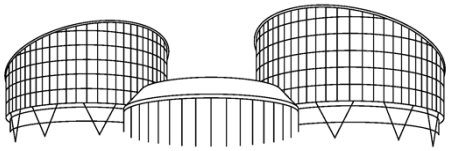

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIRST SECTION

CASE OF FEILAZOO v. MALTA

(Application no. 6865/19)

JUDGMENT

Art 34 • Hinder the exercise of the right of application • Interference with correspondence between Court and applicant through prison authorities, and ineffective legal representation through legal aid system for proceedings before the Court
Art 3 (substantive) • Degrading treatment • Inadequate conditions of detention, particularly given excessively stringent and long period of *de facto* isolation, and exposure of applicant to health-risk through unnecessary placement with new arrivals in Covid-19 quarantine
Art 5 § 1 • Lawful detention • Grounds for applicant's detention not valid throughout whole period, given later lack of prospect of deportation • Lack of active and diligent steps by authorities with a view to deporting the applicant during detention period

STRASBOURG

11 March 2021

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

In the case of Feilazoo v. Malta,

The of Human Rights (First Section), sitting as a Chamber composed of:

Ksenija Turković, *President,*
Linos-Alexandre Sicilianos,
Alena Poláčková,
Péter Paczolay,
Gilberto Felici,
Erik Wennerström,
Lorraine Schembri Orland, *judges,*

and Renata Degener, *Deputy Section Registrar,*

Having regard to:

the application (no. 6865/19) against the Republic of Malta lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Nigerian national, Mr Joseph Feilazoo ("the applicant"), on 19 August 2019;

the decision of 13 September 2019 to give notice to the Maltese Government ("the Government") of the complaints concerning Articles 3, 5, 6 and 34 of the Convention and to declare inadmissible the remainder of the application;

the decisions of 11 December 2019 and 5 May 2020 to give notice of the complaint concerning Article 3 (conditions of detention) of the Convention and Article 34 (legal representation), respectively;

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

the decision that the applicant's legal representative from the legal aid office in Malta should no longer represent or assist the applicant (Rule 36 § 4 (b) of the Rules of Court), and that the applicant be invited to engage a lawyer of his choice;

the parties' observations;

Having deliberated in private on 2 February 2021,

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

INTRODUCTION

1. The case concerns the conditions of the applicant's immigration detention as well as its lawfulness under Articles 3 and 5 of the Convention respectively. It also concerns complaints under Article 34 of the Convention in relation to the proceedings before this Court, mainly related to interference with correspondence and the domestic legal aid representation.

THE FACTS

2. The applicant was born in 1975 and lives in Safi. The applicant, who had been granted legal aid by the Court, was represented by Dr I. Sadegh, a

lawyer practising in Iklin, for the purposes of making submissions before the Court.

3. The Government were represented by their Agent, Dr V. Buttigieg, at the time State Advocate and later by their Agents, Dr C. Soler, State Advocate and Dr J. Vella, Advocate at the Office of the State Advocate.

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

THE CIRCUMSTANCES OF THE CASE

A. The first set of criminal proceedings

5. On 23 February 2010, following a guilty plea in relation to drug related charges, the applicant was convicted by the Criminal Court to twelve years' imprisonment and to a fine (*multa*) of 50,000 euros (EUR) to be converted into a further eighteen months of imprisonment if the fine was not paid. The Criminal Court also ordered the applicant to pay the court experts' fees.

6. The applicant was unable to pay the fine and expenses which were in consequence converted into a further term of imprisonment of twenty-two and a half months' imprisonment in default.

7. On 1 April 2018, a few days before having served his entire sentence, which was to end on 10 April 2018, the applicant was spoken to by two officers (M.B. and G.S., the latter a constable in the immigration office) who questioned him about his intentions following his release from prison. Since the applicant wanted to go back to Spain (where he had had a residence permit at the time of his arrival in Malta), he was told that they would check whether he would be accepted by the Spanish authorities. No reply ensued.

8. According to the Government the Spanish authorities informed the Maltese authorities that the applicant no longer had a right to reside in Spain and that they would not accept the applicant as a legal resident.

B. The incident of 10 April 2018

9. On 10 April 2018 the applicant was released from the correctional facility. On the basis of documents supplied to him on 9 April 2018 and a call from a social worker, he thought that he was going to be escorted to an emergency shelter (which offers basic needs to vulnerable people, including accommodation). Instead, on the same day, he was escorted by two officers (D.T. and M.C. from the special response team of the correctional facility) to the Immigration Office, run by Inspector D.B., at the Police Headquarters. Proceedings against M.C. for ill-treating the applicant appear to have been pending at the time.

10. During the meeting with Inspector D.B. the applicant was informed that he could not return to Spain since the Spanish authorities would not accept him. He was informed that he would, thus, have to be sent back to Nigeria but that he would in the meantime be kept at the detention centre and was ordered to proceed to the van to be escorted there. The applicant objected since no mention had been made of removal or any further detention during his prison sentence. It appears that a removal order was issued and signed on the spot and given to the applicant, although a copy of the order has not been exhibited in the domestic proceedings. A copy was exhibited before this Court by the Government.

11. On the same day the applicant was deemed to be a prohibited immigrant in accordance with Article 5 of the Immigration Act, consequently a Return Decision and Removal Order was issued on the basis that he had been "found guilty by a court of criminal jurisdiction in Malta of an offence ... which is punishable with imprisonment for a term of not less than one year". The decision stated that the applicant had a right to apply for a period of voluntary departure and to appeal against the return decision within three days. According to the Government, the applicant requested such a period, but after considering the circumstances of the case, a negative decision was issued by the Principal Immigration officer on the basis that there was a risk that he would abscond; his application for legal stay was considered manifestly ill-founded; he was a threat to public policy, public security or national security. The application for voluntary return submitted by the Government was not signed by the applicant.

12. The applicant claimed that he had not been informed of his right to appeal such action. He told Inspector D.B. that they could not deport him as he had expired documents and that he refused to be detained again. He also noted that judicial proceedings were pending. At that point the correctional officers started pushing the applicant into the van and a scuffle ensued.

13. In subsequent proceedings (see paragraphs 17-25 below), it was alleged that at the above meeting the applicant became aggressive and resisted being handcuffed and being put into the detention services' van. As a result, it was alleged that the two correctional officers suffered bodily harm. In response to the alleged resistance and aggression, and a bite to one of the officers, pepper spray was used on the applicant. The correctional officers and police officers managed to handcuff the applicant while a further police officer tied his legs with cable ties. The applicant was subsequently put into the detention services van. An ambulance was called and took the applicant to hospital since, according to the authorities, he had complained that he could not breathe properly and alleged that he had a pain in his chest.

14. From the documents available to the Court, medical reports show that the applicant had a number of injuries and abrasions. In particular, the reports dated 10 April 2018 state that the left elbow X-ray was abnormal as

it had a fracture of the radial head, as was the right shoulder X-ray which revealed "a small fragment of bone adjacent to the humeral head laterally"; abrasions were noted around the head and elbow and tenderness was elicited over medial aspect of the left elbow. Other examinations on the day showed no further injuries. A report of 12 April 2018 stated that following the alleged beating the applicant's lower back pain (from which he had suffered over the years) had become more severe. The report reiterated that the applicant had an elbow injury as well as ecchymosis (bruising) on his face and ears on both sides of the face, abrasions on the neck and shoulder, scratches on both wrists and a swollen thumb. Subsequent reports while in prison showed that the applicant was suffering from pain in both shoulders and severe lower back pain.

15. On 11 April 2018 a court (see paragraphs 22 *et seq.*, below) instructed an expert (Dr M.S.) to examine the applicant and draw up a report. The examination took place on 13 April 2018 and the applicant was informed that its findings would be reported to the court. He consented to the examination. According to the expert's conclusion, as a result of the alleged assault, the applicant sustained bruises on the face which were a result of blunt trauma and a haematoma on the left mastoid process which was also the result of blunt trauma. The abrasions on the left forearm were the result of handcuffing. The fracture of the left radial head was also due to blunt trauma – this fracture was of a grievous nature, *per durata* (thirty days or more).

16. The applicant claims that the prison authorities refused to supply him with all his medical reports for the purposes of this application. A signed and stamped letter by the correctional manager, in reply to the applicant's request, stated that "if requested by the European Court of Human Rights, CCF [the correctional facility] will be able to present any documentation in relation to your [the applicant's] prison medical file before the mentioned Court". According to the Government, the applicant had in fact requested the originals of the documents and refused to accept a copy.

C. The criminal proceedings

1. The complaint of the police officers

17. On the day of the incident the two correctional officers reported to the police that they had been assaulted by the applicant. The report was taken by an officer (J.P.) and the investigation was led by an inspector (P.C.). According to the documents available to the Court the officers who were examined at a medical centre by Dr G.B. were found to have slight injuries, i.e., in respect of M.C., who alleged to have been bitten by a Nigerian immigrant, "superficial swelling over the mandible on the left, two puncture wounds over the base of the right thumb and an abrasion over the dorsum of the hand," and in respect of D.T. "swelling of the right periorbital

area and a 1 cm laceration on the knuckle". Both confirmed that they had no further injuries.

2. The questioning of the applicant

18. On 11 April 2018 the applicant was invited to speak to an immigration lawyer (Dr G.A.) for the purposes of seeking asylum, but the applicant made no application to that effect on that date.

19. Subsequently he was taken to the office of an inspector (P.C.) who questioned him about the events of 10 April 2018, without informing him that he was being charged with any crime in relation to those events. No lawyer was present. At the end of the interview he was informed that he was being charged with various offences and asked to sign a statement, which he refused to sign since it was not complete.

20. According to that unsigned statement, in reply to questions, the applicant confirmed that he had spoken to Dr G.A. and explained to the police his current status in Malta. In relation to the incident, he explained that he had been taken to Inspector D.B.'s office where he was given information as to his situation and he objected to being detained, at which stage the correctional officers tried to push him into the escort van. They tried to grab him from behind, but he resisted. They then grabbed him by the neck and "twisted" him onto the floor to try and handcuff him but he resisted. They used their knees to hold him down and started kicking him in his private parts and using pepper spray on him. They put their knees on his face and neck and continued to use pepper spray. After tying his feet, they managed to handcuff him and put him in the van. He told them that he could not breathe, and he passed out. He only woke up when he was in the ambulance. When questioned, he stated that he could not recall biting M.C., noting that he had been gasping for air when on the floor and unaware of what was happening. He said that he would not bite anybody and that he did not want to hurt anyone. He noted that he had had previous problems with M.C. with whom he had not been on good terms. He did not know where D.T.'s injuries came from. He admitted that he had resisted the officers as he did not want to be put in detention. He just wanted to go home, and he could not understand why the authorities had not prepared the documents in the ten years he had spent in prison, before his release.

21. When asked about his injuries, he replied that he had pain in the back of his head and forehead, as well as chest pain, a fractured elbow and a dislocated right shoulder. He added that he had the right to express himself and that it was the officers who grabbed him first. Inspector D.B. had told him that the prison had nothing to do with the [immigration] procedure; the applicant therefore considered that the presence of the correctional officers was unnecessary and served only to aggravate the situation.

3. The ensuing criminal proceedings against the applicant

22. On 12 April 2018 criminal proceedings were instituted against the applicant for assaulting and violently resisting the correctional officers, threatening or causing them bodily harm, causing them injuries of a slight nature, disobeying lawful orders and wilfully disturbing public good order and public peace. He was placed in pre-trial detention on the same day.

(a) The first-instance judgment

23. On 5 February 2019 the applicant was found guilty of all the charges against him and sentenced to two years' imprisonment and a fine of EUR 5,000. He was ordered to pay the costs of the expert who had examined him and was declared an illegal immigrant under Article 5 (2) (d) and 14 of the Immigration Act. Therefore, the court held that an order for deportation was to be issued once he finished serving his sentence. For the protection of the two officers the applicant was ordered to enter into a recognizance of EUR 2,000 for a period of one year.

24. The court accepted that the applicant must have felt frustrated at the way the immigration department handled his case and considered that the department could not be lauded for its behaviour. However, this did not justify the applicant's actions, even more so as he knew that he could seek redress from the courts as he had done in another pending case regarding alleged ill-treatment. Medical documents and eyewitnesses proved beyond reasonable doubt that the correctional officers had suffered slight injuries, and it was clear that the applicant had also disobeyed lawful orders and caused alarm and disturbance.

(b) The appeal judgment

25. By an appeal judgment of 16 May 2019, the applicant's guilt was confirmed but the punishment lowered in view of the circumstances of the case, in particular the long period of incarceration of the applicant and the behaviour of the immigration authorities. He was sentenced to two years' imprisonment suspended for three years and a fine of EUR 4,000. His immediate deportation (after the payment of the fine) was ordered.

D. Subsequent detention

26. On the same day (16 May 2019) the applicant was released from prison having been detained there since 12 April 2018 in pre-trial detention. He was transferred to a closed detention centre for immigrants. According to the applicant, the authorities did not have the required passport to send him back to Nigeria given that his own passport expired while in prison. According to the Government, by means of a *note verbale* of 17 May 2019 (and another of 17 December 2019) the Maltese authorities requested their

Nigerian counter parts to issue emergency travel documents for the applicant.

27. By a further judgment of 24 May 2019, the EUR 4,000 fine resulting from the judgment of 16 May 2019 was converted into six months' imprisonment due to the applicant's inability to pay that sum. The court sympathised with the applicant but considered that the six months could not be deducted from the thirteen months he had spent in pre-trial detention. The court further ordered that the applicant be deported at the end of his term of imprisonment and that the immigration authorities organise themselves to deal with this in due time in view of their past behaviour.

28. On the same day the applicant was released from Safi Barracks where he was serving his immigration detention and imprisoned at the Corradino Correctional Facility.

29. The applicant claimed that in prison he was moved from one security regime to another in order to bar him from any contact with persons and to impede his access to legal aid to proceed with his case against the officers, as well as hindering his application to the European Court of Human Rights. He further claimed that he was being denied access to his medical documents to substantiate his complaint, or to make any photocopies of his correspondence with the Court which he considered was being tampered with. According to the applicant, the treatment he was suffering was a result of discrimination. According to the Government, the applicant was transferred from a medium security division to a high security division due to his unruly behaviour, in particular instigating several prisoners to create disorder, and at one point he was found in possession of several prohibited items in his cell. No documentation was submitted by the Government to support this.

30. The applicant was released from the Corradino Correction Facility on 14 September 2019 and was placed in immigrant detention at the Safi Detention Centre. He was not informed of a date for his deportation.

31. On the date of the last observations from the Government (12 November 2020), the applicant was still in immigration detention but, according to the Government, his deportation having become unlikely, he would be released as soon as he was medically cleared.

By means of a factual update of 25 January 2021, the Government informed the Court that the applicant received his medical clearance on 13 November 2020 and was accordingly informed that he could leave the detention centre. He was further advised that the Agency for Welfare and Asylum Seekers would provide him with accommodation, but that his stay in Malta would be temporary as efforts to deport him would ensue. By means of an email dated 15 November 2020, sent *via* his legal representative (a copy of which was submitted to the Court) the applicant refused to leave the detention centre unless he was provided with a passport to travel into Europe. He believed that he was entitled to such travel

document, under European law, after spending twelve years in Malta. The applicant's request was refused on the basis that he was a prohibited alien. Consequently, the applicant declined to leave the detention centre until 22 December 2020, the date on which he was offered accommodation at the Ħal Far Open Centre.

The Government also submitted that the Nigerian authorities had refused to issue the applicant with travel documents before meeting with him. According to the Government's update, on 18 December 2020 Nigerian consular officers, present in Malta, offered to meet with the applicant with the aim of facilitating his deportation. The Government alleged that the applicant refused to meet them and that without the cooperation of the Nigerian authorities and the applicant deportation remained unlikely.

E. Proceedings before the Court

32. The applicant lodged his application on 19 August 2019 unrepresented. On 25 September 2019 multiple complaints were communicated to the respondent Government and the non-contentious phase was initiated. The applicant was invited to appoint a lawyer and submit his position regarding a friendly settlement by 6 November 2019.

33. On 23 October 2019 a power of attorney signed by a domestic legal aid lawyer (G.T.) was received directly from the Maltese legal aid office, with no cover letter nor any answer in relation to the non-contentious phase. The contentious phase was initiated and on 22 January 2020 the Government's submissions were sent to the applicant's representative for her reply by 4 March 2020. In view of the applicant's various letters to the Court, including new complaints, the legal representative was reminded that she should keep the applicant informed of the proceedings at all times and maintain regular contact with him to be able to meet the Court's deadlines. The Respondent Government were similarly informed. Nevertheless, the applicant's legal aid representative did not submit any observations or any other correspondence.

34. Throughout the proceedings, the applicant directly submitted updates to the Court. Via these updates, on 9 November 2019, he informed the Court that he had only learnt that a lawyer had been appointed for him for the purposes of ECHR proceedings on 16 October 2019 and that he had met her on 23/4 October. He then had no news and claimed that after complaining he had also been told that he would not get legal aid to pursue proceedings in Malta but only those before the Court (which he was told were more important). On 25 December 2019 he further informed the Court that he still had not been given legal aid to pursue domestically his complaints on conditions of detention. On 27 February 2020 the applicant informed the Court that he had not even been contacted by his lawyer after the contentious phase had started. He also referred to his previous

experience with local legal aid lawyers who would not take his calls nor meet him to prepare his case. He further stated that the legal aid office put pressure on him to drop the case before the European Court of Human Rights.

35. In consequence, the President of the Section to which the case was allocated decided that the applicant's legal representative from the legal aid office in Malta should no longer represent or assist the applicant (Rule 36 § 4 (b) of the Rules of Court) and that the applicant be granted legal aid by the Court (Rules 100 and 103). The applicant was invited to engage the services of a lawyer of his choice, which he did, and the new legal representative filed the relevant submissions on his behalf.

36. It appears from the documents submitted by the Government that, according to the local legal aid lawyer initially appointed domestically, she had a meeting with the applicant on 23 October 2019 and replied to some of his calls without appointment. She had explained to the applicant that she would contact the Government Agent in the context of the non-contentious phase. No settlement having been possible, she later informed the applicant of the situation and that it was for the Government to make observations, during which time no action needed to be taken from his side. Nevertheless, he continued to call her. On having become aware of his allegation to the Court about his lack of contact with her, she requested the help of the detention authorities so that he would stop bothering her. Eventually on 5 February 2020, the local legal aid lawyer requested the domestic courts to revoke her appointment and appoint another lawyer. This application was not decreed by the domestic courts, which were closed due to the Covid-19 pandemic in March 2020.

37. It also appears from documentation submitted by the applicant that on 10 January 2020 he was notified, via the detention authorities, that his request for legal aid to pursue remedies concerning his conditions of detention had been granted. A lawyer was appointed, but to date of the applicant's observations (October 2020), the lawyer had never met or effectively contacted the applicant.

RELEVANT LEGAL FRAMEWORK

I. IMMIGRATION LAWS

38. Immigration and asylum procedures are mainly regulated by the Immigration Act, Chapter 217 of the Laws of Malta and the Refugees Act, Chapter 420 of the Laws of Malta. The relevant articles of the Immigration Act ("the Act"), in particular Article 14 and 25 are set out in *Aboya Boa Jean v. Malta* (no. 62676/16, § 26-27, 2 April 2019), and in so far as relevant to the present case Article 5 (2) (d) reads as follows:

"(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 –

(*d*) if he is found guilty by a court of criminal jurisdiction in Malta of an offence against any of the provisions of the White Slave Traffic (Suppression) Ordinance or of the Dangerous Drugs Ordinance or of a crime, other than involuntary homicide or involuntary bodily harm, which, in the case of a first crime committed by such person, is punishable with imprisonment for a term of not less than one year or, in the case of a second or subsequent crime committed by such person, is punishable with imprisonment for a term of not less than three months;"

39. In 2020 there were three closed detention centres in Malta, the Initial Reception centre in Marsa, the Ħal Safi detention centre and Lyster Barracks. There were also various open centres such as the Ħal Far Open Centre and the Ħal Far Tent Village, where residents are housed in mobile metal containers.

II. REGULATIONS

40. Regulation 18 (3) of the Prison Regulations, Subsidiary Legislation 260.03, reads as follows:

"Every prisoner shall be allowed to make a request or complaint to the Director, to the Board or to the Minister, or to petition the President of Malta, or to an internationally recognised human rights body, under confidential cover."

41. Regulation 42 of the Detention Services Regulations, Subsidiary Legislation 217.19, reads as follows:

"(1) A request or complaint to the Head Detention Services, the officer in charge, Principal Immigration Officer or the Minister relating to a detained persons' detention shall be made orally or in writing by the detained person, or his legal representative, in accordance with such procedures as may be approved by the Head Detention Services.

(2) The officer in charge shall hear any requests and complaints that are made to him under sub-regulation (1).

(3) Any written request or complaint made under sub-regulation (1) may be made in confidence and, if the detained person so wishes, shall be sealed in an envelope with the addressee clearly indicated."

III. LEGAL AID

42. The relevant articles of the Code of Organisation and Civil procedure, Chapter 12 of the Laws of Malta read, in so far as relevant, as follows:

Article 911

"1) The demand for admission to sue or defend with the benefit of legal aid in any court mentioned in articles 3 and 4 and before any other adjudicating authority where the benefit of legal aid is by law granted, shall be made by application to the Civil Court, First Hall.

(2) Nevertheless, such demand may also be made orally to the Advocate for Legal Aid.

(3) The decree granting the benefit shall apply to all the courts and adjudicating authorities mentioned in sub-article (1).

(4) The Advocate for Legal Aid shall render his professional services to persons whom he considers would be entitled to the benefit of legal aid, and prior to their obtaining such benefit, prepare and file all judicial acts, which may be of an urgent matter.

The following procedure shall be followed:

(*a*) the Advocate for Legal Aid, shall file an application in the competent court in his own name requesting that he be authorised to file specific judicial acts, on behalf of a person or persons claiming the benefit for legal aid as he considers the matter urgent;

(*b*) the competent court shall, in such an event, allow such request unless there are serious reasons to the contrary;

(*c*) the Advocate for Legal Aid, after the judicial acts are allowed to be filed, shall then follow the normal procedure leading to the appointment or otherwise of an advocate and legal procurator *ex officio* as provided in this title. ...

(5) The Minister responsible for justice shall provide such facilities as are necessary for the proper administration of the benefit of legal aid. ..."

Article 925

"(1) The advocate or legal procurator assigned to the person admitted to the benefit of legal aid shall:

(*a*) act in the best interest of the person admitted to the benefit of legal aid;

(*b*) appear in court when the case of the person admitted to the benefit of legal aid is called;

(*c*) make the necessary submissions and file the requisite notes, writs of summons, statements of defence, notices, applications, and other written pleadings as circumstances require.

(2) The advocate or legal procurator shall remain responsible for a cause assigned to him as aforesaid, until the same has been finally disposed of, even though the period of his appointment may have expired."

RELEVANT INTERNATIONAL MATERIAL

43. On 2 October 2020 The United Nations Human Rights Office called for urgent action to address the dire situation of migrants attempting to cross the central Mediterranean Sea in search of safety in Europe and to tackle the shocking conditions they face in Libya, at sea, and – frequently – upon their

reception in Europe. The call followed a week-long mission to Malta from 21-26 September 2020 by a team of human rights officers during which they spoke to government officials, UN partners, migrant community leaders, civil society organisations and seventy-six migrants of twenty-five different nationalities.

44. Regarding disembarkation in Malta, some migrants said they had been detained for several months, with little access to daylight, clean water and sanitation. They reported severe overcrowding, poor living conditions, and limited contact with the outside world, including lawyers and civil society organisations. Migrants also said they had been given only one change of clothing since arriving. At the closed detention centre the team visited, there were multiple reports of self-harming and attempted suicide. There have also been several protests within detention centres in recent months, with security forces called in to restore order. "The pressures on the reception system in Malta have long been known but the pandemic has clearly made an already difficult situation worse," said UN High Commissioner for Human Rights Michelle Bachelet.

45. The Council of Europe Committee for the Prevention of Torture (CPT) affected a visit to Malta in September 2020, its report and recommendations have not yet been published.

THE LAW

I. THE GOVERNMENT'S PRELIMINARY OBJECTIONS

A. The parties' submissions

1. The Government

46. In relation to the complaints under Articles 3, 5, 6 §§ 1 and 3 (c) the Government submitted that the applicant had failed to exhaust domestic remedies, namely constitutional redress proceedings which he could have pursued by means of available legal aid. Even assuming that there were no available effective remedies in the particular circumstances of the case, then the complaints relating to issues under Article 3 and 6 which had occurred prior to 19 February 2019 had to be rejected for non-compliance with the six-month rule.

47. As to the availability of legal aid to pursue such proceedings, the Government submitted that the applicant had obtained legal aid several times, in relation to other proceedings which he had lodged domestically. They had concerned a claim before the small claims tribunal, proceedings lodged in 2014 against the Director of Prisons which were concluded on appeal in October 2017, as well as two constitutional cases. The first constitutional case had been concluded successfully in 2017 and had found

a breach of the applicant's right to be assisted by a lawyer during questioning that took place in 2008. The second constitutional case had concerned his conditions of detention in prison, had been lodged in December 2015 and concluded unsuccessfully on appeal in March 2019. The Government also submitted that every time the applicant had asked for a legal aid lawyer the prison authorities had transferred his request to the Legal Aid Agency.

48. As to the speediness of constitutional redress proceedings, the Government asked the court to review its previous findings. In this connection, they relied on *Alfred Degiorgio vs. the Attorney General*, constitutional redress proceedings, whereby the Civil Court (First Hall) declared an Article 6 complaint premature within two days, in a media sensitive case concerning ongoing criminal proceedings, and its appeal was decided in a little less than five months. They also relied on *Victor Buttigieg vs. the Attorney General* an Article 6 claim decided in less than ten months at two instances and *Hon. Simon Busuttil vs. the Attorney General,* another Article 6 case decided within a bit more than two years at two instances.

49. In connection with the applicant's complaint concerning the conditions of his immigrant detention, the Government submitted that he had at his disposal the remedy provided by Regulation 42 of the Detention Services Regulations (Subsidiary Legislation 217.19) in force as of January 2016, whereby a detainee could make a request or complaint to the Head of Detention Services, the officer in charge, the Principal Immigration Officer, or the Minister in relation to his or her detention. The complaint would then be decided by the officer in charge. The Government stated that the applicant had alleged that he had made such a request but did not substantiate his allegation. According to the Government from the records of the detention services (not submitted to the Court) it appeared that the essence of the applicant's complaints in this respect was the legality of his detention and the lack of a gymnasium in the detention facility. However, they later admitted that he had also complained, *inter alia*, about food and hygiene (see paragraph 78 below).

50. In their second round of observations, the Government stated explicitly that they had no further submissions in relation to admissibility. However, in the submissions on the merits of the Article 5 complaint they maintained that there had been an effective remedy for the purposes of Article 5 § 4, namely Article 25A of the Immigration Act (see paragraph 38 above), as amended in 2015 following the Court's judgments on this matter which, they considered, had made the remedy effective.

2. The applicant

51. The applicant submitted that the fact that he had previously been granted legal aid did not mean that he had been granted legal aid in respect of the various breaches of the Convention that he had suffered. He also

noted that, as shown by the documents submitted by the Government in relation to the local legal aid lawyer, who had assisted him in 2018, the latter had informed him that he should no longer make contact with her. She had also complained to the prison authorities that the applicant had called often and spent more than fifteen minutes on the phone, which resulted in the prison authorities limiting the applicant's access to the legal aid office and his lawyer. From then on, he could no longer inform the legal aid office of new incidents. He claimed that the repeated requests to the head of the detention centre for access to legal aid had been, as a result, ignored and the legal aid office never favourably processed his request to bring proceedings domestically about his complaints, nor to bring proceedings before this Court. Moreover, the mere appointment of a legal aid lawyer did not guarantee the relevant service, as shown by the circumstances of the present case where the appointed lawyer had unilaterally stopped representing her client without her having been released from her duty by the domestic courts.

52. Furthermore, relying on the Court's case-law, he submitted that he had no effective remedy under Article 5 § 4, to complain about his detention, nor a remedy in respect of his conditions of detention. He noted that the fact that constitutional redress proceedings were not effective was evidenced by the procedure he had undertaken to complain about such conditions in 2015. The procedure was even lengthier for a detainee who had to go through various bureaucratic steps to obtain legal representation.

53. The applicant submitted that he had complained to the head of the detention centre about the conditions of detention, both orally and in writing, about healthcare, hygiene, food, overcrowding, ventilation and threats by other inmates, as well as access to medical records, clothing and communication facilities, but his requests had been ignored. He had also written to the ombudsman, who in turn contacted the legal aid office, but no action was taken.

B. The Court's assessment

1. General principles

54. 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 – reflected in Article 13 of the Convention, with which it has close affinity – 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).

55. The scope of a Contracting Party's obligations under Article 13 varies depending on the nature of the complaint. However, the remedy required by Article 13 must be "effective" in practice as well as in law. The term "effective" means that the remedy must be adequate and accessible (see *McFarlane v. Ireland* [GC], no. 31333/06, § 108, 10 September 2010). Particular attention should be paid to the speediness of the remedial action itself, it not being excluded that an otherwise adequate remedy could be undermined by its excessive duration (ibid., § 123). Further, its exercise must not be unjustifiably hindered by the acts or omissions of the authorities of the respondent State (see *Aksoy v. Turkey*, 18 December 1996, § 95, *Reports* 1996-VI, and *Aydın v. Turkey*, 25 September 1997, § 103, *Reports* 1997-VI).

56. 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. However, once this burden of proof has been satisfied, it falls to the applicant to establish that the remedy advanced by the Government had in fact been used or was for some reason inadequate and ineffective in the particular circumstances of the case or that there existed special circumstances absolving him or her from the requirement (see *Vučković and Others v. Serbia* (preliminary objection) [GC], nos. 17153/11 and 29 others, § 77, 25 March 2014 and *Ananyev and Others v. Russia*, nos. 42525/07 and 60800/08, § 94, 10 January 2012).

57. As a rule, the six-month period runs from the date of the final decision in the process of exhaustion of domestic remedies. Where it is clear from the outset, however, that no effective remedy is available to the applicant, the period runs from the date of the acts or measures complained of, or from the date of knowledge of that act or its effect on or prejudice to the applicant (see *Mocanu and Others v. Romania* [GC], nos. 10865/09, 45886/07 and 32431/08, § 259, ECHR 2014 (extracts)). Where an applicant avails himself or herself of an apparently existing remedy and only subsequently becomes aware of circumstances which render the remedy ineffective, it may be appropriate for the purposes of Article 35 § 1 to take the start of the six-month period as the date when the applicant first became or ought to have become aware of those circumstances (ibid., § 260; see also *El-Masri v. the former Yugoslav Republic of Macedonia* [GC], no. 39630/09, § 136, ECHR 2012). In cases where there is a continuing situation, the period starts to run afresh each day, and it is in general only when that situation ends that the six-month period actually starts to run (see *Varnava and Others v. Turkey* [GC], nos. 16064/90, 16065/90, 16066/90,

16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90, § 159, ECHR-2009).

2. Application of the above principles to the present case

(a) Accessibility of remedies

58. Without prejudice to the Court's findings in relation to Article 34 of the Convention in the present case, the Court is not convinced that the applicant had no opportunity to apply for legal aid to pursue any relevant proceedings before submitting his application to the Court. In particular, the applicant has not denied that he repeatedly made use of these services as submitted by the Government. He was also given legal aid at domestic level to pursue the present proceedings, albeit only once the Government had been given notice of the various complaints, and subsequently was also given – at least in theory – legal aid to pursue proceedings concerning the conditions of detention (see paragraph 37 above). The Court notes that the applicant has not given the relevant details (such as the dates of his requests). Nor has he substantiated that prior to bringing proceedings before the Court by himself he made a request for legal aid for the purposes of exhausting any required remedies and that such a request was denied – his arguments to that effect appear to refer mainly to the period after he lodged his application and related to the complaint of conditions of detention. While it is apparent from the case-file that some tension was present between the applicant and his former legal aid lawyer, the Court cannot conclude, solely on that basis, that a request to that effect, prior to bringing his application, would have certainly been denied. It is true that the applicant was in detention at the relevant time and that the Court has already expressed its concerns in the Maltese context about concrete access to legal aid for such persons (see, for example, *Aden Ahmed v. Malta*, no. 55352/12, § 66, 23 July 2013 in the immigration detention context, and *Yanez Pinon and Others v. Malta*, nos. 71645/13 and 2 others, § 6, 19 December 2017 in the prison context). However, in the present case it has not been sufficiently shown that any remedies were not accessible to the applicant for this reason.

(b) Adequacy of remedies

59. The Court has already found both in the context of exhaustion of domestic remedies, and that of Article 13, that there was no effective remedy in respect of conditions of detention in Malta (see *Aden Ahmed*, cited above, § 64 and *Abdilla v. Malta*, no. 36199/15, § 69-72, 17 July 2018 and the case-law cited therein). Although in a series of cases 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 repeatedly found that the Government had not submitted any relevant domestic case-law that would call into doubt

its previous conclusions (ibid.). Similarly, in the present case, the incomparable cases brought forward by the Government do not alter those conclusions. Moreover, the proceedings instituted by the applicant in 2015 whereby he complained about his conditions of detention, which had lasted for more than three years, continue to reinforce that finding (see paragraph 47 above).

60. In so far as the Government have referred to the remedy provided by Regulation 42 of the Detention Services Regulations, the Court notes that very little was explained about this remedy, which *prima facie* appears to raise the same concerns as those expressed in *Story and Others v. Malta* (nos. 56854/13 and 2 others, §§ 77-79, 29 October 2015) in relation to similar remedies. Furthermore, the Court considers that the Government should normally be able to illustrate the practical effectiveness of a remedy with examples of domestic case-law (see *Ananyev and Others*, cited above, § 109), but it is ready to accept that this may be more difficult in smaller jurisdictions, such as in the present case, where the number of cases of a specific kind may be fewer than in the larger jurisdictions. However, not one case has been brought to the Court's attention to illustrate the effectiveness of this remedy. What is more, in a contradictory fashion, the Government first submit that the applicant did not substantiate that he had used this remedy, then they refer to the content of his requests, which they submit were dismissed, though no decisions were put forward. Thus, the Court considers that in the present case there is no reason to reject the complaint concerning conditions of detention for non-exhaustion of domestic remedies.

61. The Court has also repeatedly found that constitutional redress proceedings do not provide applicants with a speedy review of their ongoing detention (see, for example, *Aden Ahmed*, § 117, and *Abdullahi Elmi and Aweys Abubakar v. Malta*, nos. 25794/13 and 28151/13, § 123, 22 November 2016, and the cases cited therein). No reasons were brought to the Court's attention to hold otherwise in the present case, nor were any other remedies referred to by the Government in the context of their submissions on the admissibility of the Article 5 complaint.

62. In their second round of observations on the merits of the complaint under Article 5, the Government submitted that an effective remedy existed, namely Article 25A of the Immigration Act as amended in 2015. However, the Court reiterates that under Rule 55 of the Rules of Court, any plea of inadmissibility must have been raised by the respondent Contracting Party - in so far as the nature of the objection and the circumstances so allowed - in its written or oral observations on the admissibility of the application (see *N.C. v. Italy* [GC], no. 24952/94, § 44, ECHR 2002-X; *Markus v. Latvia*, no. 17483/10, § 50, 11 June 2020 and *Skudayeva v. Russia*, no. 24014/07, § 27, 5 March 2019) and failure to do so will lead the Court to find that the Government are estopped from raising the objection (ibid.). The amendment

at issue having been made in 2015 there are no exceptional circumstances which would exempt the Government from their obligation to raise any objection to admissibility in a timely manner (ibid; and see also, *Khlaifia and Others v. Italy* [GC], no. 16483/12, § 52, ECHR 2016 (extracts)). It follows that the Government are thereby estopped from raising this objection.

(c) Conclusion

63. It follows that the Government's non-exhaustion objection must be dismissed in relation to the complaints concerning Article 3 (conditions of detention) and Article 5. The Court further notes that both these complaints relate to continuing situations which were still ongoing when the applicant lodged his application with the Court. It follows that the six-month time-limit has also been observed and the Government's objection in this respect is also dismissed.

64. The same cannot be said about the applicant's remaining complaints under Article 3 as well as his complaint under Article 6, in respect of which constitutional redress proceedings are, in principle, effective remedies (see, for example, *Brincat and Others v. Malta*, nos. 60908/11 and 4 others, § 71, 24 July 2014, and *Farrugia v. Malta*, no. 63041/13, § 85, 4 June 2019) and which the Court found where accessible to the applicant (see paragraph 58 above). In this connection the Court notes, that under Maltese law, in order to redress human rights violations which are protected by the provisions of the Constitution or the Convention, a court of constitutional jurisdiction may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing, or securing the enforcement of, any of those provisions (see *Apap Bologna v. Malta*, no. 46931/12, § 84, 30 August 2016), and thus does not exclude the possibility of opening or re-opening an investigation for the purpose of complying with the procedural obligations under Articles 2 and 3 of the Convention. Moreover, the Court notes that such proceedings can still be pursued domestically (see *Farrugia*, cited above, § 85, for reference) without prejudice to the applicant's possibility of bringing these complaints again before the Court, if they are unsuccessful at domestic level. The Government's objection of non-exhaustion in respect of these complaints is therefore upheld.

II. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

65. The applicant complained that on 10 April 2018 the officers used excessive force in restraining him and that no relevant investigation ensued following the failure to protect him. He also complained about his conditions of detention in the immigrant detention centre, which he claimed was in breach of Article 3 of the Convention which reads as follows:

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

A. Excessive use of Force, lack of investigation and failure to protect

66. Relying on Article 2 and 13 the applicant complained of the excessive use of force by the correctional officers (against whom he had proceedings pending), as a result of which he was charged with crimes he did not commit as opposed to being treated as a victim, following a failure to protect him.

67. The Court being the master of the characterisation to be given in law to the facts of a case (see *Radomilja and Others v. Croatia* [GC], nos. 37685/10 and 22768/12, §§ 114-115, ECHR 2018) deems that the complaint falls to be considered under Article 3 of the Convention.

68. The Court has already found (see paragraph 64 above) that the applicant had effective and accessible remedies in respect of this complaint. It follows that it is inadmissible for non-exhaustion of domestic remedies, pursuant to Article 35 §§ 1 and 4 of the Convention.

B. Conditions of detention

1. Admissibility

69. The Court has already dismissed the Government's objections in respect of this complaint (see paragraph 63 above). It further 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.

2. Merits

(a) The parties' submissions

(i) The applicant

70. The applicant submitted that the detention centre, where he was held together with other asylum seekers, was not built to serve this purpose as it was a former military barracks made up of warehouses. Hundreds of people were packed in different zones within the military bases, in very dire conditions, with the remaining bases being used for military purposes. He considered that the authorities had failed to preserve his physical and mental well-being and his detention conditions in Safi had been much worse than those in prison. The applicant relied on a covert video published in the press where fellow detainees had shared their experiences of living in overcrowded conditions with a lack of hygiene, medical attention and nutritious food and which showed the dire conditions, including dirty floors, worn out and torn clothing and the lack of clean and functional bathrooms.

He further relied on public statements made by NGOs and the formal complaint made by the Maltese Chamber of Psychologists, requesting the Government to ensure humane conditions for migrants in detention. Their concerns were also echoed by editors in the press, and the United Nations delegation following their visit to Malta after which they called for action to tackle the shocking conditions for migrants in detention in Malta (see paragraphs 43-44 above).

71. Relying on photographic evidence, he further submitted that he slept on a mattress in overcrowded conditions – in this connection he noted that the Government showed no proof that the area was of 207 sq.m., and, even had it been the case, most of the area had been taken up by the furniture, beds, toilets etc. The same space was used for sleeping, eating and praying, and smoking was allowed everywhere. The toilets did not function properly and the dormitories were infested with insects and mice. The applicant complained about the unhygienic handling of food which moreover had been distributed on a table in close proximity to the sanitary facilities, thus detainees ate whilst smelling human waste; the taste of tap water they had been made to drink; the limited hygiene products (a shower gel once every two months); and the high prices of the "shopping list" where detainees could purchase limited items (which excluded fruit and vegetables) based on any money sent to them by relatives, on an account which had been controlled by the guards.

72. He maintained that there had been no contact with the outside world as no one had been allowed inside the detention centre. His phone and laptop had been confiscated. While they did receive a phone card every month, that was not sufficient and requests for more, even against payment, were at the guards' discretion. Similarly records concerning requests for medical attention were managed by the guards. The applicant submitted that while he finally had his request to see a psychologist accepted, his requests to seek medical treatment due to the chronic pain in his shoulder and back resulting from the incident of 10 April 2018 had taken several days to be acceded to, and he was currently still waiting for a date for his operation.

73. Furthermore, following his complaint to the police and Ombudsman about threats received, on 29 April 2020 the applicant had been moved out of his dormitory and kept in solitary confinement for forty days, in a container (structure similar to shipping containers) with no natural light or fresh air and all his requests to go outside to get some fresh air had been refused. The air-conditioning did not function thus the applicant had to suffer the extreme summer heat. During these weeks, which corresponded to the Covid-19 restrictions, he had limited access to the telephone and therefore his legal representative. On 8 June 2020, on being caught complaining to the police over the phone, the applicant was verbally assaulted and spat on before being locked up in the container, this time with an additional lock. Discussions ensued after this incident and from then on

he was allowed out of the container for two hours a day until 13 July 2020 when, upon the applicant's repeated pleas, he was moved to other living quarters, only to learn that it was being used for new arrivals kept in Covid-19 quarantine. The applicant complained about this hazardous situation and the total disregard to his health, but it was only on 29 August 2020 following repeated requests by his current representative that the applicant had been moved out of those quarters.

(ii) The Government

74. The Government submitted that the conditions of the applicant's detention did not constitute abnormally harsh detention conditions. The ground floor of Block B, Safi barracks, where the applicant was still detained had a total floor area of 207 sq.m. and could accommodate fifty-four detainees. However, according to the Government's observations of June 2020, at no point during the applicant's detention had there been more than forty-five, with the result that the applicant had 4.6 sq.m. of living space.

75. Recreation consisted of television, reading and outdoor exercise (from 7.30 a.m. to 5 p.m. in winter and until 8 p.m. in summer).

76. According to the Government, the facility also provided detainees with adequate ventilation, bedding, toiletries, sanitary and showering facilities (with hot and cold water). Food, which was provided three times a day, was of the necessary quantity and quality and the menu was varied regularly. Detainees were also provided with clothing, the use of a kitchen, a common room and a recreation yard, and had access to free medical care, legal aid (on appointment) and communication facilities. A five-euro telephone card was provided free of charge every two months and the applicant made no requests for further cards.

77. Detainees were regularly provided with cleaning detergents and sanitary items to ensure their personal hygiene and that of their environment. Indeed, according to the Detention Services Regulations, detainees were under the obligation to keep themselves and the areas where they were accommodated in a clean state. Pest control was regularly employed, but in summer months it was normal to have flying insects. In winter, in the absence of a heating system, detainees were equipped with blankets and could ask for more, and the facility was equipped with ceiling fans to alleviate the heat of the summer months. While jobs were not available, the State provided all basic needs, including medical assistance; the applicant was supplied with medication and given an appointment with a psychologist. The Government noted that the applicant was not vulnerable, unlike applicants in other cases against Malta where the Court had found a violation in relation to the conditions of migrant's detention, and his detention started in mid-September 2019, thus taken as whole the conditions could not amount to a breach of Article 3.

78. The Government admitted that the applicant frequently complained about, *inter alia*, the food and hygiene, and his complaints had been taken seriously. However, no change in his food regime had been allowed as this was only an exception for persons with medical needs. He had received the same food and hygiene products as everyone else.

79. The Government disputed the allegation that the applicant had been kept in isolation in a container, pointing out that the applicant had himself asked to be moved, following altercations with other detainees, and that the room provided for him (on his own) had contained a TV, a bathroom, a table and chairs, and was air-conditioned. He had also been allowed to walk outside at appropriate times. When his safety was no longer threatened, he was moved back to the compound. In this connection, the Government noted the applicant's contradictory statements that he had been locked up for two months, yet he had an incident when he had been on the phone during that period (see paragraph 73 above). Nevertheless, the Government denied that the incident had ever happened.

(b) The Court's assessment

(i) General principles

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

81. Under Article 3, the State must ensure that a person is detained in conditions which are compatible with respect for human dignity and that the manner and method of the execution of the measure do not subject the individual to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention (see *Riad and Idiab*, cited above, § 99; *S.D. v. Greece*, no. 53541/07, § 47, 11 June 2009; and *A.A. v. Greece*, no. 12186/08, § 55, 22 July 2010). When assessing conditions of detention, account has to be taken of the cumulative effects of these conditions, as well as of specific allegations made by the applicant (see *Dougoz v. Greece*, no. 40907/98, § 46, ECHR 2001-II). The length of the period during which a person is detained in specific conditions also has to be considered (see,

among other authorities, *Muršić v. Croatia* [GC], no. 7334/13, § 101, 20 October 2016, and *Aden Ahmed*, cited above, § 86).

82. The extreme lack of personal space in the detention area weighs heavily as an aspect to be taken into account for the purpose of establishing whether the impugned detention conditions were "degrading" from the point of view of Article 3 (see *Karalevičius v. Lithuania*, no. 53254/99, § 36, 7 April 2005, and *Yarashonen v. Turkey*, no. 72710/11, § 72, 24 June 2014, and, for a detailed analysis of the principles concerning the overcrowding issue, see *Muršić*, cited above, §§ 136-141).

83. The Court further reiterates that, quite apart from the necessity of having sufficient personal space, other aspects of physical conditions of detention are relevant for the assessment of compliance with Article 3 (ibid., and *Story and Others*, cited above, § 112-113). Such elements include access to outdoor exercise, natural light or air, availability of ventilation, and compliance with basic sanitary and hygiene requirements (see *Ananyev and Others*, cited above, § 149 *et seq.* for further details, and *M.S.S. v. Belgium and Greece* [GC], no. 30696/09, § 222, ECHR 2011). The Court notes in particular that the Prison Standards developed by the Committee for the Prevention of Torture make specific mention of outdoor exercise and consider it a basic safeguard of prisoners' well-being that all of them, without exception, be allowed at least one hour of exercise in the open air every day and preferably as part of a broader programme of out-of-cell activities (see *Abdullahi Elmi and Aweys Abubakar*, cited above, § 102).

(ii) Application of the above principles to the present case

84. The Court notes that it has already had occasion to express its concern about the appropriateness of the place and the conditions of detention in Safi Barracks (see *Suso Musa v. Malta*, no. 42337/12, § 101, 23 July 2013 in the context of an Article 5 complaint). In that case it noted that various international reports had expressed concerns on the matter. Both the CPT and the International Commission of Jurists considered that the conditions in question could amount to inhuman and degrading treatment under Article 3 of the Convention. Furthermore, those conditions were exacerbated during the Libyan crisis, a time when Mr Suso Musa was in detention. In that light, the Court found it difficult to consider such conditions as appropriate for persons who have not committed criminal offences but who, often fearing for their lives, have fled from their own country. Subsequent to that judgment, in 2016, the Court had again occasion to examine the conditions of detention in Safi Barracks, and it found a violation of Article 3 where the detainees were vulnerable individuals detained for prolonged periods (see *Abdullahi Elmi and Aweys Abubakar*, cited above, §§ 114-115 concerning a sixteen and seventeen year old detained for eight months). The Court notes that the present case concerns a period subsequent to the situation in those cases and while the CPT made a

visit to the detention centre at issue in September 2020, at a time when the applicant was in detention, the relevant reports and recommendations have not yet been made public. The Court must therefore limit its assessment to the submissions made before it by the parties.

85. The Court reiterates that cases concerning allegations of inadequate conditions of detention do not lend themselves to a rigorous application of the principle *affirmanti incumbit probatio* (he who alleges something must prove that allegation) because in such instances the respondent Government alone have access to information capable of corroborating or refuting these allegations. Accordingly, applicants might experience certain difficulties in procuring evidence to substantiate a complaint in that connection. Still, in such cases applicants may well be expected to submit at least a detailed account of the facts complained of and provide – to the greatest possible extent – some evidence in support of their complaints (see *Visloguzov v. Ukraine*, no. 32362/02, § 45, 20 May 2010 and *Abdilla*, cited above, § 47). However, after the Court has given notice of the applicant's complaint to the Government, the burden is on the latter to collect and produce relevant documents. A failure on their part to submit convincing evidence on material conditions of detention may give rise to the drawing of inferences as to the well-foundedness of the applicant's allegations (see *Gubin v. Russia*, no. 8217/04, § 56, 17 June 2010, and *Khudoyorov v. Russia*, no. 6847/02, § 113, ECHR 2005-X (extracts)). The Court notes that while the applicant submitted photos substantiating many of his statements, the Government presented a number of general allegations, none of which was substantiated by any documentation or specific detail.

86. However, from the relevant parties' submissions it appears that the applicant was seen by doctors in connection with his ailments when this was necessary and was prescribed the relevant medical treatment, as would have been the case had he been treated in the State Hospital like any other citizen at liberty (see, *mutatis mutandis, Prestieri v. Italy*, (dec.), no. 66640/10, 29 January 2013). In this connection, the Court reiterates that medical treatment within detention facilities must be appropriate and comparable to the quality of treatment which the State authorities have committed themselves to providing for the population as a whole. Nevertheless, this does not mean that each detainee must be guaranteed the same medical treatment that is available in the best health establishments outside such facilities (see, *mutatis mutandis*, *Story and Others,* cited above, § 108).

87. As to overcrowding, the Court notes firstly that on the one hand the applicant relied on photographic evidence and public statements (see paragraph 70 above) without, however, giving precise details. On the other hand, the measurement calculations relied on by the Government are approximate and inconclusive. They submitted, without any substantiation, that the ground floor of Block B, Safi barracks, where the applicant had been detained had a total floor area of 207 sq.m. and that no more than

forty-five individuals had been held there at that time. The Court observes that this submission concerns the period prior to June 2020 when the Government made their first submissions, that is before any influx of asylum seekers which usually occurs in the summer months due to good weather. No similar submission was made in their observations of November 2020. Secondly, the Court finds it important to reiterate the methodology for the calculation of the minimum personal space allocated to a detainee in multi-occupancy accommodation for its assessment under Article 3. Drawing from the CPT's methodology on the matter, the Court has held that the in-cell sanitary facility should not be counted in the overall surface area of the cell. On the other hand, the calculation of the available surface area in the cell should include space occupied by furniture. What is important in this assessment is whether detainees had a possibility to move around within the cell normally (see *Muršić*, cited above, § 114). The Government, who are better placed to provide this data, have not relayed sufficient information for the Court to determine the actual space allocated to the applicant throughout the relevant period, it follows that, in the absence of exact numbers throughout the entire period and the relevant measurements being provided by any of the parties, the Court cannot conclude with certainty that there was overcrowding which was severe enough to justify in itself a finding of a violation of Article 3 (compare and contrast *Abdullahi Elmi and Aweys Abubakar*, cited above, § 107).

88. In any event, it is for the Court to assess the other aspects of the conditions of detention which are relevant to the assessment of compliance with Article 3. The Court is concerned about various claims made (see paragraphs 71 and 72 above), particularly given that the applicant's detention lasted for around fourteen months. Some of these concerns have already been highlighted in previous cases (see, for example, *Suso Musa*, cited above, § 101, in general, *Abdullahi Elmi and Aweys Abubakar*, cited above, § 110, concerning ventilation, sanitary facilities and activities; *Yanez Pinon and Others*, cited above, § 115, in relation to smoking). Others had previously seemed less troubling (ibid. § 109 *in fine*, in relation to food, clothing and hygiene products) but in the absence of concrete rebuttals, in the present case, might merit reconsideration. The Court also takes issue with the fact that the toilets did not function properly and that the dormitories were infested with insects and mice (which would not appear to be a first occurrence in Maltese detention facilities, see in the context of prisons *Story and Others*, cited above, §§ 121-122 and *Yanez Pinon and Others* cited above, § 112, respectively).

89. However, without delving further into the above claims, the Court is struck particularly by the fact that the applicant was held alone in a container for nearly seventy-five days (29 April to 13 July 2020) without any access to natural light or air, and that during the first forty days (29 April to 8 June) he had had no opportunity to exercise (see paragraph 73

above). The Government disputed the statement claiming that the applicant was put alone in a "room" with some furniture and later returned to "the compound" and that during this time he was allowed to walk outside at appropriate times (see paragraph 79 above). However, the Government did not give any explanation as to the location or structure of the "room", which appears to have been away from Block B (the compound), nor do they provide any photographic evidence, or any details as to the situation during that period. In particular, they have not claimed that the "room" had natural light or ventilation, nor did they give specific details as to the outdoor exercise allowed during this period. Indeed, bearing in mind the use of home-containers in the context of open centres (see paragraph 39 above) and the specific statements of the applicant with reference to exact dates as to when this went on and in what circumstances (see, *a contrario, Podeschi v. San Marino*, no. 66357/14, § 112, 13 April 2017), the Court finds it reasonable to give credence to the applicant's version of events.

90. The Court considers that while of itself accommodation in a container may not amount to inhuman and degrading treatment, the limited light and ventilation complained of in the present case during this period are of concern. Such conditions of confinement must have been exacerbated by the limited, if any, exercise time during the first forty days. In this connection the Court notes that the applicant claimed that his access to a phone was limited, meaning that he could in fact use a phone at times (which was certainly not in the room), therefore the Court does not discern the discrepancy referred to by the Government in the applicant's statements. In that regard, the Court reiterates that no access to open air and exercise is a factor carrying considerable weight when coupled with the other conditions (see *Aden Ahmed*, cited above, § 96, and the examples cited therein). As regards the suffering from heat in the container raised by the applicant, the Court reiterates that suffering from cold and heat cannot be underestimated, as such conditions may affect well-being and may in extreme circumstances affect health (see *Aden Ahmed*, cited above, § 94).

91. Furthermore, during these seventy-five days in which he was held in a container (see paragraph 89 above), but especially during the first forty days of this period, during which he was not even allowed out to exercise, the applicant was subjected to a *de facto* isolation although not a *de jure* one. Nevertheless, the same general principles remain relevant (see *Podeschi*, cited above, §§ 109 and 116), namely, regard must be had to the particular conditions, the stringency of the measure, its duration, the objective pursued and its effects on the person concerned. In that connection the length of the period in question requires careful examination by the Court as to its justification, the need for the measures taken and their proportionality with regard to other possible restrictions, the guarantees offered to the applicant to avoid arbitrariness and the measures taken by the authorities to satisfy themselves that the applicant's physical and

psychological condition allowed him to remain in isolation (ibid. and *Ramirez Sanchez v. France* [GC], no. 59450/00, § 136, ECHR 2006-IX). It is not disputed that the applicant was put in isolation for his own protection, upon his own request. However, the stringency and duration of the measure put in place, namely, that for at least forty days the applicant had barely any contact with anyone (except for the guards and the possibility of a few phone calls), seem excessive in the circumstances. No measures appear to have been taken by the authorities to ensure that the applicant's physical and psychological condition allowed him to remain in isolation, nor does it appear that in the specific circumstances of this case, any other alternatives to this isolation had been envisaged.

92. Furthermore, the Court is concerned about the assertion, not rebutted by the Government, that following this period the applicant was moved to other living quarters where new arrivals (of asylum seekers) were being kept in Covid-19 quarantine. The Court notes that there is no indication that the applicant was in need of such quarantine – particularly after an isolation period – which moreover lasted for nearly seven weeks. Thus, the measure of placing him, for several weeks, with other persons who could have posed a risk to his health in the absence of any relevant consideration to this effect, cannot be considered as a measure complying with basic sanitary requirements.

93. The foregoing considerations are sufficient to enable the Court to conclude that there has been a violation of Article 3 in the present case.

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

94. The applicant complained that his detention between 16 and 23 May 2019, and that subsequent to 15 September 2019, had not been lawful as there was no prospect of his deportation and the latter proceedings had not been pursued diligently contrary to that provided in Article 5 § 1 of the Convention, which, in so far as relevant, reads as follows:

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

95. The Court has already dismissed the Government's preliminary objections in respect of this complaint (see paragraph 63 above). It further 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.

B. Merits

1. The parties' submissions

(a) The applicant

96. The applicant submitted that his detention between 16 and 23 May 2019 was not in accordance with Article 5 § 1 of the Convention because the authorities did not have the required passport to send him back to Nigeria given that his own passport expired while in prison. Furthermore, the authorities knew that his fine would be converted into prison time and therefore that no deportation proceedings could be undertaken.

97. He also considered that his detention which as of 15 September 2019 had already lasted over a year (at the time of his last observations submitted in October 2020) and was still ongoing, was not in compliance with Article 5 § 1 as his deportation was not being pursued diligently. The authorities had had over a decade, while he was in prison, to organise his deportation, yet nothing had been done. They also had further time following his subsequent imprisonment. He stressed that the Government relied on two *notes verbal* (see paragraph 98 below) which have not been submitted to the Court, and they failed to explain why so many months later they had not yet deported the applicant. It was clear, in the applicant's view, that his deportation had no prospects of success, yet, despite that, he had not been released.

(b) The Government

98. The Government submitted that the applicant's detention between 16 and 23 May 2019 was justified because although the authorities were not in possession of an emergency travel document, they were in contact with the Nigerian authorities for them to issue such a document which was requested by means of a *note verbale* sent on 17 May 2019. The Government considered that the prospects of return were still possible even though eventually on 24 May 2019 the fine inflicted on the applicant was converted to prison time.

99. In relation to the detention period starting on 15 September 2019, the Government submitted that this was for the purposes of his deportation. During this time the Maltese authorities had been in contact with the Nigerian authorities for the emergency travel document to be issued, namely by means of two *notes verbale* sent on 17 May and 17 December 2019 respectively. The Government claimed that the Nigerian authorities went to Malta to speak to the applicant who insisted that he did not want to go back to Nigeria. The Maltese authorities were informed that from the

verifications made by the Nigerian authorities they were not sure about his name, however the latter did not inform the Maltese authorities that a travel document would not be issued, thus the Government believed (at the time of their observations in July 2020) that prospects of deportation still existed.

100. However, in their second round of observations (12 November 2020), the Government submitted that since their continued attempts to obtain travel documents via diplomatic channels were to no avail and deportation became unlikely, the applicant had been requested to undergo a customary health check. The Government informed the Court that the applicant would be released upon obtaining medical clearance. In their factual update of 25 January 2021 (see paragraph 31 above), they informed Court that clearance had been obtained on 13 November 2020 and that, accordingly, the applicant was informed that he could leave the centre.

2. The Court's assessment

(a) General principes

101. Article 5 enshrines a fundamental human right, namely the protection of the individual against arbitrary interference by the State with his or her right to liberty (see *Aksoy v. Turkey*, 18 December 1996, § 76, *Reports* 1996-VI). The text of Article 5 makes it clear that the guarantees it contains apply to "everyone" (see *Nada v. Switzerland* [GC], no. 10593/08, § 224, ECHR 2012). Sub-paragraphs (a) to (f) of Article 5 § 1 contain an exhaustive list of permissible grounds on which persons may be deprived of their liberty and no deprivation of liberty will be lawful unless it falls within one of those grounds (see *Saadi v. the United Kingdom* [GC], no. 13229/03, § 43, ECHR 2008). One of the exceptions, contained in sub-paragraph (f), permits the State to control the liberty of aliens in an immigration context.

102. Article 5 § 1 (f) does not demand that detention be reasonably considered necessary, for example, to prevent the individual from committing an offence or fleeing. Any deprivation of liberty under the second limb of Article 5 § 1 (f) will be justified, however, only for as long as deportation or extradition proceedings are in progress. If such proceedings are not prosecuted with due diligence, the detention will cease to be permissible under Article 5 § 1 (f) (see *Chahal v. the United Kingdom*, 15 November 1996, § 113, *Reports* 1996 V, *Saadi*, cited above, § 72 and *Khlaifia and Others*, cited above, § 90).

103. The deprivation of liberty must also be "lawful". Where the "lawfulness" of detention is in issue, including the question whether "a procedure prescribed by law" has been followed, the Convention refers essentially to national law and lays down the obligation to conform to the substantive and procedural rules of that law, but it requires in addition that any deprivation of liberty should be in keeping with the purpose of Article 5, namely to protect the individual from arbitrariness (ibid., § 91)

104. It is a fundamental principle that no detention which is arbitrary can be compatible with Article 5 § 1 and the notion of "arbitrariness" in Article 5 § 1 extends beyond a lack of conformity with national law, so that a deprivation of liberty may be lawful in terms of domestic law but still arbitrary and thus contrary to the Convention (see *Saadi*, cited above, § 67). To avoid being branded as arbitrary, detention under Article 5 § 1 (f) must be carried out in good faith; it must be closely connected to the ground of detention relied on by the Government; the place and conditions of detention should be appropriate; and the length of the detention should not exceed that reasonably required for the purpose pursued (see *A. and Others v. the United Kingdom* [GC], no. 3455/05, § 164, ECHR 2009, and *Aden Ahmed*, cited above, § 141).

(b) Application of the above principles to the present case

105. The parties have not elaborated on whether, in practice, the authorities would deport an individual who has an outstanding unpaid fine with the State. In the absence of any detail about the matter, the Court is ready to accept that such deportation was possible, and that therefore the applicant's brief period of detention which occurred between 16 to 23 May 2019 was for such purpose. While it is true that on 16 May 2019, his first day of detention, the authorities had no travel documents enabling such deportation, the following day, 17 May 2019, the Maltese authorities requested their Nigerian counter parts to issue emergency travel documents for the applicant (see paragraph 26 above). In that light and in view of the brevity of the period, it cannot be said there was no prospect of his deportation or that the authorities did not pursue it diligently.

106. The same cannot be said about the subsequent period, namely that of 15 September 2019 until 13 November 2020. In the instant case, the applicant was detained with a view to his deportation for around fourteen months. Therefore the issue is whether or not the authorities were sufficiently diligent in their efforts to deport him during this period.

107. Firstly, it is to be noted that during this period no legal challenge was pending before the domestic courts and the expulsion order was immediately enforceable, thus, the delay in the present case cannot be regarded as being due to the need to wait for the determination of any legal challenge (see *Louled Massoud v. Malta*, no. 24340/08, § 66, 27 July 2010).

108. Secondly, the Court observes that the only apparent step taken by the authorities during the fourteen months in issue was to write once to the Nigerian authorities following the initial request for the issuing of a travel document for the applicant. This led the Nigerian authorities to visit the applicant once during this period with the result that they remained unsure as to his identity (see paragraph 99 above). The Court considers that while the Maltese authorities could not compel the issuing of such a document, there is no indication that during this period they pursued the matter

vigorously or endeavoured entering into relevant negotiations with the Nigerian authorities with a view to expediting its delivery (ibid., and *Tabesh v. Greece*, no. 8256/07, § 56, 26 November 2009) despite the Government's claim that they pursued the matter via diplomatic channels – a claim which appears to be unsubstantiated. With one *note verbale* over fourteen months, the authorities can hardly be regarded as having taken active and diligent steps with a view to deporting him (compare *Auad v. Bulgaria*, no. 46390/10, §§ 130 and 132, 11 October 2011 and *Amie and Others v. Bulgaria*, no. 58149/08, §§ 76-77, 12 February 2013). Furthermore, contrary to the Government's submission that nothing indicated that the Nigerian authorities would not issue such documents, by the former's own admission, the Nigerian authorities had doubts as to the applicant's identity. Nothing has been brought to the Court's attention showing that despite those doubts the Nigerian authorities were willing to issue travel documents. Therefore, it must have been clear to the domestic authorities earlier on (and not only in November 2020) that deportation would not be feasible (compare *Louled Massoud*, cited above, § 67).

109. Moreover, the Court notes that in their observations of 12 November 2020 the Government admitted that there were no longer prospects of deportation.

110. The foregoing considerations are sufficient for the Court to conclude that the ground for the applicant's detention – action taken with a view to his deportation – did not remain valid for the whole period of his deprivation of liberty. There has therefore been a violation of Article 5 § 1 of the Convention.

IV. ALLEGED VIOLATION OF ARTICLE 34 OF THE CONVENTION

111. The applicant claimed to have suffered a hindrance from the part of the State with the effective exercise of his right of petition, as guaranteed by Article 34 of the Convention, which reads as follows:

> "The Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right."

A. The parties' submissions

1. Correspondence with the Court

112. The applicant claimed to have suffered such hindrance on two counts. Firstly, he complained that he did not have the opportunity to correspond with the Court without interference by the prison authorities, in line with Regulation 18 of the Prison Regulations and that he had been

denied access to materials intended to substantiate his application to the Court. His communication from the immigration detention centre had also not been confidential. Not only had his correspondence with the Court and his lawyer been opened, but copies of it had also been made, as shown by the fact that he had been able to obtain a copy of one of his letters from the authorities. Such acts were designed to discourage the applicant from using the Convention remedy and could hinder the proceedings before the Court. He claimed that his criminal file had been tampered with, and certain pages and photos of his injuries had been removed. Furthermore, the authorities had refused to make copies of his original documents which he needed to submit as evidence to the Court, forcing him to send originals, with the result that he no longer had any copies of such documents. Also, they had not given him his prison medical file, stating that the Court should contact them directly should it wish to obtain such documents (see paragraph 16 above).

113. The Government submitted that from the records held by the prison authorities of the applicant's correspondence, it transpired that he had regularly sent letters to and received letters from the Court and other individuals. In respect of the applicant's allegation that he was not allowed to make copies of documentation, the Government noted that most of the documents attached to his application concerned his criminal proceedings, copies of which the applicant or his lawyer could have obtained from the courts' registry. Medical documentation could be obtained on request from the health authorities. However, from the prison records it appeared that the applicant had been supplied with several photocopies. The Government considered that the applicant could have obtained relevant documentation *via* his legal aid lawyer and that there was no interference or hindrance by the authorities.

2. Domestic legal aid representation

114. The applicant considered that the acts and omissions of the applicant's representative appointed under the domestic legal aid system were imputable to the State, thus the failings in the assistance provided to him constituted hindrance by the State in the present case with the effective exercise of his right of application. He noted that he had repeatedly asked for legal aid to pursue remedies and bring proceedings before the Court, but his requests had been ignored. It was only after the Court had given notice of part of the application to the respondent Government that the legal aid office had confirmed that the applicant fulfilled both the means test and the merits qualification (i.e. reasonable ground to be a party to undertake, defend or continue a procedure) and had thus allocated a legal aid lawyer and a procurator to assist him in the proceedings before the Court. At the one and only meeting he had, members of the legal aid office insisted that he withdraw his claim with the Court, pressure that was aimed at hindering

the proceedings before the Court. After that, he never saw or spoke to the legal aid lawyer who only sent him information by email *via* the detention authorities, but he could not contact her, and therefore could not tell her about the problematic conditions of detention at the immigration centre - a complaint he thus had to lodge with the Court by himself. On 22 November 2019 she informed him that it was for the Government to file observations and therefore there was no need to meet or speak at that stage. For that reason the applicant had no option but to contact the Court directly. He later learnt that on 5 February 2020 the local legal aid lawyer had requested the domestic courts to revoke her appointment. However, neither she nor the legal aid office had informed him of this, and when he had received the notification by the law courts, it had been in Maltese, a language he could not understand. This led to a series of orders for translations during which time the deadline for submission of observations had expired (on 4 March 2020 before the closure of the courts for Covid-19 related reasons). The appointed legal aid lawyer failed to file submissions on the applicant's behalf, contrary to her duties under domestic law (see paragraph 42 above) and her duty of loyalty towards him.

115. The law clearly stated that the Minister responsible for Justice should provide the facilities necessary for the proper administration of legal aid, which was provided by the State. Thus, there was no doubt that the failures of the legal aid office were imputable to the respondent State. In this context the applicant, who was dependent on the legal aid system, was left in a vulnerable position with no possibility of complaining about the situation with the legal aid office, namely the same people who he wanted to complain about. Thus, the framework had neither proved effective nor did it protect his interests.

116. The Government submitted that many of the applicant's claims were unsubstantiated. They noted that following the appointment of a local legal aid lawyer to assist the applicant in proceedings before the Court, he had had a meeting with her on 23 October 2019 where the legal issues had been explained to him and the correspondence passed on to him. In particular, he had been told by the legal aid lawyer that although he had not exhausted domestic remedies, she was ready to assist him as far as possible. The Government claimed that the applicant had been in constant communication with the local legal aid lawyer *via* telephone and email (including on 22 November 2019) and that, nonetheless, he had maintained direct communication with the Court. Perceiving this communication as a lack of trust on 5 February 2020 the local legal aid lawyer had requested the domestic courts to revoke her appointment and appoint another lawyer. The application being in Maltese, this led to a series of orders for translation and it had ultimately never been decreed by the domestic courts which had been closed due to the Covid-19 pandemic between 16 March and 5 June 2020. The Government noted that the applicant had never complained to Legal

Aid Malta about the services being given to him. Instead, he opted to circumvent his lawyer and contact the Court directly and had given misleading information. Thus, according to the Government, from the facts that transpired it did not appear that the acts and omissions of the local legal aid lawyer appointed in accordance with national law were imputable to the State. The applicant was not hindered in making his application, which he did by himself, and he continued to communicate with the Court of his own motion despite the fact that he had been granted the services of a legal aid lawyer, who had done all that was reasonably expected of her to assist him.

B. The Court's assessment

1. Correspondence with the Court

117. The Court reiterates that the practice of intercepting, opening and reading prisoners' letters amounts to an interference with the right to respect for correspondence. It is of the utmost importance for the effective operation of the system of individual petition guaranteed under Article 34 of the Convention that applicants or potential applicants should be able to communicate freely with the Convention organs without being subjected to any form of pressure from the authorities to withdraw or modify their complaints (see *Akdivar and Others v. Turkey*, 16 September 1996, *Reports* 1996-IV, § 105, and *Sałapa v. Poland*, no. 35489/97, § 94, 19 December 2002). In this context, "pressure" includes not only direct coercion and flagrant acts of intimidation, but also other improper indirect acts or contacts designed to dissuade or discourage applicants from using a Convention remedy (see *Aydın v. Turkey*, 25 September 1997, §§ 115-117, *Reports of Judgments and Decisions* 1997-VI). The interception of letters by prison authorities can also hinder applicants in bringing their cases to the Court (see *Klyakhin v. Russia*, no. 46082/99, § 119, 30 November 2004).

118. According to the Court's case-law, although the opening of a letter from a lawyer may be permitted – if the prison authorities have reasonable cause to believe that it contains an illicit enclosure and when suitable guarantees are provided – no compelling reasons have been found to exist for the opening of letters to the Convention organs (see *Campbell v. the United Kingdom*, 25 March 1992, §§ 48 and 62, Series A no. 233, and *Peers v. Greece*, no. 28524/95, § 84, ECHR 2001 III).

119. The Court reiterates that it is important to respect the confidentiality of its correspondence since it may concern allegations against prison authorities or prison officials. The opening of letters both to and from the Convention organs undoubtedly gives rise to the possibility that they will be read and may conceivably, on occasion, also create the risk of reprisals by prison staff against the prisoner concerned (see *Campbell*, cited above, § 62 and *Peňaranda Soto v. Malta*, no. 16680/14, § 98, 19 December 2017). It is thus of prime importance for the effective exercise

of the right to individual petition under the Convention that the correspondence of prisoners with the Court should not be subjected to any form of control, which might hinder them in bringing their cases to the Court (ibid. and *Story and Others*, cited above, § 131).

120. The Court notes that Prison Regulation 18 (see paragraph 40 above) provides for complaints to internationally recognised human rights bodies to be made under confidential cover. From the case file it appears that it is only the envelopes which are stamped by the authorities and not the applicant's letters themselves (see, *a contrario*, *Peňaranda Soto*, cited above, § 100). However, from the content of some of the envelopes received by the Court, it cannot be excluded that the detainees submit open copies of their letters to the prison authorities, which in turn are placed in envelopes by the latter. Moreover, the applicant claimed that his correspondence had also been copied (see paragraph 112 above), an allegation not contested by the Government.

121. Furthermore, the Court cannot but note that once the applicant was in immigration detention in Safi Barracks, his correspondence from the Court was passed on to him through his local legal aid lawyer, *via* emails to the personnel of the detention facility. Those same emails also contained information about the processing of the case before the Court and the situation concerning the non-contentious phase. These email exchanges occurred before the Covid-19 pandemic. While the Court understands that email communication is a convenient and speedy way of relaying information, and that the information appears to have been appropriately relayed to the applicant in good faith by the detention centre staff, it considers that information relating to ongoing proceedings before the Court being openly relayed *via* third persons, which moreover could be the subject of such complaints, may create a risk of reprisal. In this connection, the Court notes that while the Detention Regulation provides for the possibility of domestic complaints being made in confidence, no such safeguard appears to apply concerning complaints and subsequent communication with international bodies (see, conversely, Prison Regulation 18 set out at paragraph 40 above).

122. The Court reiterates that a failure by the respondent Government to comply with their procedural obligation under Article 34 of the Convention does not necessarily require that the alleged interference should have actually restricted, or had any appreciable impact on, the exercise of the right of individual petition. The Contracting Party's procedural obligations under Articles 34 and 38 of the Convention must be enforced irrespective of the eventual outcome of the proceedings, and in such a manner as to avoid any actual or potential chilling effect on the applicants or their representatives (see *Mehmet Ali Ayhan and Others v. Turkey*, nos. 4536/06 and 53282/07, § 41, 4 June 2019). The Court considers that applicants who are detained, as in the applicant's case, are in a particularly vulnerable

position, as they are dependent in their correspondence with the Court – and with the rest of the outside world – on the administration (see, *mutatis mutandis*, *Chaykovskiy v. Ukraine*, no. 2295/06, § 88, 15 October 2009; and *Mehmet Ali Ayhan*, cited above, § 40).

123. Furthermore, the Court has previously found a violation of Article 34 of the Convention on the ground that the authorities had failed to ensure that the applicant, who had been dependent on them (a prisoner without a lawyer), was provided with the opportunity to obtain copies of documents which he had needed to substantiate his application before the Court (see, for example, *Naydyon v. Ukraine*, no. 16474/03, § 69, 14 October 2010; *Vasiliy Ivashchenko v. Ukraine*, no. 760/03, § 110, 26 July 2012; see also *Cano Moya v. Spain*, no. 3142/11, § 52, 11 October 2016). The Court notes that in the present case the applicant's complaint about his impossibility to make copies of documents necessary to substantiate his complaint, concerns the period when he was in prison, during which time he did not have a lawyer. Accordingly, the Government's argument that such documents could have been procured by the legal aid lawyer cannot be accepted. While the Government argued that what the applicant was seeking was the original of documents, the Court cannot but note that the applicant's argument is precisely the opposite, namely that he was forced to send originals as no copies were provided to him. Moreover, the Court cannot ignore the letter of the authorities, in reply to his request for his prison medical file (at a time when he was in prison) stating that "if requested by the European Court of Human Rights, CCF will be able to present any documentation in relation to your prison medical file before the mentioned Court" (see paragraph 16 above).

124. In view of the foregoing, the Court considers that in the circumstances of the present case the authorities' failure to ensure that the applicant was provided with the possibility of obtaining copies of documents which he needed to substantiate his application, as well as the fact that his correspondence concerning the case before the Court had not been dealt with under confidential cover, amounted to an unjustified interference with his right of individual petition.

2. Domestic legal aid representation

125. The Court observes that according to its case-law under Article 6 in discharging the obligation to provide parties to civil proceedings with legal aid, when it is provided by domestic law, the State must display diligence so as to secure to those persons the genuine and effective enjoyment of the rights guaranteed under Article 6 (see, *inter alia*, *Staroszczyk v. Poland*, no. 59519/00, § 129, 22 March 2007; *Siałkowska v. Poland*, no. 8932/05, § 107, 22 March 2007; and *Bąkowska v. Poland*, no. 33539/02, § 46, 12 January 2010). An adequate institutional framework should be in place to ensure effective legal representation for entitled persons and a sufficient

level of protection of their interests (ibid § 47). There may be occasions when the State should act and not remain passive when problems of legal representation are brought to the attention of the competent authorities. It will depend on the circumstances of the case whether the relevant authorities should take action and whether, taking the proceedings as a whole, the legal representation may be regarded as "practical and effective". Assigning counsel to represent a party to the proceedings does not in itself ensure the effectiveness of the assistance (see, for example, *Siałkowska,* cited above, § 100). It is also essential for the legal aid system to offer individuals substantial guarantees to protect those having recourse to it from arbitrariness (see *Gnahoré v. France*, no. 40031/98, § 38, ECHR 2000-IX).

126. However, a State cannot be considered responsible for every shortcoming of a lawyer (see *Kamasinski v. Austria*, 19 December 1989, § 65, Series A no. 168). Given the independence of the legal profession from the State, the conduct of the case is essentially a matter between the defendant and his or her counsel, whether counsel be appointed under a legal aid scheme or privately financed, and, as such, cannot, other than in special circumstances, incur the State's liability under the Convention (see *Artico v. Italy*, 30 May 1980, § 36, Series A no. 37; *Rutkowski v. Poland* (dec.), no. 45995/99, ECHR 2000-XI; and *Cuscani v. the United Kingdom*, no. 32771/96, § 39, 24 September 2002). The Court has previously considered that knowledge of both simple procedural formalities and substantive legal issues fall within the ambit of a legal representative's competencies. It is indeed also the lack of such knowledge which makes it necessary for a lay person to be represented by counsel. Therefore, such errors may, when critical to a person's access to court, and when incurable in so far as they are not made good by actions of the authorities or the courts themselves, result in a lack of practical and effective representation which incurs the State's liability under the Convention (see *Anghel v. Italy*, no. 5968/09, § 61, 25 June 2013).

127. Indeed, in the present case, after notice of a number of complaints had been given to the Respondent Government, a lawyer was required for the purposes of the proceedings before the Court and at that stage legal aid was granted to the applicant and a local legal aid lawyer was appointed by the domestic courts. However, the Court is of the view that in the present case that grant was not enough to safeguard the applicant's right to individual petition in a "concrete and effective manner" (see, *mutatis mutandis*, *Anghel*, cited above, § 54; and *Korgul v. Poland*, no. 35916/08, § 29, 17 April 2012). The Court will leave open the issue of the quality of the advice given to the applicant or whether pressure was exerted on him to drop his case. It suffices to note that the applicant's local legal aid representative failed to keep regular confidential client-lawyer contact. More strikingly, she proceeded to abandon her mandate without informing the applicant (and/or the Court) and without her having obtained the

revocation of her appointment by the domestic courts. As a result, contrary to her duty, she failed to make submissions on behalf of the applicant when requested, a course of action which could have irremediably prejudiced the applicant's case. Moreover, the latter action was taken despite a reminder in the Court's letter of 22 January 2020, making clear that as a representative she should keep the applicant informed of the proceedings before the Court at all times and maintain regular contact with him in order to receive relevant instructions and meet the Court's deadlines (see paragraph 33 above).

128. Furthermore, the Court notes that by a letter of the same date to the Government, the latter were informed of the above, yet no steps were taken by any State authority to improve the situation.

129. The Court further notes that the situation, as developed over time, led the President of the Chamber to take appropriate action (see paragraph 35 above) to safeguard the applicant's right of individual petition. Nevertheless, it cannot go unnoticed that the behaviour of the legal representative and the lack of any action by the State authorities to improve the situation led to the prolongation of the proceedings before the Court, despite the fact that the case had been given priority.

130. In the circumstances, in the Court's view, these failings amounted to ineffective representation in special circumstances which incur the State's liability under the Convention (see, *mutatis mutandis*, in the context of Article 6, *Anghel*, cited above, § 62).

131. Lastly, the Court recalls that it is the responsibility of the interested party to display special diligence in the defence of his/her interests (see *Teuschler v. Germany* (dec.), no. 47636/99, 4 October 2001, and *Sukhorubchenko v. Russia*, no. 69315/01, §§ 41-43, 10 February 2005). In this respect, the Court notes that the applicant persistently pursued his case and contacted the relevant authorities to obtain pertinent information or to make further complaints, to no avail. In the absence of any relevant contact he informed the Court about the continuing situation complained of. It follows that in the present case the applicant showed the required diligence by following his case conscientiously and attempting to maintain effective contact with his nominated representatives (contrast with *Muscat v. Malta*, no. 24197/10, § 59, 17 July 2012), despite the difficulties faced while in detention.

132. In the light of the above, the Court is of the view that the applicant was put in a position in which his efforts to exercise his right of individual petition before this Court by way of legal representation appointed under the domestic legal aid system failed as a result of the State's hindrance.

3. Conclusion

133. It follows from the above considerations that the respondent State has failed in its obligations under Article 34 of the Convention.

V. ALLEGED VIOLATION OF ARTICLE 6 §§ 1 AND 3 OF THE CONVENTION

134. Lastly, the applicant complained that he had not had a lawyer during the interrogation of 11 April 2018. While the applicant invoked Article 5 § 2, the Court considers that this complaint falls to be examined under Article 6 §§ 1 and 3 (c).

135. The Court has already found (see paragraph 64 above) that the applicant had effective and accessible remedies in respect of this complaint. It follows that the complaint is inadmissible for non-exhaustion of domestic remedies, pursuant to Article 35 §§ 1 and 4 of the Convention.

VI. APPLICATION OF ARTICLE 41 OF THE CONVENTION

136. 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

137. The applicant claimed 109,000 euros (EUR) in respect of pecuniary damage representing EUR 25,000 in loss of earnings during the period of his unlawful immigrant detention, and during the period of his prison sentence following the incident, as well as EUR 80,000 in future loss of earnings and medical expenses related to the injuries sustained by the incident; and EUR 4,000 for the fine imposed which he considered was in breach of the Convention. The applicant further claimed a total of EUR 309,000 in non-pecuniary damage in relation to all the complaints he lodged in his application and thereafter.

138. The Government submitted that there was no causal link between the pecuniary damage claimed and the upheld violations and that the applicant had by no means substantiated the amounts claimed. Moreover, the applicant made claims in respect of complaints which had been declared inadmissible by the Court and were not communicated to the respondent Government, and his remaining non-pecuniary claims were nevertheless excessive.

139. The Court notes that it only found a violation of Articles 3 and 5 of the Convention and the respondent State's failure to comply with Article 34 of the Convention, thus any claims related to other complaints must be dismissed. In relation to the claim for loss of earnings during his immigrant detention, which the Court found to be unlawful, the Court finds that the applicant has not demonstrated that prior to this detention he had an established or regular income. This being so, the claims connected to the

loss of income are hypothetical and unsubstantiated and must be rejected (see, for example, *Kolakovic v. Malta*, no. 76392/12, § 79, 19 March 2015). On the other hand, it awards the applicant EUR 25,000 in respect of non-pecuniary damage, plus any tax that may be chargeable.

B. Costs and expenses

140. The applicant also claimed EUR 2,000 for the costs and expenses incurred to obtain redress both domestically and before the Court.

141. The Government submitted that the applicant did not substantiate any costs incurred.

142. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these were actually and necessarily incurred and are reasonable as to quantum. In the present case, in the absence of any documents substantiating his claims, taking into account the sum of EUR 850 in legal aid paid by the Council of Europe, the Court does not make an award under this head.

C. Default interest

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

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the complaints under Article 3 in respect of the applicant's conditions of detention and Article 5 § 1 admissible and the remainder of the application inadmissible;

2. *Holds* that there has been a violation of Article 3 of the Convention;

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

4. *Holds* that the respondent State has failed to comply with its obligations under Article 34;

5. *Holds*
   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amount:
   EUR 25,000 (twenty-five thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;

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

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

Done in English, and notified in writing on 11 March 2021, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Renata Degener	Ksenija Turković
Deputy Registrar	President