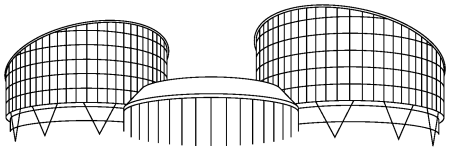

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

CASE OF MOXAMED ISMAACIIL AND ABDIRAHMAN WARSAME v. MALTA

(Applications nos. 52160/13 and 52165/13)

JUDGMENT

STRASBOURG

12 January 2016

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

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

In the case of Moxamed Ismaaciil and Abdirahman Warsame v. Malta,

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

András Sajó, *President,*
Vincent A. De Gaetano,
Boštjan M. Zupančič,
Nona Tsotsoria,
Krzysztof Wojtyczek,
Egidijus Kūris,
Gabriele Kucsko-Stadlmayer, *judges,*
and Françoise Elens-Passos, *Section Registrar,*

Having deliberated in private on 8 December 2015,

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

PROCEDURE

1. The case originated in two applications (nos. 52160/13 and 52165/13) against the Republic of Malta lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by two Somali nationals, Ms Saamiyo Moxamed Ismaaciil and Ms Deeqa Abdirahman Warsame ("the applicants"), on 13 August 2013.

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

3. The applicants alleged that they had suffered a breach of Article 3 on account of the conditions of their detention, and violations of Article 5 § 1 and 4 on account of their detention and the lack of judicial review.

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

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicants were born in 1988 and 1992 and were at the time of the introduction of the application detained in Hermes Block, Lyster Barracks Detention Centre, in Hal Far.

A. Background to the case

1. Ms Moxamed Ismaacil

6. Ms Moxamed Ismaacil, the first applicant, entered Malta in an irregular manner by boat on 16 August 2012. Upon arrival, she was registered by the immigration police and given an identification number (12U-007).

7. At that point she was presented with two documents, one containing a Return Decision and the other a Removal Order (no copies available). According to the first applicant, the contents of the decision in English were not explained to her, although she could not understand the language. According to the Government, in practice the immigration police inform the migrants verbally in English about their right to appeal and the migrants translate for each other.

8. The first applicant was further provided with an information leaflet entitled "Your entitlements, responsibilities and obligations while in detention". She claimed that the document was provided in a language she could not understand. According to the Government she did not request a booklet in another language.

9. In accordance with Article 14 (2) of the Immigration Act (see Relevant domestic law), the first applicant was detained. She was initially detained in Zone D and later moved to an unspecified Zone in Lyster Barracks.

2. Ms Abdirahman Warsame

10. Ms Abdirahman Warsame, the second applicant, also entered Malta in an irregular manner by boat on 16 August 2012. Upon arrival, she was registered by the immigration police and given an identification number (12U-009).

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

immigration police inform the migrants verbally in English about their right to appeal and the migrants translate for each other.

12. She was further provided with an information leaflet entitled "Your entitlements, responsibilities and obligations while in detention". None of these documents, in English, were explained to Ms Abdirahman Warsame who could not understand the language. According to the Government the second applicant did not request a booklet in another language.

13. In accordance with Article 14 (2) of the Immigration Act (see Relevant domestic law), the second applicant was detained. She was detained in Lyster Barracks (Zone unspecified).

B. Asylum proceedings

14. A few days following their arrival both the applicants were called for an information session provided by the Staff of the Office of the Refugee Commissioner. They were assisted in submitting the Preliminary Questionnaire (PQ), thereby registering their wish to apply for asylum under Article 8 of the Refugees Act, Chapter 420 of the Laws of Malta (see Relevant domestic law below).

15. Two months later, on 2 and 9 November 2012 respectively, they were called for a refugee status determination interview. By decisions of 19 January 2013, communicated to the applicants on 31 January 2013, the Refugee Commissioner (RC) rejected their applications on the basis that they had failed to substantiate their claim that they were born and lived in Halane village, in Qoryooley district, in Lower Shabelle Region, in southern Somalia. Thus, they did not fulfil the eligibility criteria for either refugee status or subsidiary protection.

16. On 7 February 2013, with the aid of lawyers from the Jesuit Refugee Service (JRS) the applicants appealed against the decisions. The Refugee Appeals Board (RAB) informed the applicants that they had until 18 March 2013 to present submissions. This time-limit was extended and appeal submissions were lodged in April 2013.

17. By the date their application was lodged with this Court, that is eleven months and three weeks from the date of their arrival, no decision had been issued. The applicants were hoping to be released on the lapse of twelve months from their arrival as per normal domestic practice.

C. Conditions of detention

1. Ms Moxamed Ismaacil

18. Ms Moxamed Ismaacil, the first applicant, was initially detained in Zone D and later moved to an unspecified Zone in Lyster Barracks, in conditions which she considered prison-like and basic, although she

considered Zone D to be better than the latter unspecified Zone. She explained that the place was overcrowded and noisy, and it was hard to keep it clean. There were twenty people in one dormitory and ninety-five people in the zone, with only one fridge. In summer the heat was unbearable and in winter it was too cold. They were fed the same food every day, and only allowed one hour of sunshine per day. She maintained that male detainees held in the upper floors often abused them verbally. Other factors which she considered had to be taken into consideration were her young age, her inability to communicate in any language except for Somali, and the fact that the detention centre was staffed exclusively by men. She further noted the absence of access to effective medical care, given that no interpreters were available. She had visited the clinic in the detention centre several times because she was sick, and was repeatedly told to drink water and take paracetamol tablets. Often no doctors were available and it was the soldiers at the detention centre who decided whether the issue warranted emergency treatment.

2. Ms Abdirahman Warsame

19. Ms Abdirahman Warsame explained that she endured the same circumstances mentioned above by Ms Moxamed Ismaacil. She added that she was depressed and that she often felt upset and agitated, at times she would stop drinking and eating and then lose consciousness. Despite her gastric pains, no special diet was provided for her and the doctors only administered paracetamol, to the extent that she started vomiting blood. In June 2013 she was hospitalized for a week. She alleges that she had become very weak physically and started suffering from memory loss.

D. Latest developments

1. Ms Moxamed Ismaacil

20. Ms Moxamed Ismaacil was released from detention on 14 August 2013. At the time she was still waiting for the outcome of her appeal before the RAB. Her appeal was eventually rejected on 15 October 2013.

2. Ms Abdirahman Warsame

21. Ms Abdirahman Warsame was also released from detention on 14 August 2013. At the time she was still waiting for the outcome of her appeal before the RAB. Her appeal was eventually rejected on 14 July 2014.

II. RELEVANT DOMESTIC LAW AND PRACTICE

22. The relevant domestic law concerning the case is to be found in *Suso Musa v. Malta* (no. 42337/12, §§ 23-32, 23 July 2013) and *Aden Ahmed v. Malta* (no. 55352/12, §§ 31-39, 23 July 2013).

III. RELEVANT INTERNATIONAL MATERIAL

23. The Report to the Maltese Government on the visit to Malta carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 26 to 30 September 2011, published on 4 July 2013, in so far as relevant in connection with Lyster Barracks, reads as follows:

> "44. At the time of the visit, *Lyster Detention Centre* was accommodating 248 foreign nationals (including 89 women), in five different detention units.
>
> ...
>
> 47. More generally, the CPT has serious misgivings about the fact that female detainees at Lyster Detention Centre were frequently supervised exclusively by male detention officers, since only one female officer was employed by the Detention Service at the time of the visit.
>
> **The CPT recommends that the Maltese authorities take steps as a matter of priority to ensure the presence of at least one female officer around the clock at Lyster Detention Centre.**
>
> 48. As was the case in 2008, a number of detainees complained about disrespectful behaviour and racist remarks by detention officers (in particular in the Warehouses at Safi Detention Centre). **The CPT reiterates its recommendation that the Maltese authorities remind all members of staff working in detention centres for foreigners that such behaviour is not acceptable and will be punished accordingly**.
>
> 55. At both *Lyster* [*and Safi Detention Centres*], material conditions have improved since the 2008 visit. In particular, at Lyster Barracks, these improvements are significant: the Hermes Block, which had been in a very poor state of repair at the time of the 2008 visit, had been completely refurbished and the Tent Compound, which had also been criticised by the Committee in the report on the 2008 visit, had been dismantled. At Safi Barracks, additional renovation work had been carried out in Block B. It is noteworthy that all foreign nationals received personal hygiene products on a regular basis and were also supplied with clothes and footwear.
>
> ...
>
> 56. At *Lyster Detention Centre*, the situation had clearly improved as regards activities. Each zone comprised a communal room, and groups of detainees could attend English-language courses which were organised by an NGO (usually, three times a week for two hours per group). Further, single women and couples were provided with food so that they could prepare meals themselves in a kitchenette. Every day, detainees could go outside and play football or volleyball in a rather small yard for a total of two hours.
>
> ...

60. As regards contact with the outside world, the CPT welcomes the fact that, in both detention centres visited, foreign nationals could receive telephone calls from the outside. They were also were provided with telephone cards free of charge on a regular basis, although these were limited to a total of 5€ every two months.

61. That said, at Lyster Detention Centre, a number of detainees who had family members or friends in Malta complained about the fact that they were not allowed to receive any visits, but that "visitors" could only come to the centre on Sundays to deliver parcels to staff at the gate for the attention of a detainee. This state of affairs was subsequently confirmed by staff.

The CPT calls upon the Maltese authorities to take steps to ensure that foreign nationals are allowed to receive visits on a regular basis and that specific facilities are set up for that purpose. Relevant information on the visiting arrangements should also be included in the information brochure "Your Entitlements, Responsibilities and Obligations while in Detention" which is given to detainees.

62. In the report on the 2008 visit, the CPT invited the Maltese authorities to consider adding the Committee to the list of international bodies to/from which detainees could send/receive letters confidentially (and without bearing the cost of postage). Regrettably, the authorities had not taken any steps to this end, despite their commitment given in their response to the above-mentioned report. During consultations with the delegation, the Commander of the Detention Service affirmed to the delegation that appropriate steps would be taken without delay. **The Committee would like to receive updated information on this point.**"

24. The 9th General report of the European Committee for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment (the "CPT") on the CPT's activities covering the period 1 January to 31 December 1998, at point 26, reads as follows:

"Mixed gender staffing is another safeguard against ill-treatment in places of detention, in particular where juveniles are concerned. The presence of both male and female staff can have a beneficial effect in terms of both the custodial ethos and in fostering a degree of normality in a place of detention.

Mixed gender staffing also allows for appropriate staff deployment when carrying out gender sensitive tasks, such as searches. In this respect, the CPT wishes to stress that, regardless of their age, persons deprived of their liberty should only be searched by staff of the same gender and that any search which requires an inmate to undress should be conducted out of the sight of custodial staff of the opposite gender; these principles apply a fortiori in respect of juveniles."

25. Rule 53 of the United Nations Standard Minimum Rules for the Treatment of Prisoners, reads as follows:

"(1) In an institution for both men and women, the part of the institution set aside for women shall be under the authority of a responsible woman officer who shall have the custody of the keys of all that part of the institution.

(2) No male member of the staff shall enter the part of the institution set aside for women unless accompanied by a woman officer.

(3) Women prisoners shall be attended and supervised only by women officers. This does not, however, preclude male members of the staff, particularly doctors and

> teachers, from carrying out their professional duties in institutions or parts of institutions set aside for women."

26. The report "Not here to stay: Report of the International Commission of Jurists on its visit to Malta on 26 – 30 September 2011", May 2012, pointed out, *inter alia*, that:

> "The ICJ delegation found a lack of leisure facilities in all three detention facilities visited. ... In the Lyster Barracks there was also a small recreation yard, but without direct access from the detention section. Detainees had two hours per day of "air" in the courtyard. They reportedly seldom received visits from outside, apart from the occasional NGO."

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

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

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

THE LAW

I. JOINDER OF THE APPLICATIONS

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

II. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

30. The applicants complained under Article 3 in respect of the conditions of their detention in Lyster Barracks, they relied on *Aden Ahmed v. Malta* (no. 55352/12, 23 July 2013). The provision reads as follows:

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

31. The Government contested that argument.

A. Admissibility

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

(a) The parties' submissions

(i) The Government

32. The Government submitted that the applicants had not brought their complaints before the domestic authorities. They considered that the applicants had a twofold remedy, namely constitutional redress proceedings to challenge the conditions of their detention while they were in detention and an action for damage in tort after they left detention. They further noted that an action under the European Convention Act was not subject to any time-limits.

33. As to the Constitutional jurisdictions, the Government submitted that they had wide ranging powers to deal with Convention violations. Such proceedings could also be heard with urgency, reducing the time span of such proceedings to two months from filing. The Government noted that the Court had previously criticised the duration of such proceedings. Nevertheless, a fresh assessment according to prevailing circumstances had to be done in each case. In the Government's view any delays in constitutional proceedings were counterbalanced by the fact that those jurisdictions could issue interim orders pending proceedings. They cited for example a decree in the case of *Emanuel Camilleri vs Inspector Louise Callejja and the Commissioner of Police* (no. 50/2013) where the Civil Court (First Hall) in its constitutional jurisdiction released a sentenced person from prison pending the proceedings given the particular circumstances of that case, namely where the main witness, who had testified in the applicant's trial which had ultimately returned a guilty verdict, was now being tried for perjury in connection with her testimony. Thus, in the Government's view, in the absence of speedy proceedings there nevertheless existed a speedy interim remedy which could be decreed by the constitutional jurisdictions under Article 46 (2) of the Constitution and Article 4 (2) of the European Convention Act. Despite the exceptional circumstances of the case, the example went to show that releasing persons from prison by means of an interim measure was indeed a possibility which could be used by the constitutional jurisdictions, and the applicants had not proved the contrary.

34. The Government noted that the applicants could also avail themselves of the services of a legal-aid lawyer (governed by Article 911 et seq. of the Code of Organisation and Civil Procedure).

35. The Government further relied on the Court's general principles cited in *Abdi Ahmed and Others v. Malta* ((dec.), no. 43985/13, 16 September 2014) and to its findings in that case, where the Court had established that the situation having ended, the duration of proceedings no longer rendered the remedy ineffective. The Court had also noted that the applicants had the same chances of lodging domestic proceedings as they had to lodge international proceedings, namely by means of NGO lawyers.

36. The Government considered that the applicants could also have instituted an action for damages in tort where the applicants could have obtained damage for loss sustained on the account of their conditions of detention, if they could prove on the basis of probabilities that they had suffered damage and that such damage was attributable to the Government's acts or omissions.

37. According to the Government it was evident that these remedies were effective. They formed part of the normal process of redress, were accessible, and offered reasonable prospects of success where this was justified.

38. Under this heading, the Government also noted that after lodging their application while the applicants were in detention it had taken them a number of months to inform the Court of their release, and thus they had not been diligent.

(ii) The applicants

39. The applicants submitted that there existed no effective domestic remedy which should have been used; in fact most of the Government's arguments had already been rejected by the Court in its judgment in the case of *Aden Ahmed v. Malta* (no. 55352/12, 23 July 2013) concerning an immigrant detained at around the same time as the applicants in the present case. The Court's conclusions in that case were in line with the findings of the European Commission Directorate-General for Justice in a report entitled The EU Justice Scoreboard – A tool to promote effective justice and growth (2013), which showed that the Maltese judicial system was one of the systems with the longest delays among the member States. By means of example, the case of *The Police vs Pauline Vella* (42/2007), lodged in 2007, which looked at the conditions of detention at Mount Carmel Hospital, was decided on appeal on 30 September 2011.

40. As to the use of interim measures by the constitutional jurisdictions, the applicants submitted that in the very specific circumstances of the example given by the Government, the first-instance constitutional jurisdiction itself repeatedly stressed, in its decree, the exceptional nature of interim orders. The applicants considered that the circumstances of that

case, which pointed towards a wrongful conviction, could not be compared to that of the applicants, and nothing indicated that persons in the applicants' position would obtain provisional release pending a claim on conditions of detention.

41. Similarly, one could not rely on the findings of this Court in *Abdi Ahmed and Others* (dec.), cited above, which concerned significantly different circumstances, and where, the moment the application was filed, preventive action was no longer necessary. However, in the present case, when the applicants applied to the Court they were still in detention, and thus preventive action was still necessary, but was not available due to the excessive duration of constitutional redress proceedings.

42. Lastly, the applicants also referred to the Court's considerations regarding a lack of a proper structured system enabling immigration detainees to have concrete access to effective legal aid.

(b) The Court's assessment

43. The Court refers to its case-law concerning exhaustion of domestic remedies, in particular in connection with complaints of conditions of detention, as reiterated in *Aden Ahmed* (cited above, §§ 54-58, with references therein).

44. Further, the Court notes that the circumstances of the present case are different to those in the case of *Abdi Ahmed and Others v. Malta* (dec.), cited above, relied on by the Government. That case concerned a determination as to whether following the Court's decision to apply a Rule 39 injunction indicating to the Government that they should desist from deporting the applicants - a decision which had been respected by the Maltese Government - the applicants in that case had access to an effective remedy (for the purposes of, *inter alia*, their Article 3 complaint, which did not concern conditions of detention) which they were required to use before continuing their application before this Court.

45. The Court notes that in the present case, when the applicants lodged their applications with the Court (on 13 August 2013) complaining, *inter alia*, about the conditions of their detention, the applicants were still in detention, and thus, apart from requiring a remedy providing compensation, they were required to have a preventive remedy capable of putting an end to the ongoing violation of their right not to be subjected to inhuman or degrading treatment. The Court will thus proceed to assess the matter.

46. The Court has already considered in *Aden Ahmed* (cited above, § 73) that it had not been satisfactorily established that an action in tort may give rise to compensation for any non-pecuniary damage suffered and that it clearly was not a preventive remedy in so far as it cannot impede the continuation of the violation alleged or provide the applicant with an improvement in the detention conditions (see *Torreggiani and Others v. Italy*, nos. 43517/09, 46882/09, 55400/09, 57875/09, 61535/09, 35315/10

and 37818/10, § 50, 8 January 2013, and the case-law cited therein). It thus concluded that it cannot be considered an effective remedy for the purposes of a complaint about conditions of detention under Article 3 (see, also *Mikalauskas v. Malta*, no. 4458/10, § 49, 23 July 2013). Nothing has been brought to the attention of the Court which could cast doubt on that conclusion.

47. As to constitutional redress proceedings, again, in *Aden Ahmed* (cited above, §§ 61-63), following a thorough assessment, the Court held that while it could not rule out that constitutional redress proceedings dealt with urgently (as should be the case concerning complaints of conditions of detention) may in future be considered an effective remedy for the purposes of such complaints under Article 3, the then state of domestic case-law could not allow the Court to find that the applicant was required to have recourse to such a remedy. In the present case the Government have not submitted any further examples enabling the Court to revisit its conclusion concerning the delay in such proceedings. On the contrary, they appear to acknowledge the existence of such delays, arguing however that such delays are counterbalanced by the possibility of interim measures being issued by constitutional jurisdictions pending proceedings.

48. In this connection, the Court notes that the example put forward by the Government is indeed very specific and unrelated to circumstances such as those of the present case. Accepting that the provision of examples may be more difficult in smaller jurisdictions, such as in the present case, where the number of cases of a specific kind may be fewer than in the larger jurisdictions, nevertheless the Court notes that the applicants' example concerning a case of conditions of detention did not have such a measure applied, despite the excessive duration, extending to four years. Similarly, the case of *Tafarra Besabe Berhe*, referred to by the applicants (in their submissions below, at paragraph 109 below) concerning the lawfulness of immigrants' detention and the conditions of such detention, which was still pending six years after it was lodged, also does not appear to have applied such a measure. Admittedly, the Court is aware that no examples may exist because applicants fail to make such requests. However, in the absence of any other comparable examples, the Court finds no indication that the constitutional jurisdictions would be willing on a regular basis to release immigrant detainees pending a decision on their claims on conditions of detention.

49. It follows that, in circumstances such as those of the present case, the hypothetical possibility that interim measures may be issued pending proceedings does not make up for deficiencies detected in the remedy at issue – a remedy which would be effective both as a preventive and a compensatory remedy, if it were carried out in a timely manner. Thus, current domestic case-law does not allow the Court to find that the applicants were required to have recourse to such a remedy.

50. Further, the Government have not dispelled the Court's previously expressed concerns about the accessibility of such remedies in the light of the apparent lack of a proper structured system enabling immigration detainees to have concrete access to effective legal aid (see *Aden Ahmed*, cited above, § 66).

51. In conclusion, none of the remedies put forward by the Government, alone or in aggregate, satisfy the requirements of an effective remedy in the sense of preventing the alleged violation or its continuation in a timely manner. It follows that the Government's objection is dismissed.

52. Lastly, the Court finds that Government's comment at paragraph 38 above has no bearing on the examination of this objection.

2. Conclusion

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

B. Merits

1. The parties' observations

(a) The applicants

54. The applicants considered the conditions of detention to be basic. They noted in particular the lack of access to constructive or recreational activities, insufficient provision of basic needs, lack of information, difficulties communicating with the outside world, limited access to open air, and obstacles in obtaining the most basic services. Other factors which had to be taken into consideration were their young age, their inability to communicate in any language except Somali, and the fact that the detention centre was staffed exclusively by men (most having a security background) despite them being young females.

55. In their view all the above had a greater toll given their personal circumstances and situations while they were in detention (as explained in the Facts, above), as well as the traumas they suffered before their arrival in Malta. Both applicants claimed to have experienced physical symptoms and psychological ill-health which they linked to their long-term detention.

56. The first applicant claimed to have had trouble sleeping, which was made worse by noise from the other detainees. She claimed she had been to the clinic several times and that "once she felt chest pain". The second applicant also claimed to have been ill and that she had been hospitalised for a week in June 2013, only after a number of complaints. Previously, she had informed the doctor that she was having gastric problems and had been

coughing blood; nothing had been done about the matter other than the administration of paracetamol. For four months she had also been worried about a swelling in her neck, but she only had it examined when she was in hospital in June 2013. She considers that her health had deteriorated in detention, her memory was impaired and she always felt weak. She relied on the referral to AWAS for release on grounds of vulnerability, which was made in June 2013, by a Jesuit Refugee Service representative, and which reads as follows:

> "Deka has been complaining of several medical ailments, including vomiting blood for which she has been treated but to no avail. ... She is suffering from constant nausea, stomach pain, headaches and has lost a lot of weight over the past couple of months. Deka is very worried about her medical condition, especially since she has no control over her food and treatment as she is in detention.... She needs to be released from detention as soon as possible so that she can get the care and treatment she requires."

57. The applicants submitted that each zone (measuring 300 sq. m according to a Médecins Sans Frontières report) consisted of a landing, three adjacent dormitories all opening on to a narrow corridor, nine or ten showers and toilets, a small room used as a kitchen with one or two hotplates, a common room containing metal tables and benches screwed to the ground, and one television. There was no room to store food or other materials. Free movement between zones was not possible, and for most of the day the detainees were confined to their respective zones.

58. The applicants submitted that conditions in their zone were particularly difficult in the summer months, as it became crowded because of increased arrivals. When the zone was at full capacity (sixty people), bearing in mind the areas of the dormitories and the common areas, each detainee had an average 5 sq.m of shelter space, which meant that in August, when the applicants' zone had sixty-nine inmates, the average shelter space was of 4.3 sq. m. At a different point in her submissions the first applicant claimed they were sometimes ninety in a zone (see also paragraph 18 above). The zone was much less crowded in the winter months. The applicants felt that it was difficult to live in a room with around twenty women without privacy. Moreover, they were sometimes abused by other detainees and attacked, life was stressful and fighting was regular.

59. Windows were barred and most of them glazed with opaque Perspex (which was removed in the summer months for air, though they then let air through in the cold winter months). On the one hand, in summer the facility was often crowded and heat would become oppressive despite ceiling fans. On the other hand, in winter it was unbearably cold as the facility was not heated and, moreover, was exposed to the elements as there were no adjoining buildings.

60. The applicants complained that they had nothing to do all day except watch television, and only very limited access (one and half hours) to the

open air in a small dusty yard. The first applicant claimed that it was however too hot to stay in the yard in summer, and the second applicant stated she rarely used the yard given her ill-health. They noted that most of the books in the library were in English and that the classes held by Integra had only operated for the first three months of their twelve-month' detention. Other projects did not consist of more than one activity per week.

61. Detainees had limited contact with the outside world, as no Internet was available and telephone credit was insufficient for overseas calls.

62. The detention centre lacked female staff, and only one woman worked on the shift with the zones. This meant that all the care of detained women was carried out by male staff (most having a security background) who guarded the facility, conducted headcounts (in the dormitories twice daily, including the mornings when the women were asleep – thus the applicant had to sleep fully clothed including headscarf), took care of the distribution of basic necessities, including items of personal hygiene and underwear, and accompanied them to medical appointments. This state of affairs was confirmed by a local report drawn up by a Maltese magistrate (the Valenzia Report). The applicant referred to international reports on the matter (see paragraphs 24-25 above), and considered that the situation was even more frustrating given that under the domestic system there was no mechanism to complain about ill-treatment or abuse by detention staff.

63. The food provided was also of poor quality, lacked variety and was culturally inappropriate. The second applicant noted that they were fed pasta, rice, chicken, milk and water. She felt that such foods were not suitable for her medical needs and as a result she often would not eat. She also complained that it took her a long time and various complaints until she could get mineral water instead of the water usually served.

64. The applicants also complained about the difficulties they had in obtaining information about their situation which with their prolonged detention caused them a lot of frustration, despair, unhappiness, and loneliness. Relying on a report entitled *Becoming Vulnerable in Detention*, National Report on Malta, July 2010, they highlighted that prolonged detention caused significant deterioration in physical and mental well-being.

65. Both applicants complained about their access to medical care and the quality of medical care provided. While not doubting the efficacy of the medical personnel providing a service, given that they were more often than not communicating with migrants with little or no knowledge of English, it was difficult to understand how they could provide a quality service in an average of six minutes per patient (in the light of the Government submissions, see paragraph 74 below). The applicants again referred to the CPT report and the JRS Malta report, Bridging Borders, (see paragraphs 23 and 27 above).

66. Give their situation and all the factors mentioned above, the applicants considered that they had suffered a breach of Article 3.

(b) The Government

67. The Government submitted that as shown by the calculations made by the applicants, the zones in which they were held were never overcrowded and they never had an individual space of less than 4 sq. m.. They considered that although some discomfort arises from living with other persons, this did not reach the threshold of Article 3.

68. The Government submitted that whilst in detention the applicants were housed in a sheltered compound with adequate bedding and were provided with three meals a day on a daily basis (the menu changed on a daily basis and food was prepared in different ways) and mineral water. Meals were provided from a pre-set menu, however, particular dietary requests were regularly respected and the food supplied respected the relevant religious traditions.

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

70. The detention centre is equipped with ceiling fans which can be used in the summer months. As to heating (which was installed after the applicants' release), the Government admitted that at the time of the applicants' detention there was no heating, but in their view this was counterbalanced by the provision of warm clothing and blankets - extra blankets were in fact available on request. They considered that in Malta winters were mild and the coldest temperatures were felt from January to March.

71. Immigration detainees are provided with telephone cards and various telephones can be found in the detention centre. Interpreters are provided for free at the detention centres. The detainees are further provided with stationery and books on request. They have access to a television, as well as a kitchen offering basic cooking facilities and a common room with tables and benches. They are free to practise their religion and have unlimited access to NGOs and legal assistance (*sic*). They also have the opportunity to attend language and integration classes provided by NGOs. In 2013 the immigrants also had the opportunity to take part in an EU funded project (SPARKLET) which provided, *inter alia*, educational and cultural activities. The Government submitted that access to the Internet and mobile phones was restricted for security reasons.

72. The Government submitted that access to outside exercise was limited to one and a half hours daily per zone. They also noted that the

applicants were given information on their arrival, by means of an information leaflet and verbally, and that the Commissioner for Refugees held information sessions with the aid of interpreters.

73. As to detention staff, the Government submitted that there were two female staff assigned to the single female zones, while female police officers acted as escorts when female detainees had to attend off-site medical appointments. In any event they considered that it was not debasing to have male staff, given that they were trained to cater for female detainees and to provide them with the necessary supplies, including intimate personal items. As to the headcounts, the Government submitted that in any event female detainees had to dress appropriately even with respect to other detainees in the dormitory. The Government contested the applicant's allegation that there was no complaint mechanism, and alleged that instances of misbehaviour were brought to the attention of the Head of Detention Services, either directly by the detainee or through NGOs. Without giving examples, the Government alleged that such complaints were investigated and, where necessary, disciplinary proceedings undertaken.

74. The detention centres had a medical practitioner and a nurse who provided on-site treatment and could make referrals to hospital treatment, and "custody clinics" are set up in all compounds housing migrants. The Government explained that medical services at the Safi Detention Centre had been outsourced since April 2007. Two doctors and two nurses visited the detention centres every day (except weekends) between 8.00 am and 3.00 pm (nurses) and 9.00 am and 1.00 pm (doctors). On a daily basis each doctor examined forty persons, meaning that 400 patients were examined each week. The clinics on site, at each of the compounds in Safi, were refurbished and equipped with basic medical equipment. During silent hours (when doctors were not present) detainees were allowed to visit the nearest health centre to see a doctor. Furthermore, nurses from the Malta Memorial District Nursing Association (MMDNA) reported at detention centres during weekdays (in the evening) and weekends (both morning and evenings) to dispense medicines. In the event that migrants requiring mental health support, the doctor would refer them for further treatment at Mount Carmel Hospital (the State mental health hospital) and other referrals to the State General Hospital were made if specialised attention was necessary.

75. The Government distinguished the case from that of *Aden Ahmed*, who had been particularly vulnerable. Indeed, in the present case, according to the Government the applicants could not be considered to fall under any specific category of vulnerable individuals, neither could they be considered to be seriously ill or even to be suffering from ill-health. Indeed the first applicant who alleged that she had visited the clinic on several occasions, had only been administered paracetamol and advised to drink water, which was clearly evidence of no serious sickness. The second applicant, who

alleged that she had gastric problems, had been hospitalised and had been physically unwell had not substantiated her allegations. In the Government's view the fact that a particular treatment was administered but no special diet provided was a result of a diagnosis on the second applicant which established that no such treatment was required. The Government also noted that in their affidavits to the Court the applicants had themselves acknowledged that they had been given medical assistance whenever it was requested and that medical personnel operated the clinics on site. The Government also insisted that language barriers were overcome by interpreters on site as well by migrants who were conversant with English and French as were the medical officers. Moreover, according to the Government a number of medical officers were foreign, and they spoke various languages which migrants understood.

76. The Government noted that they could not be held responsible for ill-treatment suffered before the applicants reached Malta. Referring to the applicants' claims that they continued to experience physical symptoms and psychological ill-health linked to their long-term detention, the Government submitted that a certain level of anxiety was inevitable in detention, nevertheless this could not reach the threshold of Article 3.

77. Thus, in the Government's view there was no violation of Article 3 in the circumstances of the present case.

2. The Court's assessment

(a) General principles

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

79. Under Article 3, the State must ensure that a person is detained in conditions which are compatible with respect for human dignity and that the manner and method of the execution of the measure do not subject the individual to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention (see *Riad and Idiab*, cited above, § 99; *S.D. v. Greece*, no. 53541/07, § 47, 11 June 2009; and *A.A. v. Greece*,

no. 12186/08, § 55, 22 July 2010). When assessing conditions of detention, account has to be taken of the cumulative effects of these conditions, as well as of specific allegations made by the applicant (see *Dougoz v. Greece*, no. 40907/98, § 46, ECHR 2001-II). The length of the period during which a person is detained in specific conditions also has to be considered (see, among other authorities, *Alver v. Estonia*, no. 64812/01, § 50, 8 November 2005, and *Aden Ahmed*, cited above, § 86).

80. The extreme lack of personal space in the detention area weighs heavily as an aspect to be taken into account for the purpose of establishing whether the impugned detention conditions were "degrading" from the point of view of Article 3 (see *Karalevičius v. Lithuania*, no. 53254/99, § 36, 7 April 2005, and *Yarashonen v. Turkey*, no. 72710/11, § 72, 24 June 2014, and, for a detailed analysis of the principles concerning the overcrowding issue, see *Ananyev and Others v. Russia*, nos. 42525/07 and 60800/08, §§ 143-48, 10 January 2012). The provision of four square metres of living space remains the acceptable minimum standard of multi-occupancy accommodation (see *Hagyó v. Hungary*, no. 52624/10, § 45, 23 April 2013; *Torreggiani and Others*, cited above, § 76, and *Tunis v. Estonia*, no. 429/12, § 44, 19 December 2013, and the cases cited therein). The Court also takes into account the space occupied by the furniture items in the living area in reviewing complaints of overcrowding (see *Petrenko v. Russia*, no. 30112/04, § 39, 20 January 2011; *Yevgeniy Alekseyenko v. Russia*, no. 41833/04, § 87, 27 January 2011; and *Yarashonen*, cited above, § 76).

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

82. Cases concerning allegations of inadequate conditions of detention do not lend themselves to a rigorous application of the principle *affirmanti incumbit probatio* (he who alleges something must prove that allegation) because in such instances the respondent Government alone have access to information capable of corroborating or refuting these allegations. Accordingly, applicants might experience certain difficulties in procuring evidence to substantiate a complaint in that connection. Still, in such cases applicants may well be expected to submit at least a detailed account of the

facts complained of and provide – to the greatest possible extent – some evidence in support of their complaints (see *Visloguzov v. Ukraine*, no. 32362/02, § 45, 20 May 2010). However, after the Court has given notice of the applicant's complaint to the Government, the burden is on the latter to collect and produce relevant documents. A failure on their part to submit convincing evidence on material conditions of detention may give rise to the drawing of inferences as to the well-foundedness of the applicant's allegations (see *Gubin v. Russia*, no. 8217/04, § 56, 17 June 2010, and *Khudoyorov v. Russia*, no. 6847/02, § 113, ECHR 2005-X (extracts)).

83. Failure to provide proper medical aid to a detainee would not fall under Article 3 unless there was an actual detriment to his physical or mental condition, or avoidable suffering of a certain intensity, or an immediate risk of such detriment or suffering (see *Lebedev v. Russia* (dec.), no. 13772/05, § 176, 27 May 2010).

(b) Application to the present case

84. The Court notes that the applicants submitted that in August, which appears to be one of the peak months for immigrant arrivals, there were sixty-nine detainees in their zone – a statement not contested by the Government. Nevertheless, the first applicant also claimed twice during her submissions that there were over ninety; however no indications were given as to when this occurred, or how long it lasted. Given the global statements in their submissions, as well as the fact that August is a peak month, the Court considers it unlikely that the applicants' zone hosted ninety people or more in any other given month. Thus, in the absence of any details concerning the contradictory allegation, the Court cannot consider it to be substantiated.

85. Having regard to the measurements provided by the applicants and not contested by the Government, in regular months of their detention (excluding August) during which sixty or fewer than sixty people were detained in the zone, the applicants had at least 5 sq. m of shelter space in their zone. Such a measurement does not refer only to the space available in the dormitory, but to the entirety of the space to which they had access in the zone. However, given that the applicants had in fact the opportunity to move around in the zone, the Court considers that there is no reason why the entirety of the area should not be taken into consideration for the purposes of calculating living space. Even considering that in reality this space should be significantly lower in view of the fixtures in the rooms (both the common rooms and the dormitories) (see *Yarashonen*, § 76, and *Torreggiani and Others*, § 75, both cited above) the Court considers that the ultimate living space over those months did not go below the acceptable minimum standard of multi-occupancy accommodation.

86. The same must be said for the month of August, where the applicants' zone had sixty-nine inmates, and thus the average shelter space was 4.3 sq. m per person. Further, the Court notes that in certain months, as admitted by the applicants they shared the zone with much fewer detainees, thus their living space during those months was considerably greater. In these circumstances the Court cannot find that the overcrowding was so severe as to justify in itself a finding of a violation of Article 3.

87. The Court will thus continue to assess the other aspects of the conditions of detention which are relevant to the assessment of the compliance with Article 3.

88. The Court notes that even scarce space in relative terms may in some circumstances be compensated for by the freedom to spend time away from the dormitory rooms (see *Valašinas v. Lithuania*, no. 44558/98, § 103 and 107, ECHR 2001-VIII, and *Nurmagomedov v. Russia* (dec.), no. 30138/02, 16 September 2004). Access to outdoor exercise is a fundamental component of the protection afforded to those deprived of their liberty under Article 3 (see *Yarashonen*, cited above, § 78); Outdoor exercise facilities should be reasonably spacious and whenever possible provide shelter from inclement weather (see *Neshkov and Others v. Bulgaria*, nos. 36925/10, 21487/12, 72893/12, 73196/12, 77718/12 and 9717/13, § 234, 27 January 2015, with further references). The physical characteristics of outdoor exercise facilities are also relevant (see *Ananyev and Others*, cited above, § 152, with further references).

89. The Court has already had occasion to comment on the yard referred to in the present case, in *Aden Ahmed* (cited above, § 96), where it noted that it was considerably small for use by sixty people (recreation being available in one zone at a time), it was secured on three sides by wire fencing topped with barbed wire, and left much to be desired given that it was the only outdoor access enjoyed by detainees for a limited time daily. Nevertheless, the Court observes that the applicants had access to this yard on a daily basis, and it was of their own motion that they sometimes opted not to make use of it. Furthermore, adjacent to the dormitories the applicants could move around in the common room as well as the corridors. In consequence, while the recreation yard would benefit from some improvements, including a form of shelter from the sun and the rain, it cannot be said that the applicants were denied, by the authorities, their time of exercise in the open air. Some sort of recreation was also available indoors, even though this may not have been regular or frequent.

90. As regards the other aspects raised by the applicants, the Court reiterates that suffering from cold and heat cannot be underestimated, as such conditions may affect one's well-being, and may in extreme circumstances affect health (see *Aden Ahmed*, cited above, § 94). Nevertheless, the applicants admit that fans were in place, and despite the fact that Malta is an extremely hot country in the summer months the Court

considers that the authorities cannot be expected to provide the most advanced technology. However, the Court remains concerned by the applicants' allegation that detainees suffered from the cold. Little comfort can be found in the Government's argument that January to March are the coldest months (see paragraph 70 above) given that the applicants were in fact detained also during those cold months. However, the Court welcomes the Government's action in this regard, and notes that heating has now been installed. While the latter action had no consequence for the applicants, who had been released by then, the Court observes that the provision of blankets must have aided the situation to some extent, and it does not transpire that the applicants suffered any health related concerns in this connection.

91. Concerning the staff at the detention centre, for the same reasons as those given in various reports (see paragraphs 24-25 above), the Court finds disconcerting the lack of female staff in the centre (see also *Aden Ahmed*, cited above, § 95). Indeed only two females had been working in the detention centre during part of the applicants' detention. The Government's submission that males were trained to distribute intimate products, even if it were true, cannot counteract the degree of discomfort to the female detainees who were for the most time dealt with and surrounded by male officers for their detention over several months.

92. Against some factors which remain of concern, the Court, however, also observes that according to the CPT report cited above (paragraph 23), various improvements have been put in place, both structurally and activity wise, at Lyster Barracks. No concern seems to arise about the hygiene facilities, and the applicants have had access to a common area equipped with a television, as well as telephone cards and three meals a day. The meals of which the applicants complain do not appear to have been entirely unbalanced, nor has it been established that the second applicant's ill-health was directly linked to the food provided. Moreover, while it is regrettable that it might have taken a while, the authorities acceded to her request to be given mineral water, a standard which did not apply to all detainees. Further, the applicants had access to a library, and while English might not have been their preferred language they could only gain by access to such books, which would have allowed them to get acquainted with the language - the ignorance of which caused many of their ailments. Nor can the Government be blamed for disallowing the use of the Internet.

93. Nevertheless, while the fact that the detention centre was basic cannot in itself raise an issue (see *Aden Ahmed*, cited above, § 92), improvement remains called for in the various areas examined above, and especially in so far as little privacy is found in the dormitories, which moreover lack any type of furniture where individuals could store their personal belongings. The Court highlights that, the detention in such centres is imposed in the context of immigration, and is therefore a measure which

is applicable not to those who have committed criminal offences, but to the applicants as asylum seekers.

94. In relation to the applicants' state of health the Court observes that, in respect of the first applicant she only claims to have been "ill", but failed to give any details as to her condition or how many times she sought a doctor. As to the second applicant, while she did explain her condition, she failed to give relevant details such as specific dates of when she was unwell and for how long, nor has she substantiated any of her illnesses by means of any documentation. The Court observes that she must, at least, have had some form of documentation given to her when in the State hospital if nowhere else, yet none has been submitted to the Court. The only document she submitted was her AWAS referral request which is not signed by a doctor nor has it been approved by AWAS. Thus, the applicants have not proved that they were particularly ill (compare *Aden Ahmed*, § 97). In the light of the preceding considerations, the Court considers that while it is true that the applicants, being asylum-seekers, were particularly vulnerable because of everything they had been through during their migration and the traumatic experiences they were likely to have endured previously (see *M.S.S. v Belgium and Greece*, cited above, § 232), a state of vulnerability which exists irrespective of other health concerns or age factors, they cannot be said to have been particularly vulnerable also because of their health. In consequence, they cannot objectively be considered to be more vulnerable than any other adult asylum seeker detained at the time.

95. As to the medical assistance they received on site, the Court notes that while the applicants complained that doctors were not always available, the Government gave a clear picture of the availability of medical staff on site, and the Court does not find it particularly inadequate, though there is room for improvement. Indeed, two nurses and two doctors were present on site, five days a week for seven and four hours each day respectively and the Court has no reason to doubt the Government's statement that during silent hours ill detainees were allowed to attend the nearest health centre. It would however, be of concern, if the latter was not ensured, particularly in serious cases, and if such "referrals" depended on arbitrary assessments. Nevertheless, the applicants have not claimed, or in any event given details, as to any occasion were they had requested to be seen by a doctor during both normal or silent hours and that those requests were refused. Similarly, they have not claimed that they required treatment which was not available on site and which was not given to them, indeed as shown by the second applicant's own statements, she was hospitalised in the State hospital for a week when it was necessary. Further, while the applicants' claim that communication was difficult due to language barriers, the Court has no reason to doubt the Government's statement that interpreters were present at the centre on a daily basis – again it has not been claimed that the applicants requested assistance in this connection and were refused.

96. While the Court reiterates that the mere fact that a detainee is seen by a doctor and prescribed a certain form of treatment cannot automatically lead to the conclusion that the medical care provided was adequate (see *Hummatov v. Azerbaijan*, nos. 9852/03 and 13413/04, § 116, 29 November 2007), the Court considers that the applicants failed to show that they were not given adequate medical treatment, nor as mentioned above, has it been shown that any alleged failures in treating the applicants or in the treatment prescribed, caused, or gave rise to any risk of an actual detriment to the applicants' physical or mental condition (see *Lebedev* (dec.), cited above, § 176).

97. This having been said the Court finds it regrettable that the Government failed to submit any documents related to the applicants' state of health. The Court reiterates that the authorities must ensure that a comprehensive record is kept of the detainee's state of health and his treatment while in detention (see, for example, *Khudobin v. Russia*, no. 59696/00, § 83, ECHR 2006-XII), that the diagnoses and care are prompt and accurate (see *Hummatov*, cited above, § 115, and *Melnik v. Ukraine*, no. 72286/01, §§ 104-106, 28 March 2006), and that where necessitated by the nature of a medical condition, supervision is regular and systematic and involves a comprehensive therapeutic strategy aimed at curing the detainee's diseases or preventing their aggravation, rather than addressing them on a symptomatic basis (see *Hummatov*, cited above, §§ 109 and 114; *Sarban v. Moldova*, no. 3456/05, § 79, 4 October 2005; and *Popov v. Russia*, no. 26853/04, § 211, 13 July 2006).

98. Having examined the relevant circumstances of the present case taken as a whole, although the applicants' detention persisted for almost twelve months, the Court is of the opinion that the cumulative effect of the conditions complained of did not reach the threshold of Article 3. It follows that in the present case the Court considers that the conditions of the applicants' detention in Lyster Barracks did not amount to degrading treatment within the meaning of the Convention.

99. There has accordingly been no violation of Article 3 of the Convention

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

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

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

101. The Government contested that argument.

A. Admissibility

1. The Government's objection ratione materiae

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

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

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

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

2. Conclusion

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

B. Merits

1. The parties' submissions

(a) The applicants

107. The applicants relied on the Court's findings in *Louled Massoud v. Malta* (no. 24340/08, 27 July 2010), whereby the Court held that the available remedies in the Maltese domestic system were ineffective and insufficient for the purposes of Article 5 § 4. In respect of Article 25 A (6) of the Immigration Act, they added that as a rule the Board granted bail in connection with removal orders, but has done so at least once in connection with a challenge as to the lawfulness of detention under Regulation 11(10) (see paragraph 22). Nevertheless, bail could only be granted against a financial deposit (usually around 1,000 euros (EUR)) as well as a third-party guarantee showing that applicants will have accommodation and

subsistence, conditions which were unlikely to be fulfilled by immigrants arriving by boat (as opposed to those overstaying visas). In any event the applicants highlighted that a request for bail concerned temporary release and was independent from a review of the lawfulness of the detention.

108. Following the *Louled Massoud* judgment the only change in the law concerned the transposition of the EU return directive. Nevertheless, the "new" remedy envisaged, namely an application to the immigration Appeals Board in terms of Regulation 11 (10), also failed to meet the requirements of speediness, accessibility and certainty. Further, it was not even clear whether such a remedy was available in cases such as that of the applicants, in view of the limitations under Regulation 11 (1). Also, there was no information on the possibility of using this remedy to challenge the lawfulness of detention, nor any access to legal aid to attempt the remedy. In any event, in the applicants' knowledge, of four such applications lodged only one had been determined before the claimants in those cases were released (between two and nine months after the application had been lodged), and the only one determined was decided twelve months after it was lodged.

109. As to constitutional proceedings, the applicants relied on the Court's previous findings, and considered that there were no reasons to alter those findings. Indeed, the three cases concerning lawfulness of detention under Article 5 which were pending before the constitutional jurisdictions while the applicants were detained only showed the excessive duration of such proceedings. Indeed the case of *Tafarra Besabe Berhe v. Commissioner of Police* (27/2007) showed that requests for hearing with urgency were of little avail, since the case remained pending six years after it was filed, on 8 May 2007. The case of *Essa Maneh Et vs Commissioner of Police* (53/2008) lodged on 16 December 2009, was also still pending on appeal (in January 2015). A further example, *Maximilain Ciantar vs AG* (35/2010), had been lodged on 31 May 2010 and had ended on appeal only on 7 January 2011. Neither was there any evidence to suggest that the Court Practice and Procedure and Good Order Rules cited by the Government had had any effect on the efficacy and speed of proceedings, as shown by the domestic case-law cited.

(b) The Government

110. The Government submitted that this review was provided by Article 409A of the Maltese Criminal Code, and even if that were not so, it could be provided by means of proceedings before the constitutional jurisdictions. In their observations concerning the complaint under Article 5 § 4 the Government submitted that Court's findings, in *Aden Ahmed* and *Suso Musa*, both cited above, concerning the ineffectiveness of constitutional proceedings should be revisited by the Court, given the evidence that showed that constitutional jurisdictions could give interim

relief pending proceedings (see paragraph 33 above). The Government also contended that it was impossible (*sic*) to provide a number of examples, given the limitations on small States.

111. In connection with their objection of domestic remedies under Article 5 § 1, the Government made reference to subsidiary legislation 12.09, namely the Court Practice and Procedure and Good Order Rules dealing also with constitutional matters, which emphasised the need for speedy resolution of such matters. Secondly, they noted that it was possible for an applicant to request that a case be dealt with, heard and concluded with urgency. The Government strongly objected to the fact that the Court was allowing applicants in cases involving irregular immigrants to circumvent domestic remedies. They considered that this could only be done when there were no effective remedies. They also claimed that the applicants had not lodged a request for bail before the Immigration Appeals Board.

2. The Court's assessment

112. The Court refers to its general principles concerning Article 5 § 4, as established in its case-law and reiterated in *Aden Ahmed* (cited above, §§ 113-114, and 120).

113. The Court notes that it has repeatedly examined in detail the remedies available in Malta for the purposes of Article 5 § 4, and has held that applicants seeking to challenge the lawfulness of their immigrant detention, in the Maltese context, did not have at their disposal an effective and speedy remedy under domestic law. Nevertheless, the Government claimed that the Court's findings should be revised concerning constitutional redress proceedings, despite their inability to submit any examples. They also submitted that the remedy provided by Regulation 11 was available to the applicant and they referred to the possibility of applying for bail before the IAB.

114. As to the remedy provided by Regulation 11, the Court observes that the latter regulation states that the provisions of Part IV of the subsidiary legislation 217.12, do not apply to individuals apprehended or intercepted in connection with irregular crossing by sea. Now, there is no doubt that Regulation 11 is part of Part IV of the subsidiary legislation mentioned, and that the applicants were intercepted in connection with an irregular crossing by sea. Despite the Court's findings in the cases of *Suso Musa* and *Aden Ahmed* (both cited above, §§ 58-59 and §§ 121-22 respectively), where the Court found that, even assuming that such a remedy applied in the applicant's case, it was also not effective, the Government failed to explain why such a remedy was still available to the applicants despite such limitation and the circumstances as appeared at the time. In any event, again, the Court notes that not one example was put forward by the Government concerning this remedy, and the examples referred to by the

applicants, which, while lacking appropriate substantiation have not been disputed by the Government, continue to show the ineffectiveness of the remedy. Thus, the Court finds no reason to alter its conclusions, in *Suso Musa* and *Aden Ahmed* (both cited above, §§ 58-59 and §§ 121-122 respectively). Similarly, in reply to an unexplained statement by the Government concerning a request for bail under Article 25 A (6) of the Immigration Act, the Court reiterates its findings in *Suso Musa* (§§ 56-58), to the effect that this was also not an effective remedy.

115. Thus, in the absence of any further dispute concerning the Court's findings in relation to remedies other than constitutional redress proceedings, the Court finds no reasons to re-examine the situations it has already examined in previous cases (see *Aden Ahmed*, cited above, §§ 115-124; *Suso Musa*, cited above, §§ 52-61, 23 July 2013; and *Louled Massoud*, cited above, §§ 42-47, 27 July 2010). In particular it notes that in the judgment of *Suso Musa*, cited above, the Court called for general measures in this connection, and the case remains under consideration by the Committee of Ministers and has not yet been closed.

116. As to constitutional redress proceedings, the Court reiterates that the Government should normally be able to illustrate the practical effectiveness of a remedy with examples of domestic case-law and while it is ready to accept that this may be more difficult in smaller jurisdictions, such as in the present case, where the number of cases of a specific kind may be fewer than in the larger jurisdictions (see *Aden Ahmed*, cited above, § 63), the Court cannot ignore that the examples from the Maltese context previously brought to the Court's attention, and again reiterated by the applicant in the present case, continue to show that constitutional redress proceedings, are not effective for the purposes of Article 5 § 4, in view of their duration.

117. In so far as in connection with constitutional redress proceedings, the Government relied on the possibility of obtaining interim relief pending lengthy proceedings, the Court refers to its findings at paragraph 48 *in fine*, above, and for those reasons considers that it is unlikely that constitutional jurisdictions would be willing on a regular basis to release immigrant detainees pending a decision on their claims of unlawful detention. It follows that, in the Court's view, constitutional redress proceedings are still not an effective remedy for the purposes of Article 5 § 4.

118. It follows from the above that it has not been shown that the applicants had at their disposal an effective and speedy remedy under domestic law by which to challenge the lawfulness of their detention.

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

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

120. The applicants further complained under Article 5 § 1 that their prolonged detention for nearly twelve months was arbitrary and unlawful, as it did not fall under either of the two limbs under the mentioned provision. In any event, even assuming it fell under the first limb, the law was not precise and did not provide for procedural safeguards. Moreover, their continued detention could not be considered reasonably required for the purpose, nor closely connected to the purpose of preventing an unauthorised entry. Furthermore they had been detained in conditions which were not appropriate. They relied on the Court's findings in *Suso Musa v. Malta* (no. 42337/12, 23 July 2013). The provision 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."

121. The Government contested that argument.

A. Admissibility

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

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

123. The Court has already held that the applicants did not have at their disposal an effective and speedy remedy by which to challenge the lawfulness of their detention (see paragraph 118 above). It follows that the Government's objection must be dismissed.

2. Conclusion

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

B. Merits

1. The parties' submissions

(a) The applicants

125. The applicants submitted that their initial detention was for the purpose of deportation as a result of the removal order and was in line with Article 14 (2) of the Immigration Act. Nevertheless once they applied for asylum, they could no longer be detained under either limb as, in their view, Maltese law provided that once such application was lodged the asylum seeker "shall not be removed ... and the applicant shall be allowed to enter or remain in Malta pending a final decision". Admitting that their detention was imposed in accordance with the provisions of the immigration Act and in line with Government policy on detention of irregular arrivals, they considered that, even assuming that their detention was to be considered as falling under the first limb, a twelve month detention was arbitrary, as it exceeded the time reasonably required for its purpose, and thus could not be closely connected to the purpose of preventing an unauthorised entry.

126. Furthermore, they submitted that they had not been kept in conditions which were appropriate for young single females, and noted that they were detained in the same centre as that in issue in the case of *Aden Ahmed*, cited above, in respect of which the Court had found a violation. In the present case they highlighted, the crowding in the zones, making the noise unbearable and condition difficult; the limited opportunities for recreation; the poor quality of the food; the fact that the facility was staffed almost exclusively by men; the difficulty contacting family and the lack of access to basic services, including information, psychological support and medical treatment.

127. They further claimed that they had no access to procedural safeguards, as had been established by the Court in previous judgments against Malta. Indeed at no point had there been a review to determine whether their detention remained closely connected to the purpose pursued. They believed that this was so particularly in view of the fact that the laws regulating detention of asylum seekers were vague at best; the lack of clarity was compounded by the fact that several matters were regulated not by law but by policy, which by its very nature was subject to change by the Government at their discretion, without the need for parliamentary approval. Neither the Immigration Act nor the Refugees Act contained any provisions specifically regulating the detention of asylum seekers. Moreover, the legal rules regulating the maximum length of detention for asylum seekers, fixed at the time of the present case at twelve months, were anything but clear. Similarly, the exceptions to detention, such as those regarding release from detention on grounds of vulnerability, were also prescribed by policy and there were no clear publicly available rules regulating the procedure to be

followed, the criteria to be applied, or the time-limit within which a decision was to be taken in such cases. Further, the law failed to provide either an automatic judicial review of the initial administrative decision to detain, or a speedy judicial remedy by which a detainee may challenge the lawfulness of their detention (see also submissions regarding Article 5 § 4 above). Detainees were not provided with information about the existing remedies, such as they are, in a consistent, effective and systematic manner, and consequently they cannot use them - the only information provided by the authorities was that provided in the leaflet (see paragraph 8 above). They noted that not only did the content of that document leave much to be desired in terms of quantity and quality of information provided, but it was also given to the applicants in a language that they could not understand, much less read or write. In addition, although in theory detainees may be entitled to legal aid, in practice it was extremely difficult, not to say impossible, for them to gain access to the legal aid system because they were deprived of their liberty.

(b) The Government

128. The Government submitted that the applicants' detention was legitimate under the first limb of Article 5 § 1 (f). They noted that practically all immigrants reaching Malta did not carry documents and thus ascertaining their identities upon entry was a lengthy process which dependent on the cooperation of the migrants themselves. They noted that in the present case the applicants' asylum claim had been decided at first instance within three months, and eventually they had been released after a total of nearly twelve months, even though their appeal had not yet been decided, it followed that the circumstances were more favourable than those in *Suso Musa*, relied on by the applicants.

129. The Government considered that the detention was carried out in good faith, as the centre at issue had been set up especially for that purpose, and the detention had fulfilled all the conditions indicated by the Court in *Saadi v. the United Kingdom* [GC] (no. 13229/03, ECHR 2008). They also considered that detention was based in law (Article 5 of the Immigration Act) and was not discriminatory, nor was it applied across the board.

2. The Court's assessment

(a) General principles

130. Article 5 enshrines a fundamental human right, namely the protection of the individual against arbitrary interference by the State with his or her right to liberty. The text of Article 5 makes it clear that the guarantees it contains apply to "everyone" (see *Nada v. Switzerland* [GC], no. 10593/08, § 224, ECHR 2012). Sub-paragraphs (a) to (f) of Article 5 § 1 contain an exhaustive list of permissible grounds on which persons may be

deprived of their liberty and no deprivation of liberty will be lawful unless it falls within one of those grounds (see *Saadi v. the United Kingdom* [GC], no. 13229/03, § 43, ECHR 2008). One of the exceptions, contained in sub-paragraph (f), permits the State to control the liberty of aliens in an immigration context.

131. In *Saadi* (cited above, §§ 64-66) the Grand Chamber interpreted for the first time the meaning of the first limb of Article 5 § 1 (f), namely, "to prevent his effecting an unauthorised entry into the country". It considered that until a State had "authorised" entry to the country, any entry was "unauthorised" and the detention of a person who wished to effect entry and who needed but did not yet have authorisation to do so, could be, without any distortion of language, to "prevent his effecting an unauthorised entry" (§ 65). However, detention had to be compatible with the overall purpose of Article 5, which was to safeguard the right to liberty and ensure that no-one should be dispossessed of his or her liberty in an arbitrary fashion (ibid., § 66).

132. The question as to when the first limb of Article 5 ceases to apply, because the individual has been granted formal authorisation to enter or stay, is largely dependent on national law (see *Suso Musa*, cited above, § 97).

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

134. To avoid being branded as arbitrary, detention under Article 5 § 1 (f) must be carried out in good faith; it must be closely connected to the ground of detention relied on by the Government; the place and conditions of detention should be appropriate, bearing in mind that "the measure is applicable not to those who have committed criminal offences but to aliens who, often fearing for their lives, have fled from their own country"; and the length of the detention should not exceed that reasonably required for the purpose pursued (ibid., § 74; see also *A. and Others v. the United Kingdom* [GC], no. 3455/05, § 164, ECHR 2009, and *Louled Massoud*, cited above, § 62).

(b) Application to the present case

135. The Court notes that both applicants have been detained for two days less than twelve months. It further notes that compatibility with the Convention of the applicants' detention for the first few days until they filed their asylum claim is not in dispute. The applicants are also ready to admit that initially, following their asylum claim, their detention was also justified under the first limb of Article 5 § 1 (f).

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

137. In so far as the applicants complained about the quality of the rules regulating the release from detention on ground of vulnerability procedure (paragraph 127), the Court considers that there is room for improvement. Nevertheless, given that the provisions mentioned above - which provide a lawful basis for immigration detention - do not exempt vulnerable individuals from detention, the legal framework regulating the procedure for release of vulnerable individuals is not subject to the same scrutiny.

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

139. The Court has already noted a series of odd practices on the part of the domestic authorities when dealing with immigrant arrivals and subsequent detentions and it expressed its reservations as to the Government's good faith in applying an across-the-board detention policy (save for specific vulnerable categories) (see *Suso Musa*, cited above § 100) - reservations which it maintains, particularly given that despite previous findings, the Government still fail to explain, in what way it is not an across-the board detention policy (with some exceptions).

140. As to whether the detention was closely connected to the ground of detention relied on. The Court notes that the purpose of the detention fell under the first limb of Article 5 § 1, namely to prevent an unauthorised entry, and in practice to allow for the applicants' asylum claims to be processed. Indeed the Court has no doubt that the applicants' detention at least in the first few months, was to enable the determination of their asylum claim, and thus to find out their identity and other relevant

information enabling the processing of the claim. The Court however notes that the applicants received a decision at first instance on their asylum claims within three months of them having applied for asylum. The subsequent nine months which they spent in detention were spent awaiting the outcome of the pending appeal against the decision rejecting their claim for asylum. The Court considers that the connection with the ground of detention becomes less evident, as months go by and after a first-instance decision has been issued, particularly because their identity should by then have been determined. Nevertheless, given the refusal decision, and the continued assessment of their asylum appeal to enable a determination as to whether the applicants could in fact enter the country, it cannot be said that such a period of detention was not connected to the ground relied on.

141. As to the place and conditions of detention, the Court notes that while improvements would be welcome, as held above (paragraph 98), in the circumstances of the present case the conditions of detention in Lyster Barracks did not amount to a violation of Article 3.

142. As regards the length of detention, the Court observes that the applicants were held in Lyster Barracks detention centre for a bit less than twelve months (August 2012 – 14 August 2013), they were released on the latter date even before a final decision on their asylum claims had been reached. The asylum proceedings were pending throughout the applicants' detention, and it has not been claimed that during that time the national authorities were not taking the necessary steps to establish the veracity and validity of the applicants' asylum claims. While it is true that the Court has already considered periods of three and six months' detention pending a determination of an asylum claim to be unreasonably lengthy, when coupled with inappropriate conditions (see, respectively, *Kanagaratnam v. Belgium*, no. 15297/09, §§ 94-95, 13 December 2011, and *Suso Musa*, cited above, § 102), in the absence of inappropriate conditions of detention a period of five months pending an asylum determination has not been considered unreasonable (see, for example, *Nassr Allah v. Latvia*, no. 66166/13, §§ 60-61, 21 July 2015).

143. While it is true that a period of nearly twelve months cannot but be considered lengthy, in the above-mentioned circumstances, and given the absence of inappropriate conditions of detention, the Court can accept that such a duration was overall reasonable for the purpose pursued, despite the lack of procedural safeguards (as shown by the finding of a violation of Article 5 § 4, at paragraph 119 above). Indeed, the Court reiterates that in the above-mentioned *Suso Musa* judgment, it called on the respondent State to envisage taking the necessary general measures to, *inter alia*, limit detention periods so that they remain connected to the ground of detention applicable in an immigration context (§ 123). It further notes that at the time of the present case, the Government's practice was also not to detain more

than twelve months, as opposed to the eighteen months which were applied in practice previously (compare *Louled Massoud*, cited above, § 16).

144. In conclusion, while the Court expresses reservations about the duration of such detention and the across the board detention policy, bearing in mind all the above, the Court considers that in the present case, the applicants' detention during the relevant period was in compliance with Article 5 § 1, and thus there has been no violation of that provision.

V. APPLICATION OF ARTICLE 41 OF THE CONVENTION

145. 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

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

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

148. The Court notes that it has only found a violation of Article 5 § 4 in that light it considers it equitable to award the applicants EUR 4,000 each in respect of non-pecuniary damage.

B. Costs and expenses

149. The applicants also claimed EUR 4,000 each for the costs and expenses incurred before the Court, representing 60 hours of legal work charged at an hourly rate of EUR 60, as well as clerical costs of EUR 400.

150. The Government submitted that such an award should not exceed EUR 2,000.

151. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the above criteria and the documents in its possession, as well as to the fact that most of the applicants' complaints have not been upheld, the Court considers it

reasonable to award the sum of EUR 2,000, jointly, covering costs for the proceedings before the Court.

C. Default interest

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

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Decides* to join the applications;

2. *Declares* the applications admissible;

3. *Holds* that there has been no violation of Article 3 of the Convention;

4. *Holds* that there has been no violation of Article 5 § 1 of the Convention;

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

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

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

Done in English, and notified in writing on 12 January 2016, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Françoise Elens-Passos	András Sajó
Registrar	President