of Article 5 § 1, which I would have supported if the Chamber had decided to apply Article 5 § 1 (c).

5. Alleged violation of Article 8 of the Convention

The applicant complains that his expulsion would violate his right to respect for family life, as protected by Article 8 of the Convention.

The Chamber decided that, since it found that the applicant's deportation to Syria would constitute a violation of Article 3 of the Convention it was not necessary to decide the hypothetical question whether, in the event of expulsion to Syria, there would also be a violation of Article 8 of the Convention. I am of the opposite opinion. While I believe that the applicant's deportation to Syria would not constitute a violation of Article 3, I am of the opinion that there would be a violation of Article 8 in the event of the applicant's deportation to Syria, bearing in mind the decision not only to expel the applicant but to prohibit his re-entry for five years. As mentioned in the factual background to the case, the applicant is married to a citizen of Bosnia and Herzegovina and they are together bringing up six children. Maintaining contact with his family, given the crisis in Syria, would, in my opinion, be impossible. Therefore, I voted against the Chamber's decision not to examine separately the complaint under Article 8 of the Convention.