



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

## SECOND SECTION

### CASE OF J.B. AND OTHERS v. MALTA

*(Application no. 1766/23)*

### JUDGMENT

Art 3 (substantive) • Conditions of detention in immigration centres of the first applicant, not considered a presumed minor, not sufficient to reach required Art 3 threshold • Cumulative conditions of detention of the remaining applicants, presumed minors, amounting to inhuman and degrading treatment  
Art 13 (+ Art 3) • Effective remedy • Constitutional redress proceedings ineffective for complaints of ongoing detention conditions  
Art 5 § 1 • Deprivation of liberty • Art 5 § 1 (f) • Prevent unauthorised entry into country • Applicants' initial immigration detention unlawful • Subsequent immigration detention of first applicant, ultimately found to be an adult, in compliance with Art 5 § 1 • Subsequent detention of remaining applicants, to allow processing of asylum claim with required prior age assessment, arbitrary  
Art 5 § 4 • Immigration Appeals Board (IAB) not an effective remedy for the review of the lawfulness of detention • Decisions not subject to subsequent control by a judicial body with "full jurisdiction" • Lack of proper, clear and transparent appointment procedure and selection criteria for members • Absence of guarantees against outside pressure and appearance of independence • In case-circumstances lack of automatic review and proceedings not decided speedily  
Art 46 • Respondent State required to take general measures to ensure enactment of legislation for conformity of the IAB with independence and impartiality requirements and to establish an effective domestic remedy for complaints about ongoing conditions of detention

Prepared by the Registry. Does not bind the Court.

STRASBOURG

22 October 2024

**FINAL**

**22/01/2025**

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



**In the case of J.B. and Others v. Malta,**

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

Arnfinn Bårdsen, *President*,

Jovan Ilievski,

Pauliine Koskelo,

Lorraine Schembri Orland,

Frédéric Krenc,

Davor Derenčinović,

Gediminas Sagatys, *judges*,

and Hasan Bakırcı, *Section Registrar*,

Having regard to:

the application (no. 1766/23) 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 six Bangladeshi nationals (“the applicants”), indicated in the appended table, on 10 January 2023;

the decision to give notice to the Maltese Government (“the Government”) of the complaints concerning Article 3, Article 5 §§ 1 and 4 and Article 13 in conjunction with Article 3 (conditions of detention) and to declare inadmissible the remainder of the application;

the decision not to have the applicants’ names disclosed;

the decision to give priority to the application (Rule 41 of the Rules of Court);

the decision to indicate interim measures to the respondent Government under Rule 39 of the Rules of Court;

the parties’ observations;

Having deliberated in private on 1 October 2024,

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

## INTRODUCTION

1. The case concerns various periods of detention of presumed minors and the effectiveness of remedies in relation to their detention and the conditions thereof.

## THE FACTS

2. The applicants were allegedly born in 2005 and 2006 respectively and were, at the time of the introduction of their application, held at Hal Far, Initial Reception Centre. The applicants were represented by Ms K. Gatt, a lawyer from Aditus Foundation, practising in Hamrun.

3. The Government were represented by their Agents, Dr C. Soler, State Advocate, and Dr J. D’Agostino senior lawyer at the Office of the State Advocate.

4. The facts of the case may be summarised as follows.

## I. BACKGROUND TO THE CASE

5. The applicants, who claimed to have been minors aged between 16 and 17 years at the time, arrived in Malta on 18 November 2022 with a group of around another forty persons, after being rescued at sea, and were held in Hal Far Initial Reception Centre (China House) (hereinafter ‘HIRC’). They were not provided with any document or explanation justifying their “detention”, which they considered was undertaken in inappropriate conditions. In particular, they noted that they had been detained with adults in rooms of sizes differing from 3 to 5 sq. m., where around four people were sleeping (in the absence of visitors or mobile phones no evidence to this effect could be submitted). During this period they had insufficient washrooms for the forty seven persons hosted and they were in a bad state of repair; limited to no access to an outdoor area; no access to a common area; no access to any prayer room or private space (the applicants did not recognise the photo submitted by the Government of the multipurpose room); limited access to a phone to make any calls (as it was often not working, and as noted by the Government required permission) including to lawyers; no access to any leisure or educational activities; no heating in any rooms; no appropriate clothing for winter; inadequate living conditions; limited to no access to drinkable water; no information provided in a language which they understood regarding their detention; and lack of adequate medical and psychosocial support. The Government disagreed with the applicants’ description of the conditions of detention, setting out their own (see paragraphs 40-41 below).

6. On 29 November 2022 they were medically cleared from carrying infectious diseases and on 30 November 2022, the applicants were issued with detention orders by the Principal Immigration Officer (‘PIO’) “in order to determine or verify their identity or nationality; in order to determine those elements on which the application for international protection is based which could not be obtained in the absence of detention, in particular when there is a risk of absconding”.

7. On 6 December 2022 the legality of their detention was confirmed by the Immigration Appeals Tribunal (‘IAB’) in one mass hearing, related to all the group that had arrived by boat on the same day (Regulation 6 of the Reception of Asylum Seekers Regulations, Subsidiary Legislation 420.06 of the Laws of Malta, see paragraph 27 below). One interpreter and four legal aid lawyers were present. During this hearing the PIO explained the circumstances of the group’s arrival, and that they had been detained to

determine their identity and because there was a risk of absconding, noting that they had not yet applied for asylum but were considered as having an automatic interest in doing so. The IAB noted that all the applicants in the present case except for the first applicant were minors and that a legal guardian was to be appointed. It advised all the other individuals to obtain an identity document. In view of the grounds put forward by the PIO the IAB considered the detention of the entirety of the group as being legal.

8. On 6 and 10 January 2023 the legal representatives in the present case had access to the applicants. The latter confirmed that they were minors and that they had brought the matter to the attention of the authorities. The first applicant declared that he had also informed the authorities multiple times including at the hearing of 6 December 2022 before the IAB. Thus, on the same days, the respective applicants were referred to the Agency for the Welfare of Asylum Seekers ('AWAS') (one of the applicants – M. K. – had been referred even earlier) by the applicants' legal representatives, and AWAS replied that they had not been made aware of all the applicants. The legal representatives thus referred AWAS to the decision of 6 December 2022.

9. On 6 January 2023 the legal representatives also filed a request for an urgent review of the first, fourth, fifth and sixth applicants' detention (noting that they had declared to be minors), which remained unanswered.

## II. PROCEEDINGS BEFORE THIS COURT

10. Following the applicants' request, on 11 January 2023, the Court (the duty judge) decided, in the interests of the parties and the proper conduct of the proceedings before it, to indicate to the Government of Malta, under Rule 39 of the Rules of Court, to ensure that the applicants' conditions are compatible with Article 3 of the Convention and with their status as unaccompanied minors.

11. On an unspecified date the applicants were transferred to Safi Detention Centre, Block A, Zone 4, where they were kept with other minors. According to the applicants the conditions in Safi were similar to those in the HIRC (see paragraph 5 above), apart from the size of the rooms, and the fact that in Zone 4 they had been allowed one hour daily outside in the yard. The Government disputed this (see paragraph 42 below).

## III. AGE ASSESSMENT PROCEEDINGS

12. Following an interview held a few days before, the applicants' age assessment procedure was concluded between 17 and 19 January 2023 considering that the applicants were adults. The applicants submitted that this procedure had been conducted hastily, without a holistic and multidisciplinary approach. They noted that once the relevant age-assessment

report was provided to the legal representatives, it transpired that in respect of M. K. the assessors had concluded that he was a minor, however, a bone test – to which the applicant claimed not to have knowingly consented to – showed that he was an eighteen-year-old male. The Government was of the view that the procedure had been thorough, and the interview detailed.

13. All the applicants appealed the decision concerning their age before the IAB.

14. A request to postpone the hearing (scheduled for 26 January 2023) on the grounds that the representatives had had no access to the applicants, who were in detention, nor to the remaining age-assessment reports, was refused. Nevertheless, on the same day the IAB in its formation of Division II adjourned the case, it being the same formation which had decided on the legality of the applicants' detention.

15. The appeal procedure was only scheduled in respect of the first applicant, and, upon inquiry, the applicants' representatives were told that detention service officers had informed the IAB that the remaining applicants wanted to withdraw their appeals. The IAB had taken their word for it without consulting with the legal representatives and irrespective of the fact that detention officers had no authority to speak for the applicants. The applicants subsequently confirmed, to their representatives, their wish to appeal. However, at the hearing of 20 February 2023, the IAB forwarded, to the legal representatives, declarations of adulthood signed by the first, third and sixth applicants. The legal representatives noted that the declarations had been signed in their absence and in the absence of an interpreter. The appeal procedure was therefore reinstated.

16. The remaining age-assessment reports were sent to the legal representatives on 22 February 2023 and the relevant vulnerability assessment reports (dated 28 February in respect of the third applicant and 2/3 March 2023 in respect of the remaining applicants) were sent to their representatives on 6 and 20 March 2023 respectively when the respective hearings took place. The reports showed that the first applicant had "significantly elevated" anxiety, depression, and post-traumatic stress disorder ('PTSD') as a consequence of his journey, he was referred for counselling and to the medical team. Similar conclusions were reached in the reports concerning the remaining applicants who had "significantly elevated" or "extremely high" levels of anxiety, depression and acute stress and PTSD, and the second, third and sixth applicants also had suicidal thoughts.

17. As a result, given that Regulation 14(3) of S.L. 420.06<sup>1</sup> provided that "whenever the vulnerability of an applicant is ascertained, no detention order shall be issued or, if such an order has already been issued, it shall be revoked with immediate effect" a request to the PIO to release all the applicants due to their vulnerability was submitted on 23 April 2023 and reiterated on

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<sup>1</sup> Applicable at the time of the present case but repealed by Legal Notice No. 87 of 2024

28 April 2023 but no written reply ensued. It appears that in May the PIO verbally informed the applicants' representatives that no alternatives to detention will be considered in view of updated reports dated 27 April 2023 which were sent to the representatives in May 2023. The reports did not reiterate the previous findings (see the preceding paragraph), the first applicant was doing well both physically and mentally and was followed by counselling services, the remaining applicants also had no serious physical or mental issues but remained anxious and had difficulty in detention.

18. By decisions of 16 and 22 May 2023 the IAB rejected the first applicant's appeal declaring him to be an adult as he had been carrying his passport on his arrival (indicating 2002 as his year of birth), a passport which was verified and authenticated as being genuine, and which clearly showed that he was an adult, but upheld all the other appeals, confirming the remaining applicants' minority age. In so far as relevant to the applicants' argumentation, in this respect, the decisions read as follows (original language and emphasis by the IAB):

"... In the circumstances of such direction, this Board finds it hard to believe that if an illegal immigrant actually claimed and alleged [that] he was a minor, that the Board would have ignored him and that the probability is that the statement that detention was legal was a simple *lapsus* due to the fact that there were so many alleged illegal immigrants being heard on that same day. Moreover, the Board also notes that three lawyers were present for this sitting as well as the interpreter, so it was definitively facilitated and the immigrants had all the assistance that they required. It was in fact one month after of the review of the sitting of the legality of detention that the present applicant's lawyer emailed AWAS (Doc. 3) and informed them about the claim that the appellant is a minor. The Board is certain that all immigrants were offered legal assistance before the previous Board and in fact, as already stated, three lawyers were present at the sitting.

... This Board, whilst appreciating the report, Doc. 4, presented to the Malta Government on the visit to Malta carried out by the European Commission for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment from the 17-22 September 2020 acknowledges also the significant challenges the Maltese authorities are facing and continue to face on a daily basis with large number of illegal immigrants trying to enter Malta. Of course, this Board fully believes that this problem is t[o] be addressed and requires **A COORDINATED EUROPEAN APPROACH AND SUPPORT FROM THE EU AND ITS MEMBER STATES. ...**"

19. On 16 May 2023 the first applicant was transferred to another part of the Safi detention center with adults, and on 19 May 2023 the third, fourth, fifth and sixth applicants were released and accommodated in an open center for minors. The second applicant was released sometime after.

#### IV. FURTHER CIRCUMSTANCES

20. The applicants alleged that they had been harassed while in detention because of the procedures they had undertaken at the domestic and international level. The applicants' legal representatives reported the matter,

in relation to a group of Bangladeshi minors (without mentioning the applicants' names) to the Detention authorities, the Director of Child Protection Services, the Commissioner for Children, the Monitoring Board for Detained Persons and AWAS, asking them to investigate the situation. The Government considered that the allegation was unfounded, noting that the applicants had not reported the matter to the Police. The applicants' explained that they did not do so for fear of reprisal, as this would have required the disclosure of their names while they were still in detention.

21. The first applicant's application for international protection was rejected on 12 July 2023, confirmed on appeal on 17 July 2023. Having been issued with a return decision and removal order on 27 July 2023 he left Malta on 22 August 2023.

22. According to information submitted by the Government, the second, third, fifth and sixth applicants were reported missing on different dates following 17 June 2023.

23. On 9 October 2023, following the Court's request the legal representative submitted evidence indicating that they were still in contact with the applicants.

## RELEVANT LEGAL FRAMEWORK

### I. RELEVANT DOMESTIC LAW

#### A. The Criminal Code

24. Section 409A of the Criminal Code, reads as follows:

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

(2) On the day appointed for the hearing of the application the court shall summarily hear the applicant and the respondents and any relevant evidence produced by them in support of their submissions and on the reasons and circumstances militating in favour 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, access by electronic means to the scanned record of the proceedings, including a scanned 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 (2) working days from receipt of the access by electronic means of the scanned 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."

## **B. The Immigration Act**

25. In so far as relevant, the provisions of the Immigration Act, Chapter 217 of the Laws of Malta, 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; ...

(e) if he contravenes any of the provisions of this Act or of any regulations made thereunder; or

(f) if he does not comply or ceases to comply with any of the conditions, including an implied condition, under which he was granted leave to land or to land and remain in Malta or was granted a residence permit; or

(g) if any circumstance which determined the granting of leave to land or to land and remain in Malta or the extension of such leave or the granting of a residence permit ceases to exist; ..."

### **Article 17**

"Notwithstanding any other law to the contrary, no return decision or removal order shall be obstructed nor shall the implementation of any such return decision or removal order be delayed by means of any warrant issued under the Code of Organization and Civil Procedure:

Provided that this article shall not apply to orders issued by the Constitutional Court."

### **Article 25A**

"(1) (a) There shall be a board, to be known as the Immigration Appeals Board, hereinafter referred to as the Board consisting of a lawyer who shall preside, a person

versed in immigration matters and another person, each of whom shall be appointed by the President acting on the advice of the Minister:

Provided that the Minister may by regulations prescribe that the Board shall consist of more than one division each composed of a Chairman and two other members as aforesaid.

(b) The Minister may make regulations to regulate the distribution by types of appeals or applications amongst the divisions of the Board.

(c) The Board shall have jurisdiction to hear and determine appeals or applications in virtue of the provisions of this Act or regulations made thereunder or in virtue of any other law.

(2) A member of the board shall be disqualified from hearing an appeal in such circumstances as would disqualify a judge in terms of Sub-Title II of Title II of Book Third of the Code of Organization and Civil Procedure; and in any such case either the member shall be substituted by another person appointed for the purpose by the President acting on the advice of the Minister, or the appeal, when there is more than one division of the Board in office, may be referred by order of the Board from one division of the Board to another.

(3) The members of the Board shall hold office for a period of three years, and shall be eligible for re-appointment.

(4) A member of the Board may be removed from office by the President acting on the advice of the Prime Minister, on grounds of gross negligence, conflict of interest, incompetence, or acts or omissions unbecoming a member of the Board.

(5) Any person aggrieved by any decision of the competent authority under any regulations made under Part III, or in virtue of article 7, article 14 or article 15 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.

(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<sup>2</sup>, 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 deportation order or return decision and removal order to be released from custody pending the determination of any application under the International Protection Act or otherwise pending their deportation in accordance with the following subarticle 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

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<sup>2</sup> Concerning citizens of the European Union and persons lawfully in the territory of any State which is bound by a Border Agreement

International Protection 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 International Protection 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.

...

(13) It shall be a condition of any release under subarticles (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.”

### **C. International Protection Act**

26. Article 2 of the International Protection Act, Chapter 420 of the Laws of Malta, in so far as relevant reads as follows:

“... "application for international protection" means a request made by a third country national or a stateless person which can be understood as a request for international protection unless the third country national explicitly requests another kind of protection outside the scope of this Act that can be applied for separately; ...”

27. The relevant provisions of the Reception of Asylum Seekers Regulations, Subsidiary Legislation 420.06 (hereinafter ‘the Regulations of S.L. 420.06’) in so far as relevant, read as follows:

#### **Regulation 2**

“... “unaccompanied minors” means persons below the age of eighteen who arrive in Malta unaccompanied by an adult responsible for them whether by law or by custom and for as long as they are not effectively taken into the care of such a person; it includes minors who are left unaccompanied after they have entered Malta.”

#### **Regulation 3**

“(1) These regulations shall apply to all third country nationals and stateless persons who make an application for asylum in Malta as long as they are allowed to remain in Malta as asylum seekers, as well as to family members, if they are covered by such application for asylum according to the Maltese law.”

#### **Regulation 6**

“(1) Without prejudice to any other law, the Principal Immigration Officer may, when it proves necessary and if other less coercive measures cannot be applied effectively, order the detention of an applicant for one or more of these reasons, pursuant to an individual assessment of the case:

(a) in order to determine or verify his identity or nationality;

(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;

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

(d) when the applicant is detained subject to a return procedure under the Common Standards and Procedures for Returning Illegally Staying Third-Country Nationals Regulations, in order to prepare the return or carry out the removal process, and the Principal Immigration Officer can substantiate, on the basis of objective criteria, including that the applicant already had the opportunity to access the asylum procedure, that there are reasonable grounds to believe that the applicant is making the application for international protection merely in order to delay or frustrate the enforcement of the return decision;

(e) when protection of national security or public order so require; or

(f) in accordance with Article 28 of Regulation (EU) No604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person: ...

(2) A detention order issued by the Principal Immigration Officer in writing, in a language which the applicant is reasonably supposed to understand, shall state the reason or reasons on which it is based:

Provided that wherever the Principal Immigration Officer issues such a detention order he shall also inform the applicant of procedures to challenge detention and obtain free legal assistance and representation.

(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.

(5) An applicant shall be provided with free legal assistance and representation during the review of the lawfulness of his detention in accordance with subregulation (3). Free legal assistance and representation entails preparation of procedural documents and participation in any hearing before the Immigration Appeals Board.

...

(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.

...

(9) An applicant shall not be detained for the sole reason that he is an applicant for international protection."

### **Regulation 6A**

“(1) Whenever an applicant is detained in accordance with regulation 6, he shall be detained in a specialised detention facility, which facility shall not be utilised as a place of detention for sentenced persons. In the eventuality that an applicant has to be detained in a facility for the detention of sentenced persons he shall be kept separate from inmates who are not detained pursuant to regulation 6 and the detention conditions provided for in these regulations shall apply:

Provided that minors shall never be detained in a facility utilised as a place of detention for sentenced persons.

(2) Applicants detained in a specialised detention facility in accordance with subregulation (1) shall, insofar as possible, be kept separate from third-country nationals who have not filed an application for international protection.

(3) Applicants in detention shall have access to open-air spaces.

(4) Representatives of the United Nations High Commissioner for Refugees (UNHCR) shall be given the possibility to communicate with and to visit applicants in detention in conditions that respect privacy.

(5) Legal advisors, counsellors, representatives of relevant non-governmental organisations and family members of detainees shall be given the possibility to communicate with and visit applicants in detention in conditions that respect privacy, in accordance with rules and conditions that may be laid down in legislation regulating detention facilities:

Provided that specialised detention facilities or facilities for the detention of sentenced persons may provide for limitations to access where necessary for purposes of administrative management or the upkeep of security and public order, as long as access is not severely restricted or rendered impossible.

(6) The management of specialised detention facilities or facilities for the detention of sentenced persons shall systematically provide to applicants in detention information concerning the rules of the facility, their rights and their obligations in a language in which they understand or are reasonably supposed to understand:

Provided that temporary derogations under this regulation may be authorised only in duly justified cases and for a reasonably short period of time, in the event that the applicant is detained at a border post or in a transit zone. ...”

### **Regulation 11**

“(1) The authorities responsible for the management of reception centres shall ensure that material reception conditions are available to applicants when they make their application for asylum.

(2) Applicants shall be provided with emergency health care and essential treatment of illness and serious mental disorders. Medical and other assistance shall be provided to applicants who have special reception needs, including mental health care.

(3) The material reception conditions shall be such as to ensure a standard of living adequate for the health of applicants and capable of ensuring their subsistence; the authorities referred to in sub-regulation (1) shall moreover ensure that that standard of living is met in the specific situation of persons who have special needs, in accordance with regulation 14, as well as in relation to the situation of persons who are in detention.”

**Regulation 12**

“(1) Where accommodation is provided in kind, it should take one or a combination of the following forms:

- (a) premises used for the purpose of accommodating applicants during the examination of an application for asylum lodged at the moment of entry into Malta;
- (b) accommodation centres which guarantee an adequate standard of living;
- (c) other premises adapted for accommodating applicants:

Provided that, when accommodating applicants, due regard shall be given to gender and age-specific concerns, as well as the situation of vulnerable persons ...”

**Regulation 14**

“(1) (a) In the implementation of the provisions relating to material reception conditions and health care, including mental health, account shall be taken of the specific situation of vulnerable persons who shall include minors, unaccompanied minors, disabled people, elderly people, pregnant women, single parents with minor children, victims of human trafficking, persons with serious illnesses, persons with mental disorders and persons who have been subjected to torture, rape or other serious forms or psychological, physical or sexual violence, such as victims of female genital mutilation, found to have special needs after an individual evaluation of their situation:

For the purposes of this regulation, the entity for the welfare of asylum seekers shall assess in conjunction with other authorities as necessary, whether the applicant is an applicant with special reception needs and shall also indicate the nature of such needs. This assessment shall be initiated within a reasonable period of time after an application for international protection has been submitted.

(b) The entity for the welfare of asylum seekers shall also ensure that support is being provided to applicants with special reception needs, taking into account their special reception needs throughout the duration of the asylum procedure, whilst conducting appropriate monitoring of their situation.

(c) Minors who have been victims of any form of abuse, neglect, exploitation, torture or cruel, inhuman and degrading treatment or who have suffered from armed conflicts shall be given access to pertinent rehabilitation services in terms of the Victims of Crime Act, further to being provided with the required mental healthcare. For the purposes of this provision an evaluation by the entity responsible for the welfare of asylum seekers, carried out in conjunction with other authorities as necessary shall be conducted as soon as practicably possible:

Provided that applicants identified as minors shall not be detained, except as a measure of last resort: Provided further that applicants who claim to be minors shall not be detained, except as a measure of last resort, unless the claim is evidently and manifestly unfounded.

(2) Whenever the vulnerability of an applicant becomes apparent at a later stage, assistance and support shall be provided from that point onwards, pursuant to a reassessment of the case.

(3) Repealed by Legal Notice 87 of 2024. [content applicable at the time of the present case has not been submitted]

(4) In the implementation of the provisions of these regulations, where these refer to minors, the best interests of the child shall constitute a primary consideration. When

considering the best interest of the child due regard shall be taken to the possibilities of family reunification, the minor's general well-being and social development, safety and security considerations, and the views of the minor in accordance with his age and maturity.

(5) Minor applicants shall have access to leisure activity, including play and recreational activity appropriate to their age, and to open air activity whenever accommodated in accordance with regulation 12.

(6) The entity responsible for the welfare of asylum seekers shall, with the assistance of international organisations as necessary, initiate procedures to trace the family members of applicants who are unaccompanied minors. Whenever the circulation of data may place family members in jeopardy, the collection, processing and circulation of data shall be kept confidential."

#### **Regulation 15**

"(1) The entity for the welfare of asylum seekers shall as soon as possible take measures to ensure that the unaccompanied minor is represented and assisted by a representative and the provisions of regulation 18 of the Procedural Standards for Granting and Withdrawing International Protection Regulations regarding unaccompanied minors shall apply.

(2) An unaccompanied minor shall be accommodated in centres specialised in accommodation for minors in accordance with the provisions of regulation 18 of the Procedural Standards for Granting and Withdrawing International Protection Regulations.

(3) An unaccompanied minor aged sixteen years or over maybe placed in accommodation centres for adult asylum seeker[s]. ..."

#### **Regulation 16**

"(1) Applicants who feel aggrieved by a decision taken in pursuance to the provisions of these regulations and by a decision in relation to age assessment in accordance with regulation 17 of the Procedural Standards in Examining Applications for International Protection Regulations, shall be entitled to an appeal to the Immigration Appeals Board in accordance with the provisions laid down in the Immigration Act:

Provided that applicants who lack sufficient resources to appeal from a decision, are entitled to free legal assistance and representation.

(2) Free legal assistance and representation shall entail the preparation of the required procedural documents and participation in the hearing before the Immigration Appeals Board."

28. In so far as relevant, the provisions of the Procedural Standards for Granting and Withdrawing International Protection Regulations, Subsidiary Legislation 420.07, reads 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 17**

“(1) A medical examination to determine the age of unaccompanied minors within the framework of any possible application for international protection may be carried out. Such medical examination shall be:

- (a) conducted in a language which he understands or is reasonably supposed to understand;
- (b) performed with full respect for the individual’s dignity;
- (c) the least invasive possible; and
- (d) carried out by qualified medical professionals allowing to the extent possible, for a reliable result.

(2) For the purpose of this regulation, the relevant authorities shall ensure that:

(a) unaccompanied minors are informed prior to the examination of their application for international protection, and in a language they understand or are reasonably supposed to understand, of the possibility that their age may be determined by medical examination. This shall include information on the method of examination and the possible consequences of the result of the medical examination for the examination of the application for international protection, as well as the consequences of refusal on the part of the unaccompanied minor to undergo the medical examination which may include the rejection of the application;

(b) unaccompanied minors and, or their representatives consent to a medical examination being carried out to determine the age of the minors concerned;

(c) the decision to reject an application by an unaccompanied minor who refused to undergo this medical examination has not be[en] based solely on that refusal:

Provided that an unaccompanied minor’s refusal to undergo such a medical examination shall not prevent the determining authority from taking a decision on the application for international protection, and that the best interests of the minor shall be a primary consideration in any such decision.”

## **II. RELEVANT MATERIAL**

29. The relevant parts of 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 17 to 22 September 2020, published in March 2021<sup>3</sup>, as well as those of the report of 15 February 2022 by the Council of Europe Commissioner for Human Rights following her visit to Malta from 11 to 16 October 2021 (CommDH(2022)1) are set out in *A.D. v. Malta* (no. 12427/22, §§ 64-65, 17 October 2023).

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<sup>3</sup> <https://rm.coe.int/1680a1b877> (last accessed October 2024)



30. A delegation of the Council of Europe's CPT carried out a further visit to Malta from 26 September to 5 October 2023, however the Report in relation to that visit has not yet been published.

31. The relevant international material concerning minority and age assessment is set out in *A.D. v. Malta* (cited above, §§ 66-71).

## THE LAW

### I. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

32. The applicants complained about the conditions of their detention in the HIRC, as well as in the Safi Detention Centre where they claimed to have been subjected to threats, violence and harassment by other detainees and detention officials, contrary to that provided in Article 3 of the Convention, which reads as follows:

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

#### A. Admissibility

33. The Government submitted that the applicants had failed to exhaust domestic remedies, namely constitutional redress proceedings, reiterating the submissions made in previous cases (see most recently *A.D. v. Malta*, no. 12427/22, §§ 79-80, 17 October 2023) and referring to a further case (*Repubblika vs the State Advocate, Rik. 472/2022*, instituted on 12 September 2022, and decided at first instance on 20 January 2023 and on appeal on 31 May 2023).

34. The applicants relied on the Court's well-established case-law in this field. In addition, they noted that cases relied on by the Government which were nonetheless lengthy were incomparable to the present case.

35. The Court notes that, in substance, the Government's submissions do not go further than those submitted in the recent cases of *A.D. v. Malta*, cited above, *Fenech v. Malta* (no. 19090/20, § 35, 1 March 2022) and *Feilazoo v. Malta* (no. 6865/19, § 48, 11 March 2021) in relation to the speediness of the constitutional redress proceedings for the purposes of Article 3 and *S.H. v. Malta* (no. 37241/21, § 48, 20 December 2022) in relation to the possibility of applying interim measures. In all these cases the Court rejected the Government's non-exhaustion objection, which is nonetheless being reiterated in the present case. The Court finds no reason to alter the conclusions already reached in previous cases against Malta, it thus rejects the Government's objection.

36. The Court further considers that this complaint is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. It must therefore be declared admissible.

## **B. Merits**

### *1. The parties' submissions*

#### **(a) The applicants**

37. The applicants complained that they were detained for almost two months (18 November 2022 until approximately 13 January 2023) in the HIRC in inhuman and degrading conditions (see for details paragraph 5 above). The applicants noted that their conditions of detention in the HIRC, were similar to the conditions described by the CPT in March 2021 (see paragraph 29 above). Those conditions were exacerbated by the applicants' vulnerabilities relating in particular to their young age. Contrary to what was alleged by the Government, they submitted that no further clothing for the winter had been provided to the applicants, nor any games or books.

38. As to their detention in Block A, Zone 4, in Safi Detention Centre (with other minors) they considered that this had been in breach of international standards on the rights of child as established by the United Convention on the Rights of the Child (CRC) and regional courts since it was imposed in breach of the best interest of the child principle, also having a detrimental impact on their mental and physical health. The conditions were similar to those in the HIRC, apart from the size of the rooms, and the fact that in Zone 4 they had been allowed one hour daily outside in the yard. The applicants submitted that, although similar, the photos supplied by the Government were not of the place they were held in. They added that no child-specific activities had been organised and no specialist on child services had been available on site to ensure their well-being. The applicants also submitted that there had been instances of verbal harassment towards them (and physical harassment towards others) and apparent attempts to impede justice by Detention Services officers, in particular, the applicants had been pressured to sign documents the content of which they could not understand in the absence of an interpreter (see paragraph 15 above). In the absence of their mobile phones, which had been confiscated, the applicants argued that it was impossible to provide the evidence of harassment requested by the Government, reports had however been filed concerning this behaviour (see paragraph 20 above).

39. These periods of detention had had a negative toll on the applicants, who had already been through traumatic experiences, as shown in their psychological assessments (see paragraph 16 *in fine* above) and the cumulative treatment amounted to a breach of Article 3.

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

40. The Government admitted that in the initial part of their stay the applicants had been placed with the rest of their group including adults (as allowed by domestic law for minors aged sixteen and seventeen). However,

the Government challenged the unsubstantiated allegation concerning the size of the rooms as indicated by the applicants, stating that the rooms were on average 14 sq. m. large and that there were six toilets and seven showers.

41. The Government further submitted that, on admission to the HIRC, the applicants had been given all the necessary basic items<sup>4</sup> and on 14 December 2022, all residents were provided with two additional vests for the winter. Without specific reference to the present case, the Government explained that “if the residents feel cold, they may at any time request further blankets. Furthermore, a television is available with an open package including movies and sports. The residents have regulated, direct access to a yard, with each resident being afforded at least 1.5 hours of outdoor access every day. A phone was also available where residents could receive an unlimited number of phone calls, and they could at any time make a request to officers to make external phone calls. Residents were also provided with playing cards, board games and copies of the Quran”. According to the Government, the applicants also had access to a multipurpose room (photo submitted), which could be used for praying. The same room had a tap for cold water and a tap for hot potable water to make tea or coffee. The Government disputed that the applicants could receive no visitors and invited the applicants to list the people who attempted to visit them and were refused “with relative contact details, for Government to verify whether they are being truthful in their assertions”. The Government submitted photos of HIRC.

42. As to the Safi Detention Centre the Government disputed the applicant’s description of the conditions of accommodation in Block A, Zone 4. They further noted that at this location the bedrooms were larger and had four windows, as they hosted more individuals (photos submitted). They further noted that the applicants had not provided evidence concerning their claims of harassment which had not been reported, and that even assuming the occurrences set out at paragraph 15 above had to amount to an impediment of justice, it nonetheless did not amount to treatment contrary to Article 3.

43. Finally, the Government considered that any anxiety or other negative feelings that the applicants may have experienced had not stemmed from their treatment in detention – where they had been given all the necessities and had not been tortured – but rather their ordeal in their voyage, their separation from their families, and the fear of reprisal on the part of smugglers etc.

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<sup>4</sup> Toilet Paper; One new t-shirt; One new pair of shorts; One new tracksuit; Two pairs of new underwear; Two pairs of new socks; One bed sheet; One blanket suitable for a double bed; One new pillow and pillowcase; One towel; One toothpaste and toothbrush; A bottle of body soap and clothes washing powder. Once it had been confirmed, through the medical testing, that the applicants were not suffering from scabies, they were provided with another set of clothing (t-shirt, shorts, socks, underwear, and tracksuit).

## 2. *The Court's assessment*

44. The Court need not determine for the purposes of the present complaint under Article 3 whether the situation amounted to a deprivation of liberty within the meaning of Article 5 in the initial period until their detention order had been issued. It is not disputed that all throughout that period the applicants had been dependent on the Maltese authorities for their most basic needs and subject to their control and therefore it was the responsibility of the Maltese authorities not to subject them to such conditions as would constitute inhuman and degrading treatment contrary to Article 3 of the Convention (see *A.D. v. Malta*, cited above, §§ 110).

45. The general principles concerning conditions of detention including the detention of unaccompanied minor migrants is set out in *A.D. v. Malta*, (cited above, §§ 111-20).

46. Turning to the present case, it would appear that, although with some delay, and except for the first applicant, at least on paper, the principle of presumption of minor age was applied to the applicants (see, *a contrario*, *Darboe and Camara v. Italy*, no. 5797/17, 21 July 2022, §§ 153 *et seq.*) as of 6 December 2022 when reference was made to the fact that the second, third, fourth, fifth and sixth applicants were minors and the IAB instructed measures to be taken in order for a legal guardian to be appointed by AWAS (see paragraph 7 above). Nevertheless, no alteration was made to their detention arrangements at the time and until after 11 January 2023 when the Court issued a Rule 39 measure (see paragraphs 10 and 11 above), at which point the materials submitted show that no care orders had yet been issued.

47. The Court further notes that, the age-assessment procedure on appeal confirmed that all but the first applicant were minors. There is therefore no doubt that it is with that vulnerability in mind that the Court must assess the conditions within which the latter applicants were held (see, for example, *Abdullahi Elmi and Aweys Abubakar v. Malta*, nos. 25794/13 and 28151/13, §§ 113-14, 22 November 2016).

48. In respect of all but the first applicant, the Court observes that despite being presumed minors, a matter acknowledged by the authorities, they had been hosted with adults for around two months in HIRC. The mere fact that this was allowed under domestic law has no bearing on the assessment for the purposes of Article 3 (see *A.D. v. Malta*, cited above, § 126).

49. As to the conditions of detention in HIRC, the Court reiterates that in cases which concern conditions of detention, applicants are expected in principle to submit detailed and consistent accounts of the facts complained of and to provide, as far as possible, some evidence in support of their complaints (see *Story and Others v. Malta*, nos. 56854/13 and 2 others, § 110, 29 October 2015, and the case-law cited therein). Once a credible and reasonably detailed description of the allegedly degrading conditions of detention, constituting a *prima facie* case of ill-treatment, has been made, the burden of proof is shifted to the respondent Government who alone have

access to information capable of corroborating or refuting these allegations. They are required, in particular, to collect and produce relevant documents and provide a detailed account of an applicant's conditions of detention. Relevant information from other international bodies, such as the CPT, on the conditions of detention, as well as the competent national authorities and institutions, should also inform the Court's decision on the matter (see *Muršić v. Croatia* [GC], no. 7334/13, § 128, 20 October 2016 and the case-law cited therein). In relation to the applicants' submissions concerning limited space, the Court notes that while, in the present circumstances and in the absence of their mobile phones, the applicants were not expected themselves to provide photographic evidence, their statements lack detail in relation to each applicant's individual situation, the size of their respective rooms and how many people shared each room. Nor does the relevant material available (see paragraph 29 above) demonstrate that there was an issue of overcrowding. In this light and from the materials in its possession, the Court cannot consider this allegation to be substantiated.

50. As to the remaining submissions, the CPT report (2021), supports the applicants' allegations in so far as it finds that "Some of the bathrooms had no doors and, ..., some of the showers and wash basins were blocked ... and flooded the bathroom floors when used ... There was no regime of activities in China House. Many of the detained migrants underlined that they had no access [to] any purposeful activities, no television, no access to the telephone, and were not offered access to the single exercise yard. Migrants spent 24 hours per day locked on their units with nothing to structure their days for months on end." The CPT considered that "Such living conditions may well amount to inhuman and degrading treatment contrary to Article 3 of the European Convention on Human Rights." The Government failed to supply any photos of the bathrooms and did not claim that any refurbishment had been undertaken in the HIRC following the CPT report. In relation to the photos of the centre supplied, they do not dispel the concerns of the CPT and they show that the conditions cannot be considered adapted to children, to ensure that such conditions do not create for them "a situation of stress and anxiety, with particularly traumatic consequences" (see, *mutatis mutandis*, *Tarakhel v. Switzerland* [GC], no. 29217/12, § 119, ECHR 2014). The same holds for teenagers (see, *mutatis mutandis*, *M.H. and Others v. Croatia*, nos. 15670/18 and 43115/18, § 190, 18 November 2021). Moreover, during this time no measures were taken to ensure that the applicants, as minors, received proper counselling and educational assistance from qualified personnel specially mandated for that purpose (see *Abdullahi Elmi and Aweys Abubakar*, cited above, § 111)

51. After this period in the HIRC, the applicants continued to be detained for another four months in Block A, Zone 4, in the Safi detention centre, which was undergoing refurbishment in 2023 (see *A.D. v. Malta*, cited above, § 131), that is, after the report by the CPT (see paragraph 29 above). The

detention continued despite psychological reports dated February/March 2023 showing that the applicants had “significantly elevated” or “extremely high” levels of anxiety, depression, post-traumatic stress disorder (PTSD), acute stress and the second, third and sixth applicants having suicidal thoughts (see paragraph 16 above), and the updated reports of 27 April 2023 stating that these applicants were still having difficulty in detention (see paragraph 17 above). The mere fact that this subsequent period of detention appears to have been undertaken in a location the conditions of which were more appropriate to their age barely ameliorates the situation in these circumstances. The Court also cannot ignore the applicants’ submissions to the effect that they had been harassed as duly reported to various authorities (see paragraph 20 above) and, as transpires through undisputed facts, tricked into abandoning procedures (see paragraph 15 above) – which treatment must have exacerbated their fears (compare *Abdullahi Elmi and Aweys Abubakar*, cited above, § 111).

52. In conclusion, bearing in mind the above considerations, particularly their age, the total length of their detention in both venues, the material conditions in the HIRC and its lack of appropriateness for accommodating children, as well as the vulnerability of the minor applicants and the effects of detention on a minor’s psychological condition, the Court considers that the conditions of detention of the second, third, fourth, fifth and sixth applicants amounted to inhuman and degrading treatment (compare *Rahimi v. Greece*, no. 8687/08, § 86, 5 April 2011, *Abdullahi Elmi and Aweys Abubakar*, cited above, §§ 113-14; and *M.H. and Others v. Croatia*, nos. 15670/18 and 43115/18, § 190, 18 November 2021, concerning teenagers).

53. There has accordingly been a violation of Article 3 of the Convention in their respect.

54. The Court observes that in respect of the first applicant, unlike in the case of the remaining applicants, the case file provides no documentation confirming his allegation that he informed the IAB or any other authority of his claim to be a minor prior or during the hearing of 6 December 2022. Although the legal representatives brought up this claim in the request for a review of the detention a month later (see paragraph 9 above), which remained unanswered, it is not possible for the Court to determine with certainty at which date, prior to his age-assessment interview of 15 January 2023, he had become a presumed minor in the eyes of the authorities. A registration to that effect had been noted only on 13 January 2023. Moreover, the Court cannot ignore that his final age assessment confirmed the first-instance decision of January 2023 that he was an adult (compare *Ahmade v. Greece*, no. 50520/09, § 79, 25 September 2012) on the basis of his passport (indicating that he was over twenty years of age at the time) which had been considered genuine, and that, whether willingly or unwillingly, such false claims burden the system and weaken the applicant’s

version of events (see, *mutatis mutandis*, *Mahamed Jama v. Malta*, no. 10290/13, § 149, 26 November 2015).

55. It follows that, for, nearly or possibly, the entirety of the period held in HIRC – the conditions of which were not appropriate to minors – the Court cannot consider the first applicant as having been a “presumed minor” in the eyes of the authorities (contrast *A.D. v. Malta*, cited above, § 74) and the Court is not convinced that the conditions of detention in the HIRC, although regrettable, can be considered to reach the required threshold for the purposes of Article 3 in respect of an adult who was (at the time, prior to the findings of the psychological report of March 2023) not more vulnerable than any other adult held at the time (compare *Mahamed Jama*, cited above, §§ 100-02 and 151, and the case-law cited therein).

56. In so far as it concerns his subsequent detention, in Safi Block A, Zone 4, which was, or was still being, refurbished following the issuance of the CPT report in 2021 (see paragraph 51 above), at that stage the first applicant was considered as a “presumed minor” and was detained with other minors. While it is true that according to the report of March 2023 the applicant had “significantly elevated” anxiety, depression, and post-traumatic stress disorder, the latter was a consequence of his journey, and was not worsened by his detention (contrast *A.D. v. Malta*, cited above, § 130), indeed the subsequent report found the applicant to be doing well both physically and mentally (see paragraph 17 above). While the Court remains concerned as to the duration of this detention, particularly given the just-mentioned condition, in the absence of other specific circumstances (contrast *A.D. v. Malta*, cited above, §§ 127-28, and 130), the material available and the applicants’ general submissions, are not sufficient to find that the cumulative effect of the conditions complained of reached the threshold of Article 3.

57. It follows that there has been no violation of Article 3 in respect of the first applicant.

## II. ALLEGED VIOLATION OF ARTICLE 13 IN CONJUNCTION WITH ARTICLE 3 OF THE CONVENTION

58. In connection with the above complaint under Article 3 the applicants complained that they had not had an effective remedy as required by Article 13 of the Convention which reads as follows:

“Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.”

## **A. Admissibility**

59. The Government considered that the applicants had not exhausted domestic remedies in relation to this complaint without indicating any specific remedy.

60. The applicants made no Article 13 specific submissions in reply.

61. Quite apart from the fact that the Government did not specify which remedy they were referring to, the Court has already examined such an objection, and considered, *inter alia*, that any separate domestic remedies for Article 13 complaints would not necessarily be effective for the arguable claim under the provision of the Convention with which Article 13 is invoked. Applicants would thus be forced to exhaust domestic remedies that did not provide an effective remedy for their main claim. The Court considered that that would be against the object and purpose of Article 13, which is to guarantee the provision of an effective remedy for arguable claims of breaches of the substantive provisions of the Convention. It thus found that the remedies that need to be exhausted under Article 35 § 1 of the Convention relate to the substantive provision in conjunction with which Article 13 of the Convention is being invoked. Accordingly, it did not share the opinion of the Government that Article 35 § 1 of the Convention requires applicants alleging a violation of Article 13 of the Convention to exhaust any separate domestic remedies pertaining to that claim and thus dismissed this objection (see *Diallo v. the Czech Republic*, no. 20493/07, §§ 49-58, 23 June 2011).

62. There is no reason to hold otherwise in the present case. The Government's objection in this respect is therefore dismissed.

63. The Court considers that all the applicants had an arguable complaint for the purposes of Article 3, including the first applicant whose claim under Article 3 was declared admissible and thus, not found to be manifestly ill-founded (see *Khlaifia and Others v. Italy* [GC], no. 16483/12, § 269, 15 December 2016 and contrast *Gökçe and Demirel v. Turkey*, no. 51839/99, § 70, 22 June 2006) and therefore that Article 13 applies in the present case in respect of all the applicants.

64. The Court considers that the applicants' complaint under Article 13 in conjunction with Article 3 is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. It must therefore be declared admissible.

## **B. Merits**

### *1. The parties' submissions*

#### **(a) The applicants**

65. The applicants submitted that the Court had already considered that constitutional redress proceedings were not an effective remedy due to the length of the proceedings before such jurisdictions and the Government had



not submitted any relevant domestic case-law that would call into doubt the Court's previous conclusions.

66. The Government reiterated the same arguments set out in their objection concerning non-exhaustion of domestic remedies for the purposes of Article 3.

## 2. *The Court's assessment*

67. The relevant general principles are set out in *A.D. v. Malta* (cited above, §§ 198-99).

68. In *Story and Others*, (cited above, §§ 83-85), concerning conditions of detention the Court had found that the Government had been unable to prove that constitutional redress proceedings, a remedy effective in principle, were also effective in practice, due to their duration. In *Yanez Pinon and Others v. Malta* (nos. 71645/13 and 2 others, § 76, 19 December 2017) and *Peñaranda Soto v. Malta* (no. 16680/14, § 40, 19 December 2017), although the Government requested that the Court review its conclusion concerning constitutional redress proceedings – the only shortcoming of which was the length of the proceedings – the Court found that the Government had not submitted any relevant domestic case-law that would call into question the prior conclusions. To the contrary, in *Yanez Pinon and Others* (cited above, § 76) the Court noted that the proceedings instituted by the second applicant in that case, which had lasted fourteen months at one instance, strengthened that finding. In *Abdilla v. Malta* (no. 36199/15, § 71, 17 July 2018) the Court further noted that despite its suggestion made in *Story and Others* (cited above, § 85) that the Government should be able to introduce a proper administrative or judicial remedy capable of ensuring the timely determination of such complaints, and where necessary, to prevent the continuation of the situation, no new remedy had yet been put in place. In *Fenech* (cited above, § 44) the Court noted that more than six years after the judgment in *Story and Others*, the situation remained unchanged. The situation was found to persist again in the most recent judgment *A.D. v. Malta* (cited above, §§ 201-02).

69. As already noted above, the Government's submissions do not go further than those they already submitted in recent cases of the like.

70. The Court thus finds no reason to alter the conclusions already reached in the previous cases against Malta (cited in the preceding paragraphs) that constitutional redress proceedings are not an effective remedy for the purposes of complaints of ongoing conditions of detention under Article 3.

71. The Government have not claimed that there had been any other remedy available to the applicants in this respect. There has therefore been a violation of Article 13 in conjunction with Article 3.

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

72. The applicants complained that they had been unlawfully deprived of their liberty between 18 and 30 November 2022, and that their detention following 30 November 2022 had been arbitrary, both periods falling foul of the requirements of Article 5 § 1 of the Convention, which reads as follows:

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

- (a) the lawful detention of a person after conviction by a competent court;
- (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;
- (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
- (d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;
- (e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;
- (f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.”

#### A. Admissibility

##### 1. *Applicability of the provision in relation to the first period of detention*

###### (a) **The parties’ submissions**

###### (i) *The Government*

73. In their submissions, the Government appear to challenge the application of the above provision to the circumstances of the present case, relying on the principles set out in *Ilias and Ahmed v. Hungary* ([GC], no. 47287/15, 21 November 2019). In particular, according to the Government, while it was true that the applicants could not leave the HIRC, one could not detach the applicant’s “place of accommodation” during this time from the fact that they arrived in Malta irregularly and had no means to sustain themselves, had no alternative place of accommodation and depended entirely on the national authorities to provide them with the most basic needs. The mere fact that the applicants were accommodated in a facility enlisted as a place of ‘Detention’ and run by ‘Detention Services’ could not, automatically amount to detention as understood by Article 5.

74. They noted that the applicants had not been held in a cell and were provided with food, clothing, shelter and all other necessities. They were accommodated in a block with other people, meaning that they could maintain social interaction. They were not confined to their bedroom at any time and could roam around the block and use the multipurpose room at their discretion, alone or in community with others.

75. In their view, the situation of an individual applying for entry and waiting for a short period for the verification of his or her right to enter could not be described as an illegal deprivation of liberty imputable to the State, since in such cases the State authorities have undertaken, *vis-à-vis* the individual, no other steps than reacting to his or her wish to enter by carrying out the necessary verifications. The applicants had affected an unauthorised entry into Malta and were considered to be prohibited immigrants in terms of Article 5 of the Immigration Act (Chapter 217 of the Laws of Malta) – “so exception (f) would be applicable as a legal basis”.

76. At the same time, the Government explained that during this period the applicants were checked medically, as is standard procedure, in order to verify whether or not they carried infectious diseases. This exercise was completed on 29 November 2022 and the next day, 30 November 2022, on seeing that the applicants were medically cleared, the detention order (in relation to the second period of detention) was issued with respect to each of the applicants. According to the Government, allowing them to leave the HIRC during such period would have defeated the very purpose for which the control of irregular immigration was carried out, given that entry into Malta was illegal, that the applicants’ health had to be established – in order to ascertain whether or not they carried infectious diseases – as well as in order to ascertain their identity and age. Such exercise took time and the applicants had been part of a group of forty-seven persons rescued from the sea, so it could not be completed at once. In this connection, Government contended that a term of twelve days from the date of disembarkation until the date when the detention orders were processed and issued was reasonable in the circumstances.

(ii) *The applicants*

77. The applicants considered that this period, which they spent in the HIRC, constituted a situation of detention in the sense of Article 5 § 1 of the Convention. They noted that the case of *Ilias and Ahmed*, relied on by the Government, greatly differed from the case at hand since the applicants could not leave the HIRC – as acknowledged by the Government – neither in theory nor in practice. Their situation was in fact similar to *J.R. and Others v. Greece* (no. 22696/16, 25 January 2018) where the applicants could not leave to the direction of Turkey, the country from which they came, otherwise than by boarding a vessel. The CPT had also confirmed that the conditions in which individuals were kept in the HIRC could not be considered as merely a

restriction of movement, but rather *de facto* detention as individuals were locked up for 23 to 24 hours per day in their accommodation units (see paragraph 29 above). The applicants also noted that the HIRC had been created as an additional detention facility run by the Detention Service and was included in the Schedule of Subsidiary Legislation 217.03 as a “place of detention for the purposes of the Immigration Act”. In fact, their factual accommodation conditions during this period were identical to those in the second period which – it has not been disputed – amounted to detention.

**(b) The Court’s assessment**

*(i) General principles*

78. In order to determine whether someone has been “deprived of his liberty” within the meaning of Article 5, the starting-point must be his or her specific situation in reality and account must be taken of a whole range of factors such as the type, duration, effects and manner of implementation of the measure in question (see *Nada v. Switzerland* [GC], no. 10593/08, § 225, ECHR 2012, and *Gahramanov v. Azerbaijan* (dec.), no. 26291/06, § 40, 15 October 2013). The difference between deprivation and restriction of liberty is one of degree or intensity, and not one of nature or substance (see *De Tommaso v. Italy* [GC], no. 43395/09, § 80, 23 February 2017, with the references therein; see also *Kasparov v. Russia*, no. 53659/07, § 36, 11 October 2016).

79. The Court considers that in drawing the distinction between a restriction on liberty of movement and deprivation of liberty in the context of the situation of asylum seekers, its approach should be practical and realistic, having regard to the present-day conditions and challenges. It is important in particular to recognise the States’ right, subject to their international obligations, to control their borders and to take measures against foreigners circumventing restrictions on immigration (see *Ilias and Ahmed*, cited above, § 213).

80. The applicability of Article 5 has been examined with regard to stays in reception centres for the identification and registration of migrants, located on islands at the Italian and Greek shores, including hot spots and the provision found to apply (see, *inter alia*, *Khlaifia and Others*, cited above, §§ 65-72; *J.A. and Others v. Italy*, no. 21329/18, § 94, 30 March 2023; and *J.R. and Others v. Greece*, cited above, in the latter case, where initially an official detention order had been issued in respect of the applicants, the Court took into consideration, in particular, changes in the applicants’ legal situation under domestic law and a change in the regime at the reception centre from “closed” to “semi-open” in order to distinguish between two periods, the first of which attracted the application of Article 5 and the second did not, *ibid.*, §§ 85-87).

81. In determining the distinction between a restriction on liberty of movement and deprivation of liberty in the context of confinement of foreigners in airport transit zones and reception centres for the identification and registration of migrants, the factors taken into consideration by the Court may be summarised as follows: i) the applicants' individual situation and their choices, ii) the applicable legal regime of the respective country and its purpose, iii) the relevant duration, especially in the light of the purpose and the procedural protection enjoyed by applicants pending the events, and iv) the nature and degree of the actual restrictions imposed on or experienced by the applicants (see, *inter alia*, *Ilias and Ahmed*, cited above, § 217).

*(ii) Application of the general principles to the present case*

82. The Court accepts that the measure in the present case was one concerning immigrants in the context of an initial reception centre and thus that the factors enlisted in the preceding paragraph must be considered.

83. As to i) the applicants' individual situation and their choices, it can be considered that the applicants entered Malta of their own free will, although this appears to have been a consequence of them having been rescued at sea by the Maltese authorities.

84. As to ii) the applicable legal regime of the respective country and its purpose, the Court notes that the Government did not put forward any legal framework explaining the situation in relation to this period, nor did they indicate any procedure laid down by law which had been followed. The only provision of domestic law relied on by the Government was Article 5 of the Immigration Act concerning the status of a prohibited immigrant, which neither provides for detention nor for a restriction of movement. The Court observes that, while, admittedly, the PIO could order detention in certain circumstances specifically enlisted in Regulation 6 of S.L. 420.06 (see paragraph 27 above), none had been issued in respect of the applicants during this period.

85. In the absence of any legal regime regulating this period, it is difficult to identify its purpose, however, the Government's submissions referred to a control of irregular immigration which had to be carried out given that the applicants' entry into Malta was "illegal", that the applicants' health status had to be established, as well as in order to ascertain their identity and age. The Court reiterates that under the Convention, the Court can accept that, at the moment of migrants' attempt to be admitted into the territory of a Contracting Party, a limitation of their freedom of movement in a hotspot may be justified – for a strictly necessary, limited period of time – for the purpose of identification, registration and interviewing with a view, once their status has been clarified, to their possible transfer to other facilities (see *J.A. and Others v. Italy*, cited above, § 93). In those circumstances detention is regulated by law (*ibid.*), but this does not seem to have been the situation in the present case, where the measure applied to the applicants appears to have

been a standard practice applied by the authorities in a legal vacuum (see, *a contrario*, *Ilias and Ahmed*, cited above, § 224).

86. As to iii) the relevant duration, especially in the light of the purpose and the procedural protection enjoyed by applicants pending the events, the Court notes that while twelve days might not be a particularly long time (compare *Ilias and Ahmed*, cited above, where the applicants had been held for twenty-three days) there was no limit fixed in law or elsewhere on how long the applicants (or others in their position) would remain in that situation (compare *J.A. and Others*, cited above, § 94, and, see, conversely, *Ilias and Ahmed*, cited above, § 226), which – it appears – would only come to an end once the individual is medically cleared (see the Government’s submissions at paragraph 76 above), whenever that maybe. Moreover, during such period, the applicants, who were unaware of the reasons for their “detention”, or any possible legal basis for it (in the absence of any document attesting to such, or of an administrative or judicial order), were devoid of any legal safeguards during this period (see, *mutatis mutandis*, *Khlaifia and Others*, cited above, § 105).

87. As to iv) the nature and degree of the actual restrictions imposed on or experienced by the applicants, it suffices to note that, once a detention order was issued the applicants continued to be detained in the same venue under the same conditions. There is therefore no doubt that the degree and intensity of this type of measure and the way in which it was implemented were the same (see also *A.D. v. Malta*, cited above, §148).

88. In the light of the forgoing, the Court considers that the situation amounted to a *de facto* detention and therefore that Article 5 applies (compare *Abdolkhani and Karimnia v. Turkey*, no. 30471/08, § 127, 22 September 2009). The Government’s objection is thus dismissed.

## 2. Exhaustion of domestic remedies

### (a) The parties’ submissions

89. The Government considered that the applicants had not exhausted domestic remedies in relation to both periods of detention. Besides relying again on constitutional redress proceedings also for the purposes of complaints under Article 5 § 1, they considered that the applicants had a further remedy under Section 409A of the Criminal Code which they had failed to undertake. The latter would have allowed them to apply before the Court of Magistrates asking for their release following a summary procedure, and such proceedings were appointed and heard with urgency. The provision was specifically intended to serve as the *habeas corpus* provision, allowing for a speedy review of the lawfulness of detention and if upheld immediate release. Release was also not affected by an appeal against such order until it was decided.

90. The applicants submitted, with respect to the first period, that they had had no information on the legal basis for their detention, no access to legal aid, no access to communication with persons outside of the Detention Centre, limited access to a telephone, and no information on organisations or persons, including lawyers able to assist them. These conditions did not allow them to exercise any remedy which could have been available at law and the applicants invited the Government to explain how this could be otherwise.

91. With regard to the second period, they considered that they had exhausted the ordinary remedy at law in so far as they had requested the IAB to hold a review of the applicants' detention, but the request remained unanswered. They did not resort to the filing of a *habeas corpus* application, under Section 409A of the Criminal Code, since the review of the detention order before the IAB was the ordinary remedy envisaged by the law (Chapter 217 and S.L. 420.06). In respect of the Government's arguments concerning constitutional redress proceedings, the applicants relied on the Court's well-established case-law.

**(b) The Court's assessment**

92. The Court reiterates that the rule on exhaustion of domestic remedies referred to in Article 35 of the Convention obliges those seeking to bring their case against the State before the Court to use first the remedies provided by the national legal system. Consequently, States are dispensed from answering for their acts before an international body until they have had an opportunity to put matters right through their own legal system. The rule is based on the assumption that there is an effective remedy available to deal with the substance of an "arguable complaint" under the Convention and to grant appropriate relief (see *Kudła v. Poland* [GC], no. 30210/96, § 152, ECHR 2000-XI and *A. D. v. Malta*, cited above, § 82).

93. In so far as the Government's objection concerns constitutional redress proceedings, the Court has repeatedly held that constitutional redress proceedings do not provide applicants with a speedy review of their ongoing detention (see, for example, *Aden Ahmed v. Malta*, no. 55352/12, § 117, 23 July 2013, § 117, and *Abdullahi Elmi and Aweys Abubakar v. Malta*, cited above, § 123, and the cases cited therein, as well as, more recently, *Feilazoo*, cited above, § 61). No reasons were brought to the Court's attention to hold otherwise in the present case.

94. In so far as it concerns Section 409A of the Criminal Code in relation to the first period of detention, the Court reiterates that even assuming remedies may be effective in terms of scope and speed, issues of accessibility may also arise (see, *mutatis mutandis*, *Suso Musa v. Malta*, no. 42337/12, § 61, 23 July 2013). Further, in cases where detainees had not been informed of the reasons for their deprivation of liberty, the Court has found that their right to appeal against their detention was deprived of all effective substance (see *Khlaifia and Others*, cited above, § 132, and the case-law cited therein).

Indeed, despite the applicants' invite, the Government failed to explain in what way it would have been possible for the applicants – most of whom where, moreover, minors – to access remedies which could have had any prospects of success, while being detained, without being given the grounds of their detention, nor access to relevant information or lawyers able to bring proceedings on their behalf before the domestic courts or tribunals (compare *Rahimi*, cited above, §§ 79-80). Further, the Government did not submit any example showing that any person going through this 'initial detention' was able to access any remedies, in particular that under Section 409A of the Criminal Code relied on by the Government, and that the latter had any prospect of success in this specific situation. Recalling that it is incumbent on the Government claiming non-exhaustion to satisfy the Court that the remedy was an effective one available both in theory and in practice at the relevant time, that is to say, that it was accessible, was capable of providing redress in respect of the applicants' complaints and offered reasonable prospects of success (see, for example, *A. D. v. Malta*, cited above, § 83) the Court considers that this burden has not been fulfilled.

95. It follows that the Government's objection concerning the first period of detention must be dismissed.

96. In so far as it concerns the second period of detention, the Court observes that in the circumstances of the present case – dealing strictly with a detention in the immigration context following a decision by the PIO under Regulation 6 of S.L. 420.06 – a request under Section 409A of the Criminal Code, as suggested by the Government, would not have been a proper remedy in accordance with the rule *lex specialis derogat generalis*. In line with the Immigration Act and its subsidiary legislation the body competent to examine the lawfulness of their immigration related detention was the IAB (see, for example, *A. D. v. Malta*, cited above, § 83). The Court observes that the applicants were brought for an automatic review before that body on 6 January 2023, in accordance with Regulation 6 of S.L. 420.06. A month later the legal representatives submitted a request with the IAB for an urgent review of the first, fourth, fifth and sixth applicants' detention (see Article 25A of the Immigration Act), which remained unanswered (see paragraph 9 above). No explanation has been put forward in relation to the absence of any reply to such a request. There is also no reason to consider that the outcome would have been any different in relation to a request in respect of the second and third applicants (compare *Kohen and Others v. Turkey*, nos. 66616/10 and 3 others, § 48, 7 June 2022). Moreover, in line with the same Regulation 6 of S.L. 420.06, an automatic review of the applicants' detention should have occurred after two months (of the hearing of 6 January), nevertheless, none ensued despite the applicants having remained in detention for a further four months. In these circumstances it cannot be said that the authorities have not been given the possibility of putting matters right through their own legal system even assuming that this



was an effective remedy – a matter which will be determined in the substance of the complaint under Article 5 § 4.

97. It follows that the Government’s objection concerning the second period of detention is also dismissed.

### *3. Conclusion as to admissibility*

98. The Court notes that these complaints are neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. They must therefore be declared admissible.

## **B. Merits**

### *1. The first period of detention (between 18 and 30 November 2022)*

#### **(a) The parties’ submissions**

99. The applicants considered that their detention could not be justified under Article 5 § 1 (b), (e) or (f) and was unlawful since it was not ordered according to a procedure prescribed by law; it was evidently arbitrary in nature and taken in bad faith. Moreover, there was no assessment regarding the possibility to use less coercive measures.

100. In relation to this period, the Government did not dissociate their submissions between admissibility and merits, reference is thus made to their submissions set out at paragraphs 73-76 above. In addition, the Government considered that the applicants had not been illegally deprived of their liberty and that the measure complained of by the applicants was lawful, taken in accordance with a procedure laid down by law and lacking in arbitrariness. In the Government’s view, that deprivation of liberty would be justified as a consequence of the applicants’ failure to fulfil their obligations at law (Article 5 § 1 (b)) and, or for the purpose of preventing their unauthorised entry into Malta (Article 5 § 1 (f)).

#### **(b) The Court’s assessment**

##### *(i) General principles*

101. The Court reiterates that any deprivation of liberty must, in addition to falling within one of the exceptions set out in sub-paragraphs (a) to (f) of Article 5 § 1, 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 that law (see *Denis and Irvine v. Belgium* [GC], nos. 62819/17 and 63921/17, § 125, 1 June 2021).

102. In laying down that any deprivation of liberty must be carried out “in accordance with a procedure prescribed by law”, Article 5 § 1 primarily

requires any arrest or detention to have a legal basis in domestic law. However, these words do not merely refer back to domestic law. They also relate to the quality of the law, requiring it to be compatible with the rule of law, a concept inherent in all Articles of the Convention. On this last point, the Court stresses that, where deprivation of liberty is concerned, it is particularly important that the general principle of legal certainty be satisfied. It is therefore essential that the conditions for deprivation of liberty under domestic law be clearly defined and that the law itself be foreseeable in its application, so that it meets the standard of “lawfulness” set by the Convention, a standard which requires that all law be sufficiently precise to allow the person – if need be, with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail (see *Khlaifia and Others*, cited above, §§ 91-92; *Del Río Prada v. Spain* [GC], no. 42750/09, § 125, ECHR 2013; and *Denis and Irvine*, cited above, § 128).

103. The Court considers Article 5 § 1 (f) to be a *lex specialis* in the context of immigration detention, it would therefore be more appropriate to rely on Article 5 § 1 (b) only where Article 5 § 1 (f) would be inapplicable (see *A.D. v. Malta*, cited above, § 185).

(ii) *Application to the present case*

104. Turning to the present case, the Court notes that the Government failed to explain their reliance on Article 5 § 1 (b). In any event, for the purposes of the present case, the Court can accept that the applicants’ detention could have fallen under the first limb of Article 5 § 1 (f) namely to prevent an unauthorised entry.

105. Nevertheless, the Court has already found at paragraph 84 above that this period of detention had been put in practice in a legal vacuum. While the Government alleged that the detention had been lawful, and in accordance with a procedure laid down by law, no provision of domestic law to this effect was indicated, nor any decision ordering such detention. It follows that this period of detention was not “lawful” within the meaning of Article 5 § 1.

106. There has therefore been a violation of that provision.

2. *The second period of detention (following 30 November 2022 until the applicants’ release in May 2023 or later)*

(a) **The parties’ submissions**

(i) *The applicants*

107. The applicants submitted that their detention was unlawful and could not be justified under Article 5 § 1 (b) or (f) as it was taken in bad faith, in an automatic manner, without any individual assessment; the detention was not closely connected to the grounds alleged; the authorities lacked due diligence and the detention exceeded the reasonable time required for the alleged

purpose pursued. Moreover, the conditions of detention were not appropriate and no assessment of the possibility to impose less coercive measures had ever been carried out.

108. The applicants emphasised that they were unaccompanied minors, and according to Regulation 14 (1) of S.L. 420.06 (see paragraph 27 above) applicants who claimed to be minors “shall not be detained, except as a measure of last resort, unless the claim is evidently and manifestly unfounded” and, according to Regulation 14 (3) of S.L. 420.06<sup>5</sup>, whenever the vulnerability of an applicant was ascertained, no detention order could be issued, and if issued it were to be revoked with immediate effect. Relying on *Darboe and Camara*, cited above, they considered that the presumption of minor age should apply during the age assessment, as long as it is not established that the person is in fact an adult.

109. In their view, the applicants had been detained without an individual assessment given that they were deemed “returnable” on the basis of them being Bangladeshis. The fact that the legality of their detention had been confirmed despite them claiming to be minors, without any consideration of less stringent measures, also indicated bad faith.

110. The applicants further considered that their detention could not be justified under Article 5 § 1 (b). Despite their inability to provide identification documents, this would not have been more possible by placing them in detention. They considered that asylum seekers who had no documentation because they had been unable to obtain it from their country of origin should not be detained only for that reason.

(ii) *The Government*

111. The Government submitted that the applicants’ detention had been undertaken with a view to preventing their unauthorised entry into the country, within the terms of Article 5 § 1 (f), and to secure the fulfilment of the applicants’ obligations at law, as permitted by Article 5 § 1 (b).

112. The detention was lawful, based on a detention order issue in line with Regulation 6 (1) of S.L. 420.06, as confirmed by the IAB on 6 December 2022. That detention complied with domestic law (Regulation 15 of S.L. 420.06) which provided that minors aged sixteen and over could be detained with adults. According to the Government, the decision had been taken in good faith, considering the applicants’ individual circumstances (namely that they were totally dependent on the authorities for their subsistence) and was not based on their nationality. Their detention had been necessary to determine the elements of their application for international protection, namely their age, as well as due to a fear of absconding. Since it was the applicants’ legal duty to provide all the information and documentation that was necessary for the determination of their application for international

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<sup>5</sup> Applicable at the time of the present case but repealed by Legal Notice No. 87 of 2024

protection (Regulation 9(3) of the Procedural Standards for Granting and Withdrawing International Protection Regulations, see paragraph 28 above), including their age, Article 5 § 1 (b) also applied in the present case. In the Government's view it was up to the applicants to carry proof of identity with them.

113. The Government also considered that the applicants had been accommodated "in a place suitable for asylum seekers".

**(b) The Court's assessment**

114. The relevant general principles have been set out in *A.D. v. Malta* (cited above, §§ 159-161, 163-164, 180-184).

115. The Court accepts that this period of detention had a legal basis in domestic law, Regulation 6(1) (b) of S.L. 420.06 (see paragraph 27 above), read in the light of Regulation 9(3) of the Procedural Standards for Granting and Withdrawing International Protection Regulations (see paragraph 28 above) (see also *A.D. v. Malta*, cited above, § 114, and *Aboya Boa Jean v. Malta*, no. 62676/16, §§ 58-60, 2 April 2019) and that it fell primarily under Article 5 § 1 (f) of the Convention (ibid. § 61), although the Government also relied on Article 5 § 1 (b) which – bearing in mind the relevant considerations to be applied in both cases (set out in *A.D. v. Malta*, cited above, §§ 182-84) brings nothing more to the Government's argumentation, which remained the same under both provisions, namely that the applicants' detention was necessary to determine elements regarding their claim for international protection, particularly, age.

116. In this connection, the Court reiterates that age determination is a prerequisite for the assessment of an asylum claim (see *Abdullahi Elmi and Aweys Abubakar*, § 146 and *A.D. v. Malta*, § 190, both cited above). It, however, observes that the applicants' age assessment examination at first instance came to an end on dates between 17 and 19 January 2023, that is, seven weeks after the issuance of their detention order. The applicants appealed those conclusions, and the appeals were upheld in respect of all but the first applicant (whose appeal was dismissed) four months later by decisions of 16 and 22 May 2023. Bearing in mind that a first-instance decision on the applicants' age had already been delivered after seven weeks of detention, during which the relevant tests had taken place, it is unclear what elements in respect of age the applicants were still expected to provide during their appeal requiring them to be kept in detention all along. Nevertheless, on the facts of the present case, the Court can accept that other elements related to their application for international protection (see the Government's argument at paragraph 112 above with reference to the relevant law provisions set out at paragraph 28 above) remained relevant during that period, so much so that only the applicants found to be minors were released once their age assessment had been concluded on appeal, but not the first

applicant whose adulthood had been determined and whose asylum application examination was still ongoing.

117. Thus, even accepting that the detention was closely connected to the ground of detention relied on by the Government namely to prevent an unauthorised entry, and in practice to allow for the applicants' asylum claim to be processed with the required prior age assessment and other relevant information; in order not to brand this detention period as arbitrary, it remains to be determined whether it was carried out in good faith, whether the place and conditions of detention were appropriate and whether the length of the detention exceeded that reasonably required for the purpose pursued.

118. The Court reiterates that the necessity of detaining children in an immigration context must be very carefully considered by the national authorities. An issue may arise, *inter alia*, in respect of a State's good faith, in so far as the determination of age may take an unreasonable length of time – indeed, a lapse of various months may also result in an individual reaching his or her majority pending an official determination (see *A.D. v. Malta*, cited above, § 117, and *Mahamed Jama*, cited above, § 147). The Court considers that the timelines in the present case, namely, nearly six months to finally determine the applicants' age' raises doubts as to the authorities' good faith (see, *mutatis mutandis*, *A.D. v. Malta*, § 190, and *Abdullahi Elmi and Aweys Abubakar*, § 146, both cited above). This situation is rendered even more serious by the fact that at no stage did the authorities ascertain whether the placement in immigration detention of the applicants, all of whom, except for the first applicant, had claimed to be minors already at the hearing of 6 December 2022, was a measure of last resort for which no alternative was available (see, *mutatis mutandis*, *A.D. v. Malta*, cited above, § 117; *Abdullahi Elmi and Aweys Abubakar*, cited above, § 146; and *Popov v. France*, nos. 39472/07 and 39474/07, § 119, 19 January 2012). The Court notes that, despite that claim by all but the first applicant, the IAB indiscriminately confirmed the lawfulness of their detention, despite the fact that Regulation 14 of S.L. 420.06 (see paragraph 27 above) provided that applicants who claim to be minors shall not be detained, except as a measure of last resort, unless the claim is evidently and manifestly unfounded. It has not been claimed that this was the applicants' situation, which is reinforced by the fact that five of the six applicants were finally found to be minors. Despite the law, there is no indication of any such assessment having been made before the detention order was issued on 30 November 2022, nor was any proper assessment made during the review by the IAB in December 2022. Additionally, the automatic reviews provided for by law did not take place, denying the applicants any procedural safeguards, and the applicants' requests for release on alternatives to detention in April remained without a formal reply. According to the applicants, the PIO verbally informed them that no alternatives to detention would be considered in view of the reports –

which the Court observes, indicated that all but the first applicants were having difficulty in detention (see paragraph 17 above).

119. Moreover, the Court cannot ignore that in respect of all but the first applicant it has already found that the cumulative conditions of their detention, including during this period, amounted to a violation of Article 3 (see paragraphs 51-53 above) and therefore those conditions were inappropriate for the purposes of the lack of arbitrariness requirement under Article 5 § 1 (f).

120. In conclusion, bearing in mind all the above, the Court considers that in the present case their detention during this period was not in compliance with Article 5 § 1. Accordingly, there has been a violation of that provision in respect of the second, third, fourth, fifth and sixth applicants.

121. In so far as it concerns the first applicant, who was nonetheless a presumed minor under domestic law (in the absence of any argumentation that his claim to minority was evidently and manifestly unfounded) for the greater part of this detention period, the same considerations made above in relation to the timelines in the present case, namely, nearly six months to finally determine his age, and the lack of consideration of any alternatives to detention at any stage or automatic reviews, remain valid. Nevertheless, the Court cannot ignore that the applicant was ultimately found to be an adult, and the conditions of the detention in which he had been held were not found to be in breach of Article 3 (compare *Mahamed Jama*, cited above, §§ 149-51). Further, the Court considers that the overall duration of the first applicant's detention for the purposes of the first limb of the provision which lasted, presumably, until 17 July 2023 (when his application for international protection was rejected on appeal), and therefore lasted around seven and a half months (while the legal maximum is that of nine months), although regrettable, was not unreasonable in the circumstances (compare *Mahamed Jama*, cited above, § 152, concerning a period of eight months).

122. In conclusion, while the Court expresses reservations about the duration of such age-assessment procedures and the lack of procedural safeguards, bearing in mind all the above, the Court considers that in the present case, the first applicant's detention during this period was in compliance with Article 5 § 1. Accordingly, there has been no violation of that provision in respect of the first applicant.

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

123. The applicants complained under Article 13 that they had not had an effective procedure by which to challenge the lawfulness of their detention, in so far as the IAB did not fulfil the Convention requirements, both in law and in practice.

124. Although the applicants invoked Article 13, the Court considers that since Article 5 § 4 constitutes a *lex specialis* in relation to the more general

requirements of Article 13 (see *Nikolova v. Bulgaria* [GC], no. 31195/96, § 69, ECHR 1999-II, and *A. and Others v. the United Kingdom* [GC], no. 3455/05, § 202, ECHR 2009), this complaint should be analysed exclusively under Article 5 § 4 of the Convention (see, for example, *Mikalauskas v. Malta*, no. 4458/10, § 73, 23 July 2013), 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.”

### **A. Scope of the complaint**

125. The scope of a case “referred to” the Court in the exercise of the right of individual application is determined by the applicant’s complaint or “claim” – which is the term used in Article 34 of the Convention (see *Fu Quan, s.r.o. v. the Czech Republic* [GC], no. 24827/14, § 137, 1 June 2023, and *Radomilja and Others v. Croatia* [GC], nos. 37685/10 and 22768/12, § 109, 20 March 2018). A complaint in Convention terms comprises two elements, namely factual allegations (that is, to the effect that the applicant is the “victim” of an act or omission) and the legal arguments underpinning them (that is, that the said act or omission entailed a “violation by [a] Contracting Party of the rights set forth in the Convention or the Protocols thereto”). These two elements are intertwined because the facts complained of ought to be seen in the light of the legal arguments adduced and *vice versa* (*ibid.*, § 110 and *Grosam v. the Czech Republic* [GC], no. 19750/13, § 88, 1 June 2023).

126. The Court observes that in relation to their complaint under Article 5 § 4, in their application, the applicants solely complained about the ineffectiveness of the IAB which examined the legality of their detention – based at the time on the detention order of 30 November 2022. It is that complaint which has been communicated to the Respondent Government and therefore the scope of their complaint under Article 5 § 4 is limited to the remedy concerning the second period of their detention.

### **B. Admissibility**

127. The Government submitted that the applicants had failed to exhaust domestic remedies, namely constitutional redress proceedings, in respect of their complaint under Article 5 § 4. They relied on the case of *Yorgen Fenech vs the State Advocate* where the plaintiff had instituted constitutional redress proceedings alleging a violation of Articles 5 § 4 and Article 6, on 4 May 2020, at the height of the first wave of the Covid-19 pandemic in Malta. The first court had delivered its judgment on 29 May 2020 and the Constitutional Court, on appeal, had delivered its judgment on 23 November 2020.

According to the Government, this went to show that the domestic courts of constitutional competence understood that certain cases, such as the present one, required expeditious and urgent conclusion, and were evidently willing to take the necessary action. This avenue was moreover still open to the applicants, there being no time-limit within which to challenge such claims. The Government further referred to Section 409A of the Criminal Code.

128. The applicants' relied on the Court's well-established case-law against Malta in respect of remedies for the purposes of Article 5 with no differentiation in connection with the sub-article relied on. They however noted that the case of *Yorgen Fenech v. the State Advocate* relied on by the Government was a very sensitive and highly publicised case which must surely have had an impact on the relative speediness of those proceedings.

129. The Court observes that it has already decided (see paragraph 124 above) that although the applicants invoked Article 13, it will examine the complaint under Article 5 § 4 the latter provision being a *lex specialis* in relation to the more general requirements of Article 13. Indeed, both provisions provide for the necessity of a remedy against one of the Convention's substantive complaints. In particular Article 5 § 4 requires the provision of a remedy for complaints under Article 5 § 1. It follows that, in line with that which has been explained above (see paragraph 61 above) in relation to the complaint under Article 13, applicants cannot be required to exhaust a remedy for the purposes of their complaint under Article 5 § 4, when that same remedy would not necessarily be effective for their substantive complaint under Article 5 § 1. This is particularly so where applicants are still in detention at the time when they bring proceedings before this Court, invoking both provisions, a situation pertaining in the present case.

130. It follows that the applicants were not required to bring their complaint under Article 5 § 4 before the constitutional jurisdictions.

131. The Government's objection is therefore dismissed.

132. The Court notes that this complaint is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. It must therefore be declared admissible.

## C. Merits

### 1. *The parties' submissions*

#### (a) **The applicants**

133. The applicants considered that the review of their detention order before the IAB revealed the remedy to be ineffective, in particular due to an apparent lack of independence and impartiality. Indeed, in terms of the Immigration Act, the executive had full and unfettered discretion to appoint, re-appoint, and remove members of the IAB through a procedure which lacked transparency. The selection criteria for such appointments were



“vague”, in particular any lawyer could be appointed to the IAB irrespective of any expertise. The applicants noted that IAB members were directly connected to the executive, with commentators in the press highlighting their links to the Government and/or Labour Party, and, most of whom, having multiple Government appointments (*inter alia*, as non-resident ambassadors or members of other boards or agencies or other Government entities) at the same time and in different sectors, as shown by relevant Government Gazettes and press articles<sup>6</sup>. This seriously undermined the image of the IAB and its ability to act and appear as an independent entity. In relation to the members of the IAB handling their case, there had been no call for applications, the selection process was not public, nor reviewed by an independent authority and there was no possibility to challenge such Ministerial appointment. Practice showed that at each national election, members of the IAB would resign so that the new executive would decide its composition. Indeed, the European Commission for Democracy through Law (Venice Commission) and the European Union had already in 2018 expressed their concerns concerning the appointments to such bodies<sup>7</sup>.

<sup>6</sup> According to the applicants, relying on the relevant Government Gazettes and various newspaper articles, the divisions of the IAB, who were at the time of the observations and until 2026 constituted as below, had the following links:

Division II – (that heard the detention review of the applicants)

MC (Chairperson) – former wife of a former Government Minister and Deputy Party Leader, sits on four government boards and has a non-resident ambassadorial appointment.

ASH – nephew of a Minister, sits on a government board and a government agency and has a non-resident ambassadorial appointment.

PPC (former member, now substitute) – a director of a state-co-owned company (mentioned in Paradise Papers), who has no other legal background, especially in the field of asylum and immigration.

Division I – (that heard the applicants’ age assessment appeal)

JSF (Chairperson) who holds a number of offices within other Government bodies, including a non-resident ambassadorial appointment.

MM – a lawyer of another Government facility, and brother of the former international secretary of the Labour Party (currently in Government) and who was at the time of observations facing criminal proceedings for assault.

MaM – has three other roles on Government bodies and is employed by Government as a legal aid lawyer.

Former members

AB – son of a Labour Party candidate and holds various Government positions including a non-resident ambassadorial appointment.

DS – wife of a Minister, holds another position on a government board, and former positions on other Government boards.

<sup>7</sup> Venice Commission, *Opinion 993/2020, 8 October 2020* paragraphs 97-98. [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2020\)019-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2020)019-e) and the *2021 Rule of Law Report Country Chapter on the rule of law situation in Malta*, pg. 4-5.

<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52021SC0720>

both last accessed in October 2024, with references to Venice Commission, CDL-AD(2020)019-e, para. 98; see also CDL-AD(2020)006 paras. 97-98; and CDL-AD(2018)028 paras. 80-83, the report finds “A significant number of specialised tribunals continue to

134. Moreover, as to the remedy itself, there was a lack of clear and published rules of procedure; excessive length of proceedings, sometimes with no decision being reached at all; a poor record of overturning decisions; and template-style decisions giving no reasons to individual arguments raised.

135. The applicants further noted that in the present case the IAB only carried out one review of the applicants' detention for the entire period of their detention. The review was conducted *via* a mass hearing with one decision confirming the detention of several individuals (around forty-seven persons) rather than providing an individualised assessment of the legality of the detention for each of them, irrespective of the fact that some of them had claimed to be minors. The IAB never questioned the position of the PIO, failed to take into account the vulnerabilities of the applicants and merely confirmed the applicants' detention with adults. The "decisions" made no reference to the applicable law, were not signed by the IAB members and did not provide any reasoning. The IAB also failed to assess the possibility of applying less coercive measures. Lastly, it was evident from the age-assessment decisions in the present case (see paragraph 18 above) that the IAB did not hesitate to make political considerations.

**(b) The Government**

136. The Government was of the view that the IAB complied with the requirements of a "court" under Article 5 § 4. It was composed of a lawyer as Chairman and two other members appointed by the President of Malta on the advice of the Minister (Article 25A of the Immigration Act, see paragraph 25 above). The IAB was not subject to the authority or control of any person or entity, therefore, it functioned autonomously, independently and impartially and adjudicated the cases before it fairly. Members of the IAB had to abstain in the same circumstances as a judge of the superior courts and could likewise be recused by either party.

137. The Government disputed "the applicants' allegations" concerning the independence and impartiality of the IAB. Firstly, the applicants had not identified any reason, concerning their own proceedings before the IAB, which would indicate that the IAB lacked impartiality. Secondly, their criticism concerning the independence of the IAB, including that the members thereof had links with the executive branch, were gratuitous statements, baseless and unsubstantiated. According to the Court's case-law

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operate. Many of these tribunals are appointed through a procedure involving the executive power. The Venice Commission has raised concerns regarding the operation of these specialised tribunals, considering that they do not enjoy the same level of independence as that of the ordinary judiciary, and reiterated in October 2020 its recommendations in that respect. Stakeholders, including the Chamber of Advocates, have also expressed concerns. There are ongoing discussions in the context of the Recovery and Resilience Facility about the review of the independence of these specialised tribunals."

the “court” in question need not be part of the traditional judicial machinery of a country and thus, its members need not be appointed in the same manner and with the same rigour as members of the highest courts of the country. This did not mean that they lacked independence and impartiality.

138. As to the procedure before the IAB, the latter was empowered to order release even on a mere verbal request and the law provided that, following an initial review, the lawfulness of detention should be reviewed “after periods of two months”. In the present case the IAB held its first review on 6 December 2022 (six days after the issuance of the detention order).

139. As to its scope, the Government explained that the IAB was not meant to review the necessity of the detention as such. Its purpose was to assess the progress being made in the asylum proceedings and to determine whether the continued detention continued to be lawful. The Government noted that amendments to Article 25A (10) of the Immigration Act in 2015 following the judgment in *Louled Massoud v. Malta* (no. 24340/08, 27 July 2010), which had found a violation of Article 5 § 4, enabled the Board not only to take into consideration the reasonableness of the duration of detention, but the lawfulness of the detention decision itself, it now also allowed for release even if the identity of the individual could not be verified. At the hearing of 6 December 2022, the IAB had asked the PIO to substantiate the reasons for the applicants’ detention, having been satisfied of the reasons thereof, the IAB did not order the release of the applicants. It had, therefore, fulfilled its duty at law. Moreover, the Convention did not impose an obligation on a judge examining a challenge to detention to address every argument contained in the applicant’s submissions.

140. The Government also relied on constitutional redress proceedings whereby the applicants could have asked for an interim measure to be released, as well as on Section 409A of the Criminal Code, as explained in their non-exhaustion objection in respect of Article 5 § 1.

## 2. *The Court’s assessment*

### (a) **General principles**

141. The Court reiterates that Article 5 § 4 entitles detained persons to institute proceedings for a review of compliance with the procedural and substantive conditions which are essential for the “lawfulness”, in Convention terms, of their deprivation of liberty. The notion of “lawfulness” under paragraph 4 of Article 5 has the same meaning as in paragraph 1, such that a detained person is entitled to a review of the “lawfulness” of his detention in the light not only of the requirements of domestic law but also of the Convention, the general principles embodied therein and the aim of the restrictions permitted by Article 5 § 1. Article 5 § 4 does not guarantee a right to judicial review of such a scope as to empower the court, on all aspects of the case including questions of pure expediency, to substitute its own

discretion for that of the decision-making authority. The review should, however, be wide enough to bear on those conditions which are essential for the “lawful” detention of a person according to Article 5 § 1 (see *Denis and Irvine*, cited above, § 186). The reviewing “court” must not have merely advisory functions but must have the competence to “decide” the “lawfulness” of the detention and to order release if the detention is unlawful (see *Khlaifia and Others*, cited above, § 128, with further references).

142. The existence of the remedy must nevertheless be sufficiently certain, not only in theory but also in practice, failing which it will lack the requisite accessibility and effectiveness (see *Khlaifia and Others*, cited above, § 130).

143. The requirement of procedural fairness under Article 5 § 4 does not impose a uniform, unvarying standard to be applied irrespective of the context, facts and circumstances. Although it is not always necessary that an Article 5 § 4 procedure be attended by the same guarantees as those required under Article 6 for criminal or civil litigation, it must have a judicial character and provide guarantees appropriate to the type of deprivation of liberty in question (see, among other authorities, *A. and Others v. the United Kingdom* [GC], no. 3455/05, § 203, ECHR 2009). The Court has held that both independence and impartiality are important constituent elements of the notion of a “court” within the meaning of Article 5 § 4 of the Convention. Furthermore, a “court” must always be “established by law”, failing which it would lack the legitimacy required in a democratic society to hear individual cases (see *Lavents v. Latvia*, no. 58442/00, § 81, 28 November 2002). The general principles concerning the independence and impartiality of a tribunal, for the purposes of Article 6 of the Convention, were set out in the case of *Ramos Nunes de Carvalho e Sá v. Portugal* ([GC], nos. 55391/13 and 2 others, §§ 144-50, 6 November 2018) and the Court has considered that those principles, developed in the context of Article 6 § 1 of the Convention, apply equally to Article 5 § 4 (see *Ali Osman Özmen v. Turkey*, no. 42969/04, § 87, 5 July 2016, and *Baş v. Turkey*, no. 66448/17, § 267, 3 March 2020).

144. In particular, in order to establish whether a tribunal can be considered to be ‘independent’ within the meaning of Article 6 § 1, regard must be had, *inter alia*, to the manner of appointment of its members and their term of office, the existence of guarantees against outside pressures and the question whether the body presents an appearance of independence (see *Findlay v. the United Kingdom*, 25 February 1997, § 73, *Reports of Judgments and Decisions* 1997-I, and *Tsanova-Gecheva v. Bulgaria*, no. 43800/12, § 106, 15 September 2015). The Court observes that the notion of the separation of powers between the executive and the judiciary has assumed growing importance in its case-law (see *Stafford v. the United Kingdom* [GC], no. 46295/99, § 78, ECHR 2002-IV). However, neither Article 6 nor any other provision of the Convention requires States to comply with any theoretical constitutional concepts regarding the permissible limits

of the powers' interaction (see *Kleyn and Others v. the Netherlands* [GC], nos. 39343/98 and 3 others, § 193, ECHR 2003-VI).

145. The Court has also held that there is a very close inter relationship between the requirements of “independence”, “impartiality” and “tribunal established by law”, and that a judicial body which does not satisfy the requirements of independence – in particular from the executive – and of impartiality may not even be characterised as a “tribunal” for the purposes of Article 6 § 1 (see *Guðmundur Andri Ástráðsson v. Iceland* [GC], no. 26374/18, §§ 231-32, 1 December 2020). In that context, “independence” refers to the necessary personal and institutional independence that is required for impartial decision-making, and it is thus a prerequisite for impartiality. It characterises both (i) a state of mind, which denotes a judge’s imperviousness to external pressure as a matter of moral integrity and (ii) a set of institutional and operational arrangements – involving both a procedure by which judges can be appointed in a manner that ensures their independence and selection criteria based on merit – which must provide safeguards against undue influence and/or unfettered discretion of the other State powers, both at the initial stage of the appointment of a judge and during the exercise of his or her duties (*ibid.* § 234).

146. 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 *Aboya Boa Jean*, cited above, § 76). However, where automatic review of the lawfulness of detention has been instituted, the decisions of the competent courts must follow at “reasonable intervals” (see *Abdulkhakov v. Russia*, no. 14743/11, § 209, 2 October 2012, and *N. v. Romania*, no. 59152/08, § 190, 28 November 2017). The rationale underlying the requirements of speediness and periodic judicial review at reasonable intervals within the meaning of Article 5 § 4 and the Court’s case-law is that a detainee should not run the risk of remaining in detention long after the time when his deprivation of liberty has become unjustified (see *Shishkov v. Bulgaria*, no. 38822/97, § 88, ECHR 2003-I, with further references).

147. 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 *Abdulkhakov*, cited above, §§ 212-214, for a summary of the Court’s case-law in the context of detention under sub-paragraphs (a), (c), (e) and (f)).

148. The Court observes that it is not its 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 – as with the reasonable-time stipulation in Article 5 § 3 and Article 6 § 1 – be determined in the light of the

circumstances of each case. The Court must, in particular, examine whether any new relevant factors arisen in the interval between periodic reviews were assessed, without unreasonable delay, by a court having jurisdiction to decide whether or not the detention has become “unlawful” in the light of these new factors (*ibid.*, § 215).

**(b) Application of the general principles to the present case**

149. As transpires from the above general principles, the Court has already considered that a remedy for the purposes of Article 5 § 4 must have a judicial character and in particular that the principles developed in the context of Article 6 § 1 of the Convention concerning independence and impartiality apply equally to Article 5 § 4. Thus, bearing in mind that the decisions taken by the IAB are not subject to subsequent control by a judicial body that has “full jurisdiction” which could ensure respect for the relevant guarantees by curing any failing, the Court must examine whether the IAB fulfilled those requirements in the present case.

150. The Court observes that while it is true that the appointment of judges by the executive or the legislature is permissible under the Convention, provided that appointees are free from influence or pressure when carrying out their adjudicatory role, the question is always whether, in a given case, the requirements of the Convention are met (see *Guðmundur Andri Ástráðsson*, cited above, § 207). The same applies even to the appointment of adjudicators, who do not have the status of judges but have similar functions.

151. The Court cannot but note the limited submissions by the Government, which fail to usefully rebut the applicants’ arguments concerning the lack of a proper procedure for the appointment of the members of the IAB and the absence of proper selection criteria based on merit. Neither have they indicated the existence of any guarantees against outside pressure nor commented on whether the body presents an appearance of independence, other than the submission that the applicants’ claims concerning the links of the individual members with the executive were baseless and unsubstantiated. The latter submission presumably refers to the family connections given that the public material provided by the applicants (including official documents, such as the Government Gazette, or websites) supports their analysis of the connections of the members of the IAB to the executive, in particular in so far as they held various government jobs, a fact which has not been disproved by the Respondent Government. Moreover, the latter seem to acknowledge that such body was not appointed with the same rigour as other judicial bodies, as in their view, this was not necessary – a view refuted by the recapitulation of the Court’s case-law set out above.

152. The Court reiterates that it is inherent in its very notion that a “tribunal” be composed of judges selected on the basis of merit – that is, judges who fulfilled the requirements of technical competence and moral integrity to perform the judicial functions required of such tribunal in a State

governed by the rule of law. The higher a tribunal was placed in the judicial hierarchy, the more demanding the applicable selection criteria should be (see *Dolińska-Ficek and Ozimek v. Poland*, nos. 49868/19 and 57511/19, § 273, 8 November 2021, and *Guðmundur Andri Ástráðsson*, cited above, §§ 220 and 222). While non-professional judges could be subject to different selection criteria, particularly when it comes to the requisite technical competencies (*ibid.*), it is relevant to the present case that the IAB is a body entirely constituted of non-professional judges. The latter are purported to perform the functions of an Article 5 § 4 remedy which should have a judicial character in so far as it is required to provide for a judicial review of a decision by an administrative authority.

153. In the present case, the Government does not contend, nor does it appear from the domestic legislation produced, that the members had to meet any predetermined selection criteria other than that the Chairman had to hold a law degree, another member had to be versed in immigration matters and another person required no qualification whatsoever. It therefore appears that the Minister, who advised the President, had wide discretion in the choice of all three members (see, *mutatis mutandis*, *Catană v. the Republic of Moldova*, no. 43237/13, § 80, 21 February 2023). Further, the Court is not in a position to conclude on the basis of the evidence before it that there was a clear and transparent process for selecting the IAB members (see, *mutatis mutandis*, *Catană v.* cited above, § 81), nor had there been a possibility to challenge their appointment.

154. Additionally, the principle of irremovability of judges could provide no protection given that the members' mandates were short, i.e. three years; they were eligible for re-appointment; they could be dismissed by the Minister (advising the President), albeit on limited grounds (see Article 25 A of the Immigration Act at paragraph 25 above) (compare *Brudnicka and Others v. Poland*, no. 54723/00, § 41, ECHR 2005-II, and *Luka v. Romania*, no. 34197/02, § 44, 21 July 2009); and no procedural or substantive safeguards against the discretionary exercise of that power have been brought to the attention of the Court (compare *Henryk Urban and Ryszard Urban v. Poland*, no. 23614/08, § 53, 30 November 2010). In other words, the members' initial mandates, their reappointment to that body as well as to other government bodies – which, considering the multiple appointments for each member, certainly constituted a substantial financial interest – depended on the satisfaction of the executive. Indeed, and in the absence of any rebuttal by the Government as to its veracity, the practice of resigning at each general election supported the idea that this was a mere political appointment. At this juncture it is important to note that the present case does not concern determinations of disputes between private parties, but rather an individual's challenges to actions or inactions of State authorities falling under the direction of the Government of the day.

155. Lastly, the Court cannot but note that both the European Commission and the Venice Commission expressed serious concerns about the functioning of tribunals similar to the one at issue in the present case (see paragraph 133 *in fine* above). Bearing in mind all the above, and in the absence of any relevant safeguards, the Court considers that the applicants' doubts as to the independence of the IAB were legitimate.

156. Turning to the circumstances in the case of the applicants, the Court expresses doubts as to the scope of the review undertaken at the first hearing (six days after the detention order was imposed on the applicants) in the absence of any considerations being made on the lawfulness of their detention in the light of all (but the first) applicants' proclaimed age, and therefore their best interests and/or the question of alternatives to the detention in that light (compare *G.B. and Others v. Turkey*, no. 4633/15, § 186, 17 October 2019).

157. Subsequent to that initial assessment, according to domestic law a further assessment of the lawfulness of their detention should have taken place after two months, however, none ensued in the five and a half months that followed until their release. Additionally, no reply ensued to the applicants request for an urgent hearing. While 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 (see *Aboya Boa Jean*, cited above, § 80), more than five months without any automatic review, in the circumstances of the present case, cannot be considered compliant with Article 5 § 4 in the context of a remedy in connection with detention falling under the first limb of Article 5 § 1 (f) (*ibid.* §§ 77 *in fine* and 78).

158. In so far as the Government reiterated their submissions in relation to other remedies, these have already been rejected (see paragraphs 93 and 96 above). Moreover, bearing in mind that the Government put in place a specific remedy in this regard, which the applicants resorted to (either by force in the sense of an automatic review, or by means of their request which remained unanswered), it is that remedy which must conform to the requirements of Article 5 § 4.

159. It follows from the above that the applicants did not have an effective remedy for the purposes of Article 5 § 4, there has therefore been a violation of that provision.

## V. RULE 39 OF THE RULES OF COURT

160. The Court reiterates that, in accordance with Article 44 § 2 of the Convention, the present judgment will not become final until (a) the parties declare that they will not request that the case be referred to the Grand Chamber; or (b) three months after the date of the judgment, if referral of the



case to the Grand Chamber has not been requested; or (c) a panel of the Grand Chamber rejects any request to refer under Article 43 of the Convention.

161. However, in view of the information provided by the parties, (see paragraphs 19 and 21 above), it considers that the indication made to the Government under Rule 39 of the Rules of Court (see paragraph 10 above) should be lifted.

## VI. APPLICATION OF ARTICLE 46 OF THE CONVENTION

162. The applicants asked the Court to consider indicating general measures to ensure that the IAB fulfils the requirements of an Article 5 § 4 remedy.

163. The Government considered that it would be unfair to indicate general measures in the absence of a violation of Article 6 with respect to the alleged shortcomings of the composition of the IAB.

164. The relevant parts of Article 46 of the Convention read as follows:

“1. The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.

2. The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution ...”

165. The Court reiterates that by Article 46 of the Convention the Contracting Parties have undertaken to abide by the final judgments of the Court in any case to which they are parties, execution being supervised by the Committee of Ministers. It follows, *inter alia*, that a judgment in which the Court finds a breach of the Convention or the Protocols thereto imposes on the respondent State a legal obligation not just to pay those concerned the sums awarded by way of just satisfaction, but also to choose, subject to supervision by the Committee of Ministers, the general and/or, if appropriate, individual measures to be adopted in their domestic legal order to put an end to the violation found by the Court and to redress as far as possible the effects (see *Scozzari and Giunta*, [GC], nos. 39221/98 and 41963/98, § 249, ECHR 2000-VIII; *Maestri v. Italy* [GC], no. 39748/98, § 47, ECHR 2004-I; and *Grabowski v. Poland*, no. 57722/12, § 66, 30 June 2015). In principle it is not for the Court to determine what may be the appropriate measures of redress for a respondent State to perform in accordance with its obligations under Article 46 of the Convention (see *Scozzari and Giunta*, cited above; *Brumărescu v. Romania* (just satisfaction) [GC], no. 28342/95, § 20, ECHR 2001-I; and *Öcalan v. Turkey* [GC], no. 46221/99, § 210, ECHR 2005-IV). With a view, however, to helping the respondent State fulfil its obligations under Article 46, the Court may seek to indicate the type of individual and/or general measures that might be taken in order to put an end to the situation it has found to exist (see *Broniowski v. Poland* [GC], no. 31443/96, § 194, ECHR 2004-V; *Scoppola v. Italy (no. 2)* [GC],

no. 10249/03, § 148, ECHR 2009; and *Stanev v. Bulgaria* [GC], no. 36760/06, § 255, 17 January 2012).

166. In the Court's view, the problems detected in the applicants' particular case may subsequently give rise to numerous other well-founded applications which are a threat to the future effectiveness of the system put in place by the Convention (see *Grabowski*, § 67, and *Suso Musa*, § 121, both cited above). The Court's concern is to facilitate the rapid and effective suppression of a defective national system hindering human-rights protection. In that connection and having regard to the situation which it has identified above the Court considers that general measures at national level are undoubtedly called for in execution of the present judgment.

167. The Court notes that it has found that the applicants did not have an effective remedy for the purposes of Article 5 § 4, considering, *inter alia*, that in the absence of any safeguards the applicants had legitimate doubts as to the independence of the IAB. Bearing in mind that both independence and impartiality are important constituent elements of the notion of a "court" within the meaning of Article 5 § 4 of the Convention and that the general principles concerning the independence and impartiality of a tribunal, for the purposes of Article 6 of the Convention apply equally to Article 5 § 4 (see 143 above) the Court calls on the Government to ensure that legislation is put in place in order for the IAB to conform with those requirements, having regard to the manner of appointment of its members and their term of office, the existence of guarantees against outside pressure and the necessity for the body to present an appearance of independence.

168. In the present judgment the Court found yet another violation of Article 13, in conjunction with Article 3, given the absence of an effective remedy to complain about the conditions of an ongoing detention, a situation which has remained unchanged ever since the Court's solicitations to that effect made in *Story and Others*, cited above, delivered nine years ago (see paragraph 68 above). It thus formally calls on the Government to put in place a domestic remedy, which is effective both in law and practice, for this purpose.

## VII. APPLICATION OF ARTICLE 41 OF THE CONVENTION

169. 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**

170. The applicants claimed 25,000 euros (EUR) each in respect of non-pecuniary damage.

171. The Government considered the applicants' claims to be excessive.

172. Ruling on an equitable basis and in view of the violations found in respect of each, the Court awards the first applicant EUR 9,000, plus any tax that may be chargeable, and all the remaining applicants EUR 15,000 each, plus any tax that may be chargeable in respect of non-pecuniary damage.

### **B. Costs and expenses**

173. The applicants also claimed EUR 1,856.83 each for the costs and expenses incurred before the domestic courts and the Court. They supplied invoices dated 6 January 2023 payable by 17 February 2024.

174. The Government noted that there had been no evidence that the invoices had been paid since payment was due by a date following the filing of observations, and no fiscal receipt thus ensued. They also noted that the invoices were identical, charging each applicant for each service despite the case being dealt with in a collective manner.

175. According to the Court's case-law (see *L.B. v. Hungary* [GC], no. 36345/16, § 149, 9 March 2023) an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these were actually and necessarily incurred and are reasonable as to quantum. The Court notes that the applicants have signed a power of attorney mandating the legal representatives to bring proceedings before the Court, and thus have entered into a contractual relationship with the legal representatives who are entitled to recover relevant dues as per invoice issued even assuming that these have not yet been paid (see *A.D. v. Malta*, cited above, § 218). In the present case, regard being had to the documents in its possession and the above criteria, and nothing that the case has been dealt with collectively and that some of the expenses would have been incurred irrespective of the violations found, the Court considers it reasonable to award the sum of EUR 6,000, jointly, covering costs under all heads, which, in the circumstances of the case, should be payable directly to Aditus foundation.

**FOR THESE REASONS, THE COURT, UNANIMOUSLY,**

1. *Declares* the application admissible;
2. *Holds* that there has been a violation of Article 3 of the Convention in respect of the second, third, fourth, fifth and sixth applicants and no violation in respect of the first applicant;

3. *Holds* that there has been a violation of Article 13 taken in conjunction with Article 3 of the Convention in respect of all the applicants;
4. *Holds* that there has been a violation of Article 5 § 1 of the Convention concerning the period of 18 to 30 November 2022 in respect of all the applicants and a violation of the same provision concerning the period following 30 November 2022 until the applicants' release in respect of the second, third, fourth, fifth and sixth applicants and no violation in respect of the first applicant in relation to this latter period;
5. *Holds* that there has been a violation of Article 5 § 4 of the Convention in respect of all the applicants;
6. *Decides* to lift the indication made to the Government under Rule 39 of the Rules of Court;
7. *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 9,000 (nine thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage to the first applicant;
    - (ii) EUR 15,000 (fifteen thousand euros), each, plus any tax that may be chargeable, in respect of non-pecuniary damage, to the second, third, fourth, fifth and sixth applicants;
    - (iii) EUR 6,000 (six thousand euros), jointly, 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;
8. *Dismisses* the remainder of the applicants' claim for just satisfaction.

Done in English, and notified in writing on 22 October 2024, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Hasan Bakırcı  
Registrar

Arnfinn Bårdsen  
President

## APPENDIX

List of applicants:

Application no. 1766/23

| No. | Applicant's Name | Year of birth | Nationality |
|-----|------------------|---------------|-------------|
| 1.  | J. B.            | 2005          | Bangladeshi |
| 2.  | R. A.            | 2006          | Bangladeshi |
| 3.  | S. I.            | 2006          | Bangladeshi |
| 4.  | M. K.            | 2006          | Bangladeshi |
| 5.  | T. K.            | 2006          | Bangladeshi |
| 6.  | S. M.            | 2006          | Bangladeshi |