



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

THIRD SECTION

**CASE OF ABOYA BOA JEAN v. MALTA**

*(Application no. 62676/16)*

JUDGMENT

STRASBOURG

2 April 2019

**FINAL**

**02/07/2019**

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



**In the case of Aboya Boa Jean v. Malta,**

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

Branko Lubarda, *President*,

Vincent A. De Gaetano,

Helen Keller,

Pere Pastor Vilanova,

Alena Poláčková,

Georgios A. Serghides,

Jolien Schukking, *judges*,

and Fatoş Aracı, *Deputy Section Registrar*,

Having deliberated in private on 12 March 2019,

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

## PROCEDURE

1. The case originated in an application (no. 62676/16) 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 a national of the Ivory Coast, Mr Serge Aboya Boa Jean (“the applicant”), on 27 October 2016.

2. The applicant was represented by Dr N. Falzon, a lawyer practising in Hamrun. The Maltese Government (“the Government”) were represented by their Agent, Dr P. Grech, Attorney General.

3. The applicant alleged that the deprivation of his liberty had been unlawful and arbitrary, thus in violation of Article 5 § 1 and that the remedy afforded to him to challenge his detention had not been speedy and effective as required by Article 5 § 4.

4. On 10 July 2017 notice of the application was given to the Government.

## THE FACTS

### I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1978 and was at the time of the introduction of the application detained at the Safi detention centre.

### **A. Background to the case**

6. On 10 September 2016 the applicant, a refugee from Ivory Coast who claimed to have previously obtained asylum in Armenia, left Russia and arrived in Malta by plane. Upon arrival he presented his documents (including a national passport) to the immigration authorities.

7. According to the applicant he immediately informed the authorities that he was a refugee from Ivory Coast and that he had fled the war in his country many years before. He claimed that he had reached Malta from Armenia, where he had lived as a refugee prior to his arrival in Malta. He also promptly confirmed his intention to seek asylum in Malta, due to his fear that Armenia would return him to Ivory Coast.

8. The applicant was found carrying false Italian identification documents and, according to the Government, when questioned, he informed the police that he had obtained the documents from a friend in Italy and that his intention was to travel to Italy by transiting via Malta. The applicant was also found to be in possession of a travel ticket to Italy.

9. The applicant was denied entry since according to the immigration authorities he was not in possession of the required documentation. On the same day he was taken to police headquarters where he was questioned. During questioning the applicant provided further information concerning his escape from war in Ivory Coast, his life in Armenia and the reasons why he felt he could no longer live there, reasons primarily linked to his skin colour and the lack of physical security. The police confiscated his documents.

10. On the same day, the police (immigration branch) issued a detention order in terms of the Immigration Act (Chapter 217 of the Laws of Malta) and Subsidiary Legislation 420.06 “Reception of Asylum Seekers Regulations” (hereinafter “the Reception Regulations” – see Relevant domestic law below) on the grounds that the elements on which the applicant’s application for international protection had been based could not be determined in the absence of detention, in particular due to the risk of absconding. He was informed that he had the right to appeal this decision before the Immigration Appeals Board (hereinafter “the Board”) within three days. He was further informed that the Board would automatically review this order within seven days from the date of its issuance, which could be extended by a further seven days; and that if he remained in detention a further review would occur every two months. He was informed that he was entitled to free legal assistance.

11. The applicant was accompanied to Safi Barracks detention centre, where he was detained.

12. On 20 September 2016 the applicant applied for international protection and was formally registered as an asylum-seeker.

## **B. Proceedings before the Board**

13. According to documentation submitted by the Government, on 30 September 2016, the applicant appeared before the Board accompanied by one of his lawyers (of choice), but the case was put off to the next board meeting to be held on 5 October 2016, since one of the applicant's representatives (of choice) was abroad. The applicant appears to contest the existence of this hearing and notes that the Government have not provided any proof of notification of such hearing or what went on. He however claims that even if it did occur his legal aid lawyer was not present as required by law.

14. On 5 October 2016 the Board convened in order to review the legality of the applicant's detention, in accordance with Regulation 6(3) of the Reception Regulations. The applicant was present with his legal representatives and was provided with an interpreter.

15. According to the applicant, during the hearing before the Board, in the presence of a representative of the Malta Police Force who explained the circumstances of the applicant's detention, the Board informed the applicant that it had not been able to comply with the deadline provided by the law for the review of his detention since on the date required by the Reception Regulations (namely seven working days from the issuing of the detention order) a Board member was attending a conference overseas and therefore he could not take part in the hearing. Furthermore, the Board stressed that since its members were merely part-time employees meeting once a week and lacking administrative support while being responsible for a vast array of immigration related appeals, it was simply unable to meet its legal obligation and determine the lawfulness of his detention on time.

16. During the hearing the applicant's representative repeatedly requested the Malta Police Force's representative and the chairperson of the Board to specify the grounds on which he was being detained. Both the Malta Police Force's representative and the Board's chairperson orally indicated "fear of absconding" as the primary reason for the applicant's detention.

17. The applicant's representative made written and oral submissions to the Board. He noted, in particular, that from the moment of his first contact with the Maltese authorities the applicant had provided consistent factual information about his identity, nationality, countries of transit, intention to seek asylum in Malta, migration/asylum status in third countries and reasons for flight from Ivory Coast. He had not made any attempt to conceal any information and had acted with honesty, openness and transparency towards the authorities. It followed that he had already presented to the authorities all the elements on which his application for international protection had been based, thus the legal basis on which the authorities had relied in order to justify his detention could not be held applicable to his case and the

interference with the applicant's liberty had not been provided by law. The applicant also claimed that his detention had been neither necessary nor proportionate. In his opinion the immigration police had failed to demonstrate that without the applicant's detention it would have been impossible for them to determine any elements on the basis of his asylum application.

18. On the same day the Board dismissed the applicant's complaints and confirmed the legality of his detention. The Board specified that: (i) the elements in question referred to the application for refugee status, which had not yet been determined; (ii) if the applicant left Malta he would be unable to provide the information (elements) required by the Commissioner for Refugees (REFCOM); (iii) the fact that the applicant had been found in possession of a ticket to go to Italy showed that his intention was not to remain in Malta; (iv) "with the fact that he was inadmissible in the first place because he had forged a document, there is no reason to believe that appellant will not abscond".

19. The Board requested the Principal Immigration Office (PIO) to enquire as to whether all elements had been clarified and given to REFCOM, and whether the applicant would have been given refugee status, in order to ensure that detention did not subsist for longer than was needed. If the period of detention continued because of the asylum proceedings, including an appeal, the PIO were to consider alternatives to detention particularly those listed in Regulation 6(8) of the Reception Regulations S.L. 420.06, as such detention would then no longer be reasonable.

### **C. Proceedings before the Court of Magistrates**

20. On 21 October 2016 the applicant applied to the Court of Magistrates relying on Article 409(A) of the Criminal Code to contest the lawfulness of his detention. He argued that there had been no individual assessment of the applicant's situation, and that it was not clear what elements were still required. He noted that a risk of absconding could not be examined on its own and that Regulation 1(6) of the Reception Regulations S.L. 420.06 could not be interpreted as meaning that detention could be prolonged throughout the entire proceedings.

21. It appears that the immigration police argued that the one fundamental element they expected the applicant to provide was a document confirming the statement that he was recognised as a refugee in Armenia.

22. On the same day the Court of Magistrates upheld the legality of the applicant's detention. The court found that the applicant was raising the same issues he had raised before the Board, and which had already been decided by it. The court agreed that the risk of absconding under Regulation 6(1) (b) could not be seen on its own but in the light of the whole Regulation. The Reception Regulations, L.S. 420.06, allowed the

detention of persons like the applicant - pending a decision on asylum - in order to establish the elements on which such application was based, when it would be difficult to do so in the absence of detention. During the hearing it transpired that further verifications were necessary and that the applicant was at risk of absconding, making the asylum determination impossible. It followed that the applicant's detention could not be considered unlawful.

#### **D. Subsequent happenings**

23. The applicant was released from immigrant detention on 8 November 2016, subject to reporting at the police station daily.

24. By a judgment of 19 January 2017, in accordance with his guilty plea, the applicant was found guilty of using a false passport. Although he was liable to imprisonment for a period of six months to two years, the court, in application of Section 22 of the Probation Act (Chapter 446 of the Laws of Malta) conditionally discharged the applicant for three years.

25. On an unspecified date in March 2017 the applicant's asylum application was rejected. The applicant appealed, which appeal reached the Secretary of the Refugee Appeal's Board on 21 March 2017.

## **II. RELEVANT DOMESTIC LAW AND PRACTICE**

### **A. The Immigration Act**

26. Immigration and asylum procedures are mainly regulated by the Immigration Act, Chapter 217 of the Laws of Malta and the Refugees Act, Chapter 420 of the Laws of Malta. The relevant articles of the Immigration Act, at issue in the present case, ("the Act"), in so far as relevant, read as follows:

#### **Article 5**

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

(2) Notwithstanding that he has landed or is in Malta with the leave of the Principal Immigration Officer or that he was granted a residence permit, a person shall, unless he is exempted under this Act from any of the following conditions or special rules applicable to him under the foregoing provisions of this Act, be a prohibited immigrant also -

(a) if he is unable to show that he has the means of supporting himself and his dependants (if any) or if he or any of his dependants is likely to become a charge on the public funds; or ..."

**Article 6**

“(1) Without prejudice to any rights arising from the preceding Parts, for the purposes of this Act, the Principal Immigration Officer may ...

(b) grant leave to land or leave to land and remain to any other person arriving in Malta, under such conditions and for such period as the Principal Immigration Officer may deem proper to establish;

...”

**Article 9**

“(1) Without prejudice to any regulations made under Part III of this Act, leave to land or to land and remain in Malta shall be signified either by a written permit delivered to, or by an appropriate endorsement on the passport of, the person concerned, but the conditions attached to such leave may be contained in a separate document delivered to such person.”

**Article 10**

“(1) Where leave to land is refused to any person arriving in Malta on an aircraft, such person may be placed temporarily on land and detained in some place approved by the Minister and notified by notice in the Gazette until the departure of such aircraft is imminent.

...

(3) Any person, while he is detained under sub-article (1) or (2), shall be deemed to be in legal custody and not to have landed.”

**Article 14**

“(1) If any person is considered by the Principal Immigration Officer to be liable to return as a prohibited immigrant under any of the provisions of article 5, the said Officer may issue a return decision against such person who shall have a right to appeal against such decision in accordance with the provisions of article 25A.

(2) If such a return decision is accompanied by a removal order, such person against whom such order is made, may be detained in custody until he is removed from Malta:

Provided that if the person in respect of whom a return decision and a removal order has been made is subject to criminal proceedings for a crime punishable with imprisonment or is serving a sentence of imprisonment, the Minister may give such directions as to whether the whole or part of the sentence is to be served before the return of such person from Malta, and in default of such directions, such person shall be removed after completion of the sentence, without prejudice to the provisions of any other law.

(3) Nothing in this article shall affect the obligation of any person who does not fulfil or who no longer fulfils the conditions of entry, residence or free movement to leave Malta voluntarily without delay.

(4) Removal of a person shall be to that person’s country of origin or to any other State to which he may be permitted entry, in particular under the relevant provisions of any applicable readmission agreement concluded by Malta and in accordance with international obligations to which Malta may be party:

Provided that, following the issue of a removal order by the Principal Immigration Officer in accordance with the provisions of this article, to any person considered as a prohibited immigrant under any of the provisions of article 5, if such person files an application for asylum in terms of the Refugees Act, all the effects of the removal order shall be suspended pending the final determination of the asylum application. Following the final rejection of the asylum application, the removal order along with its effects shall again come into force:

Provided that, notwithstanding that the effects of the removal order are suspended pending the final determination of the asylum application, the detention of such person shall continue until a final decision on detention is reached in terms of the regulations issued under the Refugees Act:

Provided further that, whenever a prohibited immigrant has filled in an application for asylum, the Principal Immigration Officer shall not be required to issue a return decision or a removal order.

(5) Nothing in this article shall preclude or prejudice the application of Maltese law on the right to asylum and the rights of refugees and of Malta's international obligations in this regard.... ”

27. Article 25A of the Act concerns the appeals and applications (lodged by virtue of the provisions of the Act or Regulations made thereunder, or by virtue of any other law) to be heard and determined by the Immigration Appeals Board (“the Board”). Article 25A as amended in 2015 reads, in so far as relevant, as follows:

“(5) Any person aggrieved by any decision of the competent authority under any regulations made under Part III, or in virtue of article 7 [residence permits], article 14 [removal orders] or article 15 [responsibility of carriers] may enter an appeal against such decision and the Board shall have jurisdiction to hear and determine such appeals.

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

(7) Any appeal has to be filed in the Registry of the Board within three working days from the decision subject to appeal:

Provided that the period applicable for the filing of an appeal from the refusal, annulment or revocation of a visa shall be of fifteen days.

(8) The decisions of the Board shall be final except with respect to points of law decided by the Board regarding decisions affecting persons as are mentioned in Part III, from which an appeal shall lie within ten days to the Court of Appeal (Inferior Jurisdiction). The Rule Making Board established under Article 29 of the Code of Organization and Civil Procedure may make rules governing any such appeal.

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

(10) The Board shall grant release from custody where the detention of a person is, taking into account all the circumstances of the case, not required or no longer required for the reasons set out in this Act or subsidiary legislation under this Act or under the Refugees Act, or where, in the case of a person detained with a view to being returned, there is no reasonable prospect of return within a reasonable time-frame.”

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

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

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

(12) A person who has been released under the provisions of sub-articles (9) to (11) may, where the Principal Immigration Officer is satisfied that there exists a reasonable prospect of deportation or that such person is not co-operating with the Principal Immigration Officer with respect to his repatriation to his country of origin or to another country which has accepted to receive him, and no proceedings under the Refugees Act are pending, be again taken into custody pending his removal from Malta.

(13) It shall be a condition of any release under sub-articles (9) to (12) that the person so released shall periodically (and in no case less often than once every week) report to the immigration authorities at such intervals as the Board may determine.”

## **B. The Criminal Code**

28. Article 409A of the Criminal Code reads as follows:

“409A. (1) Any person who alleges he is being unlawfully detained under the authority of the Police or of any other public authority not in connection with any offence with which he is charged or accused before a court may at any time apply to the Court of Magistrates, which shall have the same powers which that court has as a court of criminal inquiry, demanding his release from custody. Any such application shall be appointed for hearing with urgency and the application together with the date of the hearing shall be served on the same day of the application on the applicant and on the Commissioner of Police or on the public authority under whose authority the applicant is allegedly being unlawfully detained. The Commissioner of Police or public authority, as the case may be, may file a reply by not later than the day of the hearing.

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

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

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

### **C. Relevant subsidiary legislation**

#### *1. Subsidiary Legislation 420.06*

29. Regulation 6(1) (b), (3) (4) and (7) of the Reception of Asylum Seekers Regulations (Legal Notice 320 of 2005 as amended by Legal Notice 417 of 2015) provides as follows:

"(1) The Principal Immigration Officer may, without prejudice to any other law, order the detention of an applicant for one or more of these reasons, pursuant to an assessment of the case:

...

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

...

(3) The Immigration Appeals Board shall, with due regard to Article 25A (10) of the Immigration Act, review the lawfulness of detention after a period of seven (7) working days, which may be extended by another seven (7) working days by the Board for duly justified reasons.

(4) If the applicant is still detained, a review of the lawfulness of detention shall be held after periods of two months thereafter. Wherever the Immigration Appeals Board rules that detention is unlawful, the applicant shall be released immediately.

...

(7) Any person detained in accordance with these regulations shall, on the lapse of nine months, be released from detention if he is still an applicant.

(8) Where the Principal Immigration Officer does not order the detention of an applicant in accordance with sub-regulation (1), he may require the applicant:

(a) to report at a police station within specified timeframes;

(b) to reside at an assigned place.

For the purposes of this paragraph, the Principal Immigration Officer shall have the possibility to grant temporary permission to leave. The Principal Immigration Officer shall take the decisions individually, objectively and impartially and shall give reasons if the decisions are negative:

Provided that the applicant shall in no case require permission to keep appointments with authorities and courts if his appearance thereat is necessary:

Provided further that wherever the applicant is not required to reside at an assigned place, he shall be required to notify any change of address to the Principal Immigration Officer within not more than twenty-four hours;

(c) to deposit or surrender documents; or

(d) to place a one-time guarantee or surety, with the Principal Immigration Officer.

Such measures shall have a maximum duration of nine months:

Provided that, if the applicant concerned does not comply with conditions referred to in this sub-regulation, the Principal Immigration Officer may order the detention of such applicant in accordance with the terms and conditions prescribed in this subregulation.”

## *2. Subsidiary Legislation 420.07*

30. Regulations 9(3) and 16(2) of the Procedural Standards for Granting and Withdrawing International Protection Regulations (Legal Notice 416 of 2015) provides as follows:

### **Regulation 9**

“...(3) The applicant shall submit as soon as possible all elements needed to substantiate the application for international protection. Such elements shall consist of the applicant’s statements and all the documentation at the applicant’s disposal regarding the applicant’s age, background, including that of relevant relatives, identity, nationality, country and place of previous residence, previous applications for international protection, travel routes, travel documents and the reasons for applying for international protection....”

### **Regulation 16**

“...(2) Notwithstanding the provisions of any other law to the contrary, and except where a subsequent application will not be further examined pursuant to article 7A of the Act, or where an applicant is to be surrendered or extradited as appropriate to another Member State pursuant to obligations in accordance with a European Arrest Warrant or otherwise, or to a third country or to international criminal courts or tribunals, an applicant shall not be removed from Malta before his application is finally determined and such applicant shall be allowed to enter or remain in Malta pending a final decision of his application....”

## **D. The Passport Ordinance**

31. Section 5 of the Passports Ordinance, Chapter 61 of the Law of Malta, reads as follows:

“5. Any person who forges, alters or tampers with any passport or uses or has in his possession any passport which he knows to be forged, altered or tampered with, shall, on conviction, be liable to imprisonment for a term from six months to two years.”

## **E. The Probation Act**

32. Section 22 of the Probation Act, Chapter 446 of the Laws of Malta, in so far as relevant, reads as follows:

“(1) Where a court by which a person is convicted of an offence (not being an offence punishable only by a fine (*multa* or *ammenda*) and not being an offence which apart from an increase of punishment in view of continuity or previous convictions, is punishable with imprisonment for a term exceeding seven years) is of opinion that, having regard to the circumstances of the case, including the nature of the offence and the character of the offender, it is inexpedient to inflict punishment and that a probation order, a community service order or a combination order are not appropriate, the court may make an order discharging the offender absolutely, or, if the court thinks fit, discharging the offender subject to the condition that he commits no offence during such period, not exceeding three years from the date of the order, as may be specified therein ....”

## THE LAW

### I. PRELIMINARY OBJECTIONS

#### **A. The Government’s request to strike the application out of its list of cases / Abuse of petition**

##### *1. The parties’ submissions*

33. The Government submitted that the applicant’s failure to update the Court with information relative to his application (namely the fact that his asylum claim was eventually rejected and that he filed an appeal against that decision) meant that he was no longer interested in pursuing his application, which should therefore be struck out.

34. The applicant submitted that he was still interested in pursuing his application, which was unrelated to the process or outcome of his asylum application.

##### *2. The Court’s assessment*

35. In the present case there is no doubt that the applicant still wishes to pursue his application, as is evidenced by his submissions in reply. Accordingly, the Court rejects the Government’s request to strike the application out of its list of cases under Article 37 § 1 of the Convention, and continues the examination of the case.

36. In so far as the applicant’s failure to inform the Court about the process of his asylum application, following his release from detention, could be considered as an objection on the grounds of abuse of petition, the Court reiterates that any conduct of an applicant that is manifestly contrary

to the purpose of the right of individual application as provided for in the Convention and impedes the proper functioning of the Court or the proper conduct of the proceedings before it constitutes an abuse of the right of application. However, the rejection of an application on grounds of abuse of the right of application is an exceptional measure and has so far been applied only in a limited number of cases (see *Peñaranda Soto v. Malta*, no. 16680/14, § 34, 19 December 2017, and the examples cited therein).

37. The Court notes that the application lodged by the applicant concerns his detention, as an asylum seeker, from 10 September 2016 to 8 November 2016 and the remedies available against that detention during such period. The Court considers therefore that his status consequent to that period is irrelevant to the assessment of his complaints. It follows that there is no question of improper behaviour by the applicant for not having informed the Court about a matter unrelated to his complaints and any objection to this effect must be dismissed.

## **B. Non-exhaustion of domestic remedies**

### *1. The parties' submissions*

38. The Government submitted that the applicant had not exhausted domestic remedies. They referred to Regulation 6 of the Reception Regulations which provided for an automatic review procedure that applies to persons issued with a detention order and to Article 25A of the Immigration Act concerning the possibility to challenge the grounds for detention and the lawfulness of such detention, as well as constitutional redress proceedings, during which one could also request an interim order. They noted that the applicant had solely resorted to requesting a review of his detention without exhausting all the other remedies that exist at the national level.

39. The applicant submitted that he fully engaged with the automatic review procedure before the Board, and also undertook proceedings under Article 409A of the Criminal Code (which became potentially effective following the introduction of S.L. 420.06) which was examined on the merits. He considered that the other remedies relied on by the Government could not be considered effective for the reasons outlined below (see paragraphs 70 and 71 below).

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

40. The Court notes that it is not necessary at this stage to decide on whether the remedies relied on by the Government were effective remedies as required under Article 5 § 4 - a matter to be examined under the merits of that complaint. Nor is it necessary to join such an objection to the merits of that complaint, since it suffices to note that, in the present case, two of the

remedies invoked by the Government for the purposes of their non-exhaustion objection were in actual fact undertaken by the applicant. Bearing in mind that under the Court's established case-law, when a remedy has been pursued, the use of another remedy which has essentially the same objective is not required (see, *inter alia*, *Micallef v. Malta* [GC], no. 17056/06, § 58, ECHR 2009) the Court considers that the applicant has exhausted available remedies.

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

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

42. The applicant complained that the deprivation of his liberty had been unlawful and arbitrary, since he had been authorised entry and there had been no other reason for his detention. His detention was thus contrary to that provided in Article 5 § 1 of the Convention, which in so far as relevant, reads as follows:

“1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: ...

(b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation 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.”

43. The Government contested that argument.

### A. Admissibility

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 applicant

44. The applicant considered that his detention had been unlawful and arbitrary on two grounds. Firstly, relying on *Suso Musa v. Malta* (no. 42337/12, § 97, 23 July 2013) the applicant argued that Regulation 16(2) of the Procedural Standards Regulations authorised entry

and therefore the detention order had been contrary to the Convention. Secondly, the detention order had also been contrary to the domestic law in so far as the applicant had provided all the relevant documentation on his arrival, and he had not been requested to provide anything further. It was only one month later, during the proceedings he himself lodged, that the immigration police relied on the need for the certification concerning his refugee status in Armenia, even though such document had never been requested before from the applicant. Moreover, such a document was not required by Regulation 9(3) of the Procedural Standards Regulations. Furthermore, no assessment as to the necessity of the applicant's detention had been carried out by the immigration authorities, and their conclusion that such document would not be provided if the applicant was at liberty had no foundation. Thus, the decision to detain him had lacked the requirements of good faith and due diligence.

45. The applicant explained that Regulation 16(2) of the Procedural Standards Regulations, explicitly stated that asylum applicants "shall be allowed to enter or remain in Malta pending a final decision of his application". He noted that such Regulation came into force in 2015 and therefore provided the Government with the opportunity to clarify the questions raised by the Court in *Suso Musa* (cited above) and such law confirmed the right of an asylum seeker to enter and remain pending the outcome of an asylum application.

46. Without prejudice to the above, the applicant submitted that while the Government relied on Regulation 6 of the Reception Regulations read in light of the definition set out in Regulation 9(3) of the Procedural Standards Regulations, as a basis for his detention, the latter Regulation specified the submission of "documentation at the applicant's disposal". In that respect the applicant noted that he had submitted all the material in his possession upon his arrival, and the authorities' decision concerning the certificate he was required to present from Armenia was arbitrary in so far as i) it was unpredictable, ii) the request was only made one month later, and iii) the document was not required by law. In his view, the detention had not been in good faith as it had not examined his individual situation, including whether the applicant could procure the required document without necessitating detention.

47. Similarly, while domestic law provided that detention to determine the elements on which an asylum application is based must be linked to an identified risk of absconding, it did not specify what elements ought to be assessed to evaluate such risk, nor did it distinguish between asylum seekers and refugees.

48. As to the Government's reliance on Article 5 § 1 (b) of the Convention, the applicant submitted that such a detention ground was not mentioned in his detention order. Indeed the need to submit the relevant certificate was only raised a month after his detention. Thus, it could not be

said that he had been detained to allow the fulfilment of a specific and concrete obligation which came about a month later. However, even if that had been so, then the authorities would have had the obligation in terms of the Convention to assess whether the applicant's detention was truly necessary for such purpose.

**(b) The Government**

49. Relying on *Saadi v. the United Kingdom* ([GC], no. 13229/03, ECHR 2008), the Government submitted that the applicant's detention fell under Article 5 § 1 (f), namely to prevent effecting an unauthorised entry since asylum seekers who obtained temporary admission to enter a country remained unauthorised entrants susceptible to detention. Moreover, such detention needed not be necessary, as long as it was not arbitrary. They noted that in the present case, the detention facility had been specifically set up for this purpose and thus the good faith test had been fulfilled. The applicant had also been released once his detention was no longer lawful (necessary).

50. The Government noted that the detention order of 10 September 2016 specifically stated that it was being issued on the ground that the elements on which the applicant's application for international protection was based could not be determined in the absence of detention in particular due to the risk of absconding. This was in line with Regulation 6(1) (b) of the Reception Regulations (see Relevant domestic law above), and the order was issued, and detention undertaken, in accordance with a procedure prescribed by law (Regulation 6(3) of the Reception Regulations). They noted that in the applicant's case, given his allegations about his stay and status in Armenia, the documents requested were indeed relevant and required by law (Regulation 9(3) of the Procedural Standards Regulations). As to the risk of him absconding, the Government noted that the applicant had intended to go to Italy, via Malta, as shown by the flight tickets he carried with him.

51. The Government submitted that the applicant's detention was also covered by Article 5 § 1 (b) which provided for detention in order to secure the fulfilment of any obligation prescribed by law. Regulation 9(3) of the Procedural Standards Regulations established an obligation on the applicant to provide all relevant elements, including those related to country and place of previous residence, thus in the present case the applicant was required to submit certification attesting that he enjoyed refugee status in Armenia as claimed by him.

## 2. *The Court's assessment*

### (a) General principles

52. 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*, cited above, § 43). One of the exceptions, contained in sub-paragraph (f), permits the State to control the liberty of aliens in an immigration context (*ibid.*, § 64).

53. In *Saadi* (cited above, §§ 65-66) 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”. It did not accept that, as soon as an asylum seeker had surrendered himself to the immigration authorities, he was seeking to effect an “authorised” entry, with the result that detention could not be justified under the first limb of Article 5 § 1 (f) (§ 65). It considered that to interpret the first limb of Article 5 § 1 (f) as permitting detention only of a person who was shown to be trying to evade entry restrictions would be to place too narrow a construction on the terms of the provision and on the power of the State to exercise its undeniable right of control referred to above. Such an interpretation would, moreover, be inconsistent with Conclusion No. 44 of the Executive Committee of the United Nations High Commissioner for Refugees’ Programme, the UNHCR’s Guidelines and the Committee of Ministers’ Recommendation (see §§ 34-35 and § 37 of the *Saadi* judgment), all of which envisaged the detention of asylum seekers in certain circumstances, for example while identity checks were taking place or when elements on which the asylum claim was based had to be determined. 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).

54. 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 in issue, including the question whether “a procedure prescribed by law” has been followed, the Convention refers essentially to national law and lays

down the obligation to conform to the substantive and procedural rules of national law. Compliance with national law is not, however, sufficient: 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).

55. 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, *Louled Massoud v. Malta*, no. 24340/08, § 62, 27 July 2010; and *Suso Musa*, cited above, § 93).

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

56. In so far as the Government argued that the applicant’s detention was carried out in pursuance of the first limb of Article 5 § 1 (f), the Court makes the following considerations.

57. In *Suso Musa* (cited above) the Court held that where a State which has gone beyond its obligations in creating further rights or a more favourable position – a possibility open to it under Article 53 of the Convention – enacts legislation explicitly authorising the entry or stay of immigrants pending an asylum application, an ensuing detention for the purpose of preventing an unauthorised entry may raise an issue as to the lawfulness of detention under Article 5 § 1 (f). In that case, the Court was ready to accept that, despite some confusion and conflicting interpretation, the detention had a sufficiently clear legal basis, namely Article 5 in conjunction with Article 14 of the Immigration Act and that, given that it had not been established that the applicant had actually been granted formal authorisation to stay (the applicant had not been issued with the relevant written documentation under Article 9 of the Immigration Act) the detention in that case fell under the first limb of Article 5 § 1 (f).

58. Turning to the present case, the Court notes that the applicant was detained on the basis of Regulation 6(1) (b) of the Reception Regulations, read in the light of Regulation 9(3) of the Procedural Standards Regulations. The applicant claimed that such legislation was in contrast with that provided in Regulation 16(2) of the latter Regulations.

59. The Court notes that subsidiary legislation Nos. 420.06 and 420.07 (the Reception Regulations, and the Procedural Standards Regulations) were amended and entered into force, respectively, in November and December 2015, after the Court's judgment in *Suso Musa*. A fresh assessment of the domestic legislation is therefore necessary.

60. Having examined the legislation at issue, the Court considers that on the basis of similar considerations to the ones made in *Suso Musa*, the legal basis (ie. subsidiary legislation Nos. 420.06 and 420.07) was of sufficient quality. In particular, in the absence of any conflicting interpretations by the domestic authorities (see, *a contrario*, *Suso Musa*, cited above, § 98) Regulation 16(2) of the Procedural Standards Regulations reflects international standards to the effect that an asylum seeker may not be expelled pending an asylum claim without necessarily requiring that an individual be granted formal authorisation to stay or to enter the territory. It follows that it cannot be considered in contrast with other domestic law provisions, including Regulation 6(1) (b) of the Reception Regulations, which permitted detention pending an asylum claim.

61. In the present case it has not been established that the applicant had actually been granted formal authorisation to stay. Indeed no relevant documentation under Article 9 of the Immigration Act had been issued to him. The Court therefore accepts that his detention fell under the first limb of Article 5 § 1 (f). It remains to be determined whether such detention was arbitrary.

62. The Court notes that the applicant had been detained on the grounds that the elements on which the applicant's application for international protection had been based could not be determined in the absence of detention, in particular due to the risk of his absconding. In other words, the applicant was detained on the basis of the need to supply information to the authorities in order to examine his asylum application. However, the applicant complained that it was only a month later that specific information had been requested.

63. Firstly, the Court considers that from the submissions made in the present case, there is nothing to indicate that the formulation of Regulation 9(3) of the Procedural Standards Regulations (see paragraph 30 above) was not sufficiently precise. Secondly, in the Court's view, the evaluation made by the authorities upon the applicant's arrival cannot be considered unreasonable. It is noted that the applicant failed to specify what documents other than his national passport he had presented to the authorities on his arrival. However, it is not disputed that he had not supplied documentation confirming his allegation that he had already been granted refugee status in Armenia. It does not appear unreasonable for the domestic authorities to have expected such documentation to be submitted, nor is it unreasonable to consider that the applicant might abscond, given his clear intention to travel to Italy (see paragraph 8 above). It follows that the

applicant's detention was closely connected to the ground of detention relied on by the Government. Moreover, while it was true that the authorities only specified their request at a later date, the applicant had been immediately informed that not sufficient documentation had been provided (see paragraph 9 above). He could thus have provided any further documentation supporting his allegations concerning his "background" "country and place of previous residence" and/or "previous applications for international protection" (elements set out in Regulation 9(3) of the Procedural Standards Regulations) of his own motion at any time prior to the specific request regarding the alleged grant of refugee status in Armenia. The Court also considers that after the overhaul in domestic law and practice which ensued subsequent to the judgment of *Suso Musa*, there is no reason to consider that the detention in the present case was not carried out in good faith. Furthermore, the applicant has not complained that the place and conditions of detention were not appropriate. Lastly, the Court considers that the length of the detention (less than two months) cannot be considered as having exceeded that reasonably required for the purpose pursued.

64. The Court therefore finds that the applicant's detention was compliant with Article 5 § 1 (f), and in that light it does not need to consider whether it also fell under Article 5 § 1 (b) of the Convention.

65. There has accordingly been no violation of Article 5 § 1 of the Convention.

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

66. The applicant complained that the remedy afforded to him to challenge his detention had not been speedy and effective, as required by Article 5 § 4 of the Convention, which reads as follows:

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

67. The Government contested that argument.

#### A. Admissibility

68. 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 applicant**

69. The applicant complained that the remedy had not been speedy and effective, owing to the violation of the deadline provided by law in order for the Board to carry out an automatic mandatory review of his detention. Domestic law provided for a mandatory automatic review of the lawfulness of an asylum-seeker's detention within seven working days. In the present case, not only had the Board reviewed the detention only one month later, but they had also failed to convene in order to discuss whether there were any duly justified reasons to postpone the review. In addition, the applicant complained about the quality of the law in so far as he was unable to know when the next automatic review would be. They further considered that, contrary to that alleged by the Government, overseas travel of a board member could not be considered as a duly justified reason to postpone a hearing concerning a review of detention.

70. In reply to the Government's reliance on Article 25A of the Immigration Act the applicant submitted that such a remedy was not accessible since he could not read the content of the detention order, nor did such an order state that (as provided in law) free legal assistance was available for the first review of the applicant's detention. In the applicant's case legal aid services were provided to the applicant on 13 September but they only met in the presence of an interpreter on the following day, i.e. the last day to appeal the detention order before the Board by means of Article 25A (the limit for which is three working days), and they had not been provided with a copy of the detention order, as they were told the applicant should have his own.

71. The applicant considered that the constitutional remedy could not be considered effective for the reasons already denounced by the Court in repeated findings. In the absence of any change in such remedy no fresh assessment was warranted.

#### **(b) The Government**

72. Reiterating that Article 5 § 4 applied solely while an applicant was in detention, the Government referred to Article 409A of the Criminal Code, as well as to constitutional redress proceedings (including the possibility of requesting interim measures). Furthermore, the Government relied on Regulation 6(3) of the Reception Regulations which guaranteed a speedy review, i.e. a review within seven working days which could be extended only once for another seven working days. If a person is still in detention after two months, then another automatic review takes place two months after the initial review. According to the Government the speediness of this

review was evident from the circumstances of the present case, where the applicant was released within two months of his detention order. The Government also referred to constitutional redress proceedings claiming that the Court should examine whether any developments occurred domestically. In particular they relied on a court decree no. 50/2013 in the case of *Emmanuel Camilleri vs Inspector Louise Calleja and the Commissioner of Police*, whereby the courts of constitutional competence ordered, as an interim measure, the release of a person serving a prison sentence pending the outcome of the constitutional redress proceedings. Thus, the availability of interim measures resolved any issue of the length of such proceedings.

73. In connection with the applicant's allegations concerning the accessibility of proceedings before the Board, the Government submitted that on his arrival the applicant was given a detention order, and already on 10 September 2016 the applicant's lawyer of choice had made written submissions, while the expiration of the time-limit was 14 September 2016. While it was true that no interpreter was present at the hearing of the Board this meant that there was no need for one as the applicant was conversant with the English language.

## 2. The Court's assessment

### (a) General principles

74. The Court reiterates that Article 5 § 4 of the Convention, in guaranteeing to detained persons the right to institute proceedings to challenge the lawfulness of their detention, also proclaims their right, following the institution of such proceedings, to a speedy judicial decision concerning the lawfulness of detention and the ordering of its termination if it proves unlawful (see *Mooren v. Germany* [GC], no. 11364/03, § 106, 9 July 2009, *Idalov v. Russia* [GC], no. 5826/03, § 154, 22 May 2012 and *Ilmseher v. Germany* [GC], nos. 10211/12 and 27505/14, § 251, 4 December 2018).

75. The question of whether the right to a speedy decision has been respected must be determined in the light of the circumstances of each case and – as is the case for the “reasonable time” stipulation in Articles 5 § 3 and 6 § 1 of the Convention – including the complexity of the proceedings, their conduct by the domestic authorities and by the applicant and what was at stake for the latter (see *Mooren*, cited above, § 106, and *Ilmseher*, also cited above, § 252, and the references therein).

76. The forms of judicial review satisfying the requirements of Article 5 § 4 may vary from one domain to another, and will depend on the type of deprivation of liberty in issue. It is not excluded that a system of automatic periodic review of the lawfulness of detention by a court may ensure compliance with the requirements of Article 5 § 4 (see *Megyeri v. Germany*, 12 May 1992, § 22, Series A no. 237-A). However, long

intervals in the context of automatic periodic review may give rise to a violation of Article 5 § 4 (see, among others, *Herczegfalvy v. Austria*, 24 September 1992, § 77, Series A no. 244). The requirements of Article 5 § 4 as to what may be considered a “reasonable” interval in the context of periodic judicial review varies from one domain to another, depending on the type of deprivation of liberty in issue (see, for a summary of the court’s case-law in the context of detention for the purposes set out in sub-paragraphs (a), (c), (e) and (f) of Article 5 § 1, *Abdulkhakov v. Russia*, no. 14743/11, §§ 212-14, 2 October 2012).

77. In particular, in the context of detention pending deportation or extradition under Article 5 § 1 (f), the Court has previously noted that the factors affecting the lawfulness of detention pending deportation or extradition, such as, for example, factors relating to the progress of the extradition or deportation proceedings and the authorities’ diligence in the conduct of such proceedings, may change over the course of time (see *Rahmani and Dineva v. Bulgaria*, no. 20116/08, § 78, 10 May 2012). It therefore considered that shorter intervals between reviews are necessary for detention pending deportation or extradition as compared to detention after conviction by a competent court or detention of persons of unsound mind. Indeed, the factors affecting the lawfulness of detention are likely to evolve faster in situations where the proceedings are continuing (as in cases of detention with a view to extradition) than in situations where the proceedings have been closed after the establishment of all relevant circumstances (as in cases where a conviction has been pronounced by a competent court or compulsory psychiatric treatment ordered by a court on the basis of medical reports confirming the person’s dangerousness). At the same time, given the limited scope of the review of the lawfulness of detention required under Article 5 § 4 in extradition cases – which does not extend, for example, to the questions whether the detention was “necessary” for the prevention of crime or fleeing – the review need not be as frequent as in cases of deprivation of liberty under Article 5 § 1 (c) (see *Abdulkhakov*, cited above, § 214). Thus, the Court has, for example found, that intervals between periodic reviews of detention ranging from two to four months were compatible with the requirements of Article 5 § 4 (see *Soliyev v. Russia*, no. 62400/10, §§ 57-62, 5 June 2012, and *Khodzhamberdiyev v. Russia*, no. 64809/10, §§ 108-114, 5 June 2012). However, it is not the Court’s task to attempt to rule as to the maximum period of time between reviews which should automatically apply to a certain category of detainees. The question of whether periods comply with the requirement must be determined in the light of the circumstances of each case (see *Abdulkhakov*, cited above, § 215).

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

78. The Court is of the view that the same considerations set out in the preceding paragraph apply in the context of a remedy in connection with detention pending asylum proceedings which falls under the first limb of Article 5 § 1 (f), namely to prevent effecting an unauthorised entry. Indeed, as in the cases concerning detention pending extradition or deportation, the lawfulness of detention pending asylum proceedings is also affected by factors which may change over time, such as factors relating to the progress of the proceedings and the authorities' diligence in the conduct of such proceedings.

79. Turning to the circumstances of the present case the Court notes that the applicant was detained on 10 September 2016 and that on 30 September 2016 he appeared before the Board accompanied by one of his lawyers (of choice). The Court observes that his first review was meant to take place automatically within seven working days, that is, at the latest on 20 September (as 10 and 11 and 17 and 18 September were Saturdays and Sundays respectively i.e. non-working days). However, on 20 September no review took place as a Board member was abroad. As allowed by law (Regulation 6(3) of the Reception Regulations) the Board could have extended the period by another seven working days. Given that the 21 September was a public holiday i.e. a non-working day, the next review was to be held by the latest 30 September (24 and 25 September being a Saturday and Sunday i.e. non-working days) - date on which the Board actually convened. Therefore, the Court notes that, when the Board reconvened on 30 September they were still within the maximum domestic time-limit. On that day, given that his other lawyer of choice was abroad the case was put off to 5 October 2016. On the latter date the Board explained to the applicant why it had not been able to comply with the deadline provided by law for his first review; it considered his situation and gave reasons for its decision to continue the applicant's detention (see paragraph 18 above). At the same time it also gave instructions in connection with any future assessment (see paragraph 19 above), which according to domestic law should have taken place two months after the initial assessment. However, this never took place in the present case given that the applicant was released on 8 November 2016, a little more than a month after his initial review. Thus, the Court notes that the procedural irregularity in this case was that the applicant did not have an automatic review within the first seven working days and that the period for review was not properly extended. Nevertheless, the hearing took place within the maximum time-limit provided by law and it was only adjourned because one of the applicant's lawyers of choice was abroad.

80. The Court notes firstly that the applicant did not complain that the Board, because of its composition or the terms of appointment of its members, was not a court or judicial authority for the purposes of

Article 5 § 4 of the Convention. Therefore the Court will proceed on the assumption that it is (compare *Louled Massoud*, cited above, § 44). The Court further considers that while under Article 5 § 1 detention which is not compliant with domestic law induces a violation of that provision, a breach of time-limits for automatic reviews established in law does not necessarily amount to a violation of Article 5 § 4, if the proceedings by which the lawfulness of an applicant's detention were examined were nonetheless decided speedily. The Court notes that, in the present case, despite certain irregularities (the fact that the applicant did not have his initial automatic review within seven working days of the start of his detention as provided by domestic law, nor was this period extended in line with the regular practice) the time which elapsed until his first review, i.e. twenty running days - which due to a postponement became twenty-five running days - cannot be considered unreasonable.

81. Thus, in the circumstances of the present case the applicant had the lawfulness of his detention reviewed speedily by a court, within the meaning of Article 5 § 4 and it is therefore not necessary for the Court to assess the effectiveness of any other available remedies.

82. In conclusion, the Court finds that there has been no violation of Article 5 § 4.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the application admissible;
2. *Holds* that there has been no violation of Article 5 § 1 of the Convention;
3. *Holds* that there has been no violation of Article 5 § 4 of the Convention.

Done in English, and notified in writing on 2 April 2019, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Fatoş Aracı  
Deputy Registrar

Branko Lubarda  
President