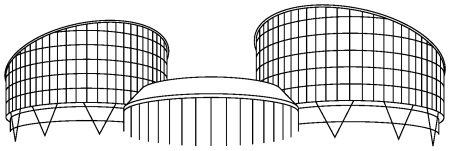

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIFTH SECTION

CASE OF MAHAMED JAMA v. MALTA

(Application no. 10290/13)

JUDGMENT

STRASBOURG

26 November 2015

FINAL

02/05/2016

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

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

In the case of Mahamed Jama v. Malta,

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

Josep Casadevall, *President,*
Angelika Nußberger,
Boštjan M. Zupančič,
Vincent A. De Gaetano,
André Potocki,
Helena Jäderblom,
Síofra O'Leary, *judges,*
and Milan Blaško, *Deputy Section Registrar,*

Having deliberated in private on 20 October 2015,

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

PROCEDURE

1. The case originated in an application (no. 10290/13) against the Republic of Malta lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Somali national, Ms Farhiyo Mahamed Jama ("the applicant"), on 4 February 2013.

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

3. The applicant alleged that her continued detention for more than eight months was arbitrary and unlawful, and that she had not had a remedy to challenge the lawfulness of that detention. She further complained about the conditions of detention. She relied on Articles 3 and 5 §§ 1, 2, and 4.

4. On 5 August 2014 the application was communicated to the Government.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was (to her knowledge) born in 1996 and at the time of the introduction of the application was detained in Lyster Barracks, Ħal Far.

A. Background to the case

6. The applicant entered Malta in an irregular manner by boat on 27 May 2012. Upon arrival, she was registered by the immigration police, given an identification number (12H-006), and presented with two documents in English, one containing a Return Decision and the other a Removal Order.

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

8. According to the applicant, the contents of the decision in English were not explained to her, although she could not understand the language. According to the Government, in practice the immigration police inform the migrants verbally in English about their right to appeal, and the migrants translate for each other.

9. The applicant was further provided with an information leaflet entitled "Your entitlements, responsibilities and obligations while in detention" in Arabic, a language she did not understand. According to the Government the applicant did not request a booklet in another language.

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

B. Initial proceedings

11. During the registration process upon her arrival, in the absence of an interpreter, the applicant's age was recorded as twenty-six (born 1986). She claims to have told the authorities that she was sixteen years old. According to the Government, it emerged from the authorities' records (not submitted to the Court) that the applicant declared that she was born in 1986.

12. On 30 May 2012 the applicant appealed against the Removal Order and Return Decision. By the date of the introduction of the application (4 February 2013), no date had been set for her appeal hearing by the IAB.

C. Asylum proceedings

13. A few days following her arrival the applicant was called for an information session provided by the staff of the Office of the Refugee Commissioner. She was assisted in submitting the Preliminary Questionnaire (PQ), thereby registering her wish to apply for asylum under Article 8 of the Refugees Act, Chapter 420 of the Laws of Malta (see Relevant domestic law below). She stated on the form that she was sixteen years old.

D. The AWAS Age-Assessment Procedure

14. On an unspecified date some two months after her arrival in Malta, the applicant was called for an interview with a member of Agency for the Welfare of Asylum Seekers (AWAS) staff, who informed her that as she had claimed to be sixteen years old she would be interviewed by three members of AWAS staff with a view to assessing the veracity of her claim that she was a minor.

15. About a week later, three people from AWAS interviewed her. During the interview a male detainee provided interpretation services. After the interview they informed her that as they could not confirm her minor age through the interview they would send her for a further age verification (FAV) test - an X-ray of the bones of the wrist. The applicant was taken for the FAV test about two months after her interview, on 5 October 2012.

16. At the beginning of November, as the applicant had not received any decision from the AAT, she asked a woman from AWAS (who was visiting the detention centre to conduct interviews with other detainees who had health problems) whether she knew anything about her case. The woman told her that her X-ray was being assessed and if she was found to be a minor she would be released soon. Some three weeks later, on 22 November 2012, some other people from AWAS went to the centre and told her that according to the test she was not a minor but an adult. During the latter meeting a fellow (female) detainee provided translation.

17. By the date of the lodging of the application the applicant had not received a written decision informing her of the outcome of the age assessment procedure. According to the Government a decision on the applicant's age was taken on 14 January 2013; no date was submitted regarding notification. The Government submitted that since no care order was issued the applicant was obviously not a minor.

E. Conditions of detention

18. The applicant was detained in Hermes Block in Lyster Barracks (see paragraph 10 above), in conditions which she considered prison-like and basic. The Government contested this allegation.

19. She explained that the Block is divided into five self-contained zones (one on the ground floor, two on the first floor and two on the second floor) and four of the zones (B,C,D,E) were virtually identical. For the first few days of her detention she had been held in Zone E which at the time accommodated families (i.e. couples with or without children), and then she was moved to Zones C and D with other single women.

20. These zones contained a number of dormitories (containing bunk beds but no lockers or cupboards for personal belongings), ten showers and toilets, a small kitchen with one or two hot plates and a fridge (no further storage for food, which was stored in open boxes accessible to insects, was available), and a common room with six basic metal tables and benches screwed to the ground, together with a television. Blankets hanging from bunk beds were the only means of privacy.

21. Access to the zones was through metal gates which were kept locked all day, and detainees could leave the zone for one and a half hours per day, which they could spend in a small dusty yard. Windows were barred and most of them glazed with opaque Perspex (which was removed in the summer months for air, though they then let air through in the cold winter months). On the one hand, in summer the facility was often crowded and the heat would become oppressive despite the presence of ceiling fans. On the other hand, in winter it was unbearably cold as the facility was not heated and, moreover, was exposed to the elements as there were no adjoining buildings.

22. The applicant considered that the facility was shared by too many people – in summer the applicant's dormitory (one out of three in the zone) was shared by twenty women – and agreement amongst so many different persons having cultural and linguistic differences was difficult. However, at the time of the introduction of the application, the applicant was in less crowded conditions, sharing an entire zone with only twenty-five other women, most of whom were Eritrean and Somali.

23. The applicant noted that since her arrival she had only been provided with two bed sheets, a small towel, a blanket, a T-shirt, one pillow and a pillow case, a few items of underwear and a pair of flip-flops, as well as a plastic plate, cup, and set of cutlery. Other items of clothing were distributed sporadically. She stated that she was never provided with a quilt, a bra or running shoes. While toilet paper was distributed on a monthly basis, certain basic items such as sanitary pads were missing. In winter detainees were not systematically provided with warm clothes and closed shoes, which were distributed according to what was received by way of

donation and which was not sufficient to supply the needs of all detainees. Although blankets were distributed to everyone, the building was not heated and winter months were unbearably cold.

24. Detainees had little to do all day, and only limited access to open air. In particular, the applicant noted that she was let out into the small dirty yard for the first time only after a few months of detention. While in the yard, other male detainees called out names and picked on the women from the windows of their rooms overlooking the yard. The applicant referred to the report "Not here to stay: Report of the International Commission of Jurists on its visit to Malta on 26 – 30 September 2011", May 2012 (see paragraph 45 below).

25. She also noted that although telephone cards were distributed (each of 5 Euro (EUR)), the credit they contained was often insufficient to make long distance calls and no cheaper ways of keeping contact with the family or outside world were available as they had no internet access. By the time she lodged her application she had received EUR 25 in credit. The applicant also considered inappropriate that detainees were given the same soap to use for their bodies, hair, clothes and floor. The applicant further made reference to an incident with a detention officer who had pushed her down the stairs and tried to forcefully resuscitate her by slapping her and grabbing different parts of her face leaving her in pain – she, however, admitted that she could not recognise the officer in question and that she had feared reprisal had she reported the matter.

26. Furthermore, as could be seen from the results of the Jesuit Refugee Service (JRS) Europe study on detention of vulnerable asylum seekers, the physical conditions of detention and their impact on the physical and mental well-being of detainees were exacerbated by other factors[1]. These factors included: length of detention, lack of constructive activities to occupy detainees, overcrowding, limited access to open air, difficulties in communication with staff and with other detainees, and lack of information about one's situation. Moreover, there was a lack of any real possibility of obtaining effective redress and inmates knew that detention was not serving any useful purpose and was in no way proportionate to the aim to be achieved.

27. The applicant submitted that all of those objective factors had had a particular impact on her because of her personal circumstances, particularly her young age, her inability to communicate in anything but Somali and the fact that as a young woman she was detained in a facility administered almost exclusively by men.

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[1] *Becoming Vulnerable in Detention*, National Report on Malta, July 2010, which may be accessed at: http://jrs.attmalta.org/wp-content/uploads/downloads/2011/02/Becoming-Vulnerable-in-Detention-MT.pdf last accessed on 20 June 2014.
The Regional Report on the DEVAS project, published by JRS Europe in June 2010 may no longer be accessed online.

F. Latest developments

28. On 24 January 2013 the applicant was called for an interview with the Refugee Commissioner. By means of a decision of the Refugee Commissioner of 2 February 2013, the applicant was granted subsidiary protection in Malta. She was notified of this decision and released on 7 February 2013.

II. RELEVANT DOMESTIC LAW

A. The Immigration Act and the Refugees Act

29. The relevant articles of the above mentioned Acts can be found in *Aden Ahmed v. Malta* (no. 55352/12, §§ 31-35, 23 July 2013).

B. Government Policy

30. According to the Irregular Immigrants, Refugees and Integration Policy Document, issued by the Ministry for Justice and Home Affairs and the Ministry for the Family and Social Solidarity, in 2005:

> "Irregular immigrants who, by virtue of their age and/or physical condition, are considered to be vulnerable are exempt from detention and are accommodated in alternative centres."

31. The document contains an inclusive list of those categories of migrants considered vulnerable, which includes: "unaccompanied minors, persons with disability, families and pregnant women". With specific reference to unaccompanied minors and age assessment, the policy document states that:

> "Unaccompanied children and minors will be placed under state custody in terms of the Children and Young Persons (Care Order) Act (Chapter 285). This ensures that an unaccompanied minor is given the same treatment as a Maltese minor. ... The detention of minors should be no longer than what is absolutely necessary to determine their identification and health status. Interviews are to be carried in a 'child friendly' manner.
>
> Unfortunately there will be cases where individuals make false claims about their age in order to benefit from the terms and conditions of a Care Order. In order to ensure, as far as possible, that:
>
> (a) Care Orders are only issued in respect of true minors;
>
> (b) provisions for minors are not abused, and
>
> (c) actual minors are not deprived of the accommodation and services to which they are entitled by virtue of their age and the degree of vulnerability associated with it, Ministry for Justice and Home Affairs in consultation with the Ministry for the Family and Social Solidarity shall, in those cases where there is good reason to suspect the

> veracity of the minority age claimed by the immigrant, require the individual concerned to undertake an age verification test as soon as possible after arrival."

C. The Age Assessment Procedure

32. In order to give effect to this policy, a procedure known as the Age Assessment Procedure was developed and implemented first by the Refugee Service Area within Aġenzija Appoġġ (the National Agency for children, families and the community) and later by AWAS (formerly OIWAS), with a view to assessing claims to minor age. Although AWAS is not formally charged with the responsibility for this procedure by the law which constitutes it (see below) in practice the said agency has full responsibility for this procedure.

33. In practice, from the information available, it appears that the Age Assessment Procedure consisted of a number of different phases. Individuals were referred to the AWAS by the Immigration Police (where they declare to be minors on arrival) or the Refugee Commissioner (where they declare to be minors in their PQ). Following referral, an initial interview is conducted by one member of AWAS staff. Where this interview is inconclusive, a second interview is conducted by a panel of three persons known as the Age Assessment Team (AAT).

34. Where the panel is convinced that the individual concerned is not a minor, the minority age claim is rejected. Where a doubt remains, s/he is referred for a Further Age Verification (FAV) test, which essentially consists of an X-ray of the bones of the wrist. Although the AAT is not bound by the results of the test, in practice, it would appear that in most cases where it is resorted to the result will determine the outcome of the assessment.

35. If the individual concerned is found to be a minor, a care order is issued, the individual is released from detention and placed in an appropriate non-custodial residential facility, and a legal guardian is appointed to represent the minor. Once a guardian is appointed the asylum interview is carried out, and during the said interview the minor is assisted by a legal guardian. If the individual's claim to minor age is rejected, AWAS informs the Refugee Commissioner so that his office can proceed with the refugee status determination procedure.

36. In so far as relevant, Regulation 6 of the Agency for the Welfare of Asylum Seekers Regulation, Subsidiary Legislation 217.11, reads as follows:

> "(1) The function of the Agency shall be the implementation of national legislation and policy concerning the welfare of refugees, persons enjoying international protection and asylum seekers.
>
> (2) In the performance of its functions, the Agency shall:

(a) oversee the daily management of accommodation facilities either directly or through subcontracting agreements;

(b) provide particular services to categories of persons identified as vulnerable according to current policies;

(c) provide information programmes to its clients in the areas of employment, housing, education, health and welfare services offered under national schemes;

(d) act as facilitator with all public entities responsible for providing services to ensure that national obligations to refugees and asylum seekers are accessible;

(e) promote the Government's policy and schemes regarding resettlement and assisted voluntary returns;

(f) maintain data and draw up reports that are considered relevant for its own function and to provide statistics to appropriate policy-making bodies;

(g) advice the Minister on new developments in its field of operation and propose policy or legislation required to improve the service given and fulfil any legal obligations in respect of its service users;

(h) encourage networking with local voluntary organisations so as to increase the service standards as well as academic research;

(i) work with other public stakeholders and, where possible, offer its services to asylum seekers accommodated in other reception centres not under its direct responsibility; and

(j) implement such other duties as may be assigned to it by the Minister or his representative."

37. Regulation 15 of the Procedural Standards in Examining Applications for Refugee Status Regulations Subsidiary Legislation 420.07 -Legal Notice 243 of 2008, as applicable at the time of the present case (prior to amendments in 2014) laid down some basic procedural safeguards applicable when minors are interviewed, including the provision of information about the asylum procedure, assistance with preparation for the interview and presence of the representative during the interview. Its paragraph (2) dealt with the use of medical procedures to determine age within the context of an application for asylum. In so far as relevant it read as follows:

"(1) In relation to an unaccompanied minor falling within the provisions of article 13(3) of the Act, as soon as possible, and not later than thirty days from the issue of the care order under that article:

(a) it shall be ensured that the appointed representative of the unaccompanied minor is given the opportunity to inform the unaccompanied minor about the meaning and possible consequences of the personal interview and, where appropriate, how to prepare himself for the personal interview. The representative shall be present at the interview and may ask questions or make comments within the framework set by the person who conducts the interview;

(b) where an unaccompanied minor has a personal interview on his application for asylum, that interview is to be conducted and the decision prepared by a person who has the necessary knowledge of the special needs of minors.

(2) Medical examinations to determine the age of unaccompanied minors within the framework of any possible application for asylum may be carried out.

Provided that:

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

(b) unaccompanied minors and their representatives consent to carry out the determination of the age of the minors concerned;

(c) the decision to reject an application from an unaccompanied minor who refused to undergo this medical examination shall not be based solely on that refusal:

Provided that an unaccompanied minor who has refused to undergo such a medical examination shall not prevent the determining authority from taking a decision on the application for asylum and that the best interests of the minor shall be a primary consideration in any such decision."

38. Article 15 of the Reception of Asylum Seekers (Minimum Standards) Regulations, Subsidiary Legislation 420.06 – Legal Notice 320 of 2005, states that:

"an unaccompanied minor aged sixteen years or over may be placed in accommodation centres for adult asylum seekers."

D. Other Relevant Subsidiary Legislation

39. Part IV of Subsidiary Legislation 217.12, Common Standards and Procedures for Returning Illegally Staying Third-Country Nationals Regulations, Legal Notice 81 of 2011 (Transposing Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in member States for returning illegally staying third-country nationals, aka the Return Directive) in so far as relevant, is set out in *Aden Ahmed v. Malta* (cited above, §§ 31-35).

III. RELEVANT MATERIALS

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

"44. At the time of the visit, *Lyster Detention Centre* was accommodating 248 foreign nationals (including 89 women), in five different detention units.

In keeping with the Government's Detention Policy, no unaccompanied minors were held in either of the two detention centres visited. Upon issuance of a care order by the Minister of Social Policy, unaccompanied minors were always transferred to a juvenile institution. Single women were always accommodated separately from male detainees.

47. More generally, the CPT has serious misgivings about the fact that female detainees at Lyster Detention Centre were frequently supervised exclusively by male detention officers, since only one female officer was employed by the Detention Service at the time of the visit.

The CPT recommends that the Maltese authorities take steps as a matter of priority to ensure the presence of at least one female officer around the clock at Lyster Detention Centre.

48. As was the case in 2008, a number of detainees complained about disrespectful behaviour and racist remarks by detention officers (in particular in the Warehouses at Safi Detention Centre). **The CPT reiterates its recommendation that the Maltese authorities remind all members of staff working in detention centres for foreigners that such behaviour is not acceptable and will be punished accordingly.**

55. At both *Lyster* [*and Safi Detention Centres*], material conditions have improved since the 2008 visit. In particular, at Lyster Barracks, these improvements are significant: the Hermes Block, which had been in a very poor state of repair at the time of the 2008 visit, had been completely refurbished and the Tent Compound, which had also been criticised by the Committee in the report on the 2008 visit, had been dismantled. At Safi Barracks, additional renovation work had been carried out in Block B. It is noteworthy that all foreign nationals received personal hygiene products on a regular basis and were also supplied with clothes and footwear.

...

56. At *Lyster Detention Centre*, the situation had clearly improved as regards activities. Each zone comprised a communal room, and groups of detainees could attend English-language courses which were organised by an NGO (usually, three times a week for two hours per group). Further, single women and couples were provided with food so that they could prepare meals themselves in a kitchenette. Every day, detainees could go outside and play football or volleyball in a rather small yard for a total of two hours.

...

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

41. In so far as relevant, extracts from a report by Human Rights Watch in 2012 called "Boat-ride to Detention", reads as follows:

"Children lack adequate information about the age determination process (including whether documents are accepted and whether there is an appeal). Some migrants who request an age determination procedure are seemingly ignored: interviewees reported telling authorities they were minors but never receiving age determination. Other children never request an age determination because they lack information on the procedure."

"The government should do more to provide children with reliable information about the age determination procedure. Children receive no guidance on the content of the procedure, whether documents will be useful, or whether they can appeal. Malta has taken considerable steps in providing information to migrants about the process for asylum, including by conducting information sessions to every incoming migrant. It could easily do the same for the age determination process."

42. A 2014 report issued by Aditus, a local NGO entitled "Unaccompanied Minor Asylum-Seekers in Malta: a technical Report on Ages Assessment and Guardianship Procedures, reads as follows:

"The procedural information provided to persons undergoing age assessment is extremely limited which further excludes the applicant from active participation in the process."

"Under the old procedure [2012] persons were not adequately informed of the possibility of appeal... persons were also typically not informed of the reasons for a negative decision."

"Most experts agree that age assessment is not a determination of chronological age but rather an educated guess. There are risks that due to the inaccuracy of age assessment techniques, persons claiming to be minors may have their age mis-assessed."

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

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

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

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

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

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

(3) Women prisoners shall be attended and supervised only by women officers. This does not, however, preclude male members of the staff, particularly doctors and teachers, from carrying out their professional duties in institutions or parts of institutions set aside for women."

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

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

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

46. The applicant complained about the conditions of her detention. She considered that the situation 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."

47. The Government contested that argument.

A. Admissibility

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

(a) The parties' submissions

(i) The Government

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

49. As to the constitutional jurisdictions, the Government submitted that they had wide ranging powers to deal with Convention violations. Such proceedings could also be heard with urgency, reducing the time span of such proceedings to two months from filing. The Government noted that the Court had previously criticised the duration of such proceedings. Nevertheless, a fresh assessment according to prevailing circumstances had to be done in each case. In the Government's view any delays in

constitutional proceedings were counterbalanced by the fact that those jurisdictions could issue interim orders pending proceedings. They cited for example a decree in the case of *Emanuel Camilleri vs Inspector Louise Callejja and the Commissioner of Police* (no. 50/2013) where the Civil Court (First Hall) in its constitutional jurisdiction released a sentenced person from prison pending the proceedings given the particular circumstances of that case, namely where the main witness, who had testified in the applicant's trial which had ultimately returned a guilty verdict, was now being tried for perjury in connection with her testimony. Thus, in the Government's view, in the absence of speedy proceedings there nevertheless existed a speedy interim remedy which could be decreed by the constitutional jurisdictions under Article 46 (2) of the Constitution and Article 4 (2) of the European Convention Act. Despite the exceptional circumstances of the case, the example went to show that releasing persons from prison by means of an interim measure was indeed a possibility which could be used by the constitutional jurisdictions, and the applicant had not proved the contrary.

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

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

52. The Government considered that the applicant could also have instituted an action for damages in tort where she, as a released detainee, could have obtained damage for loss sustained on the account of her conditions of detention, if she could have proved on the basis of probabilities that she had suffered damage and that such damage was attributable to the Government's acts or omissions.

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

(ii) The applicant

54. The applicant submitted that there existed no effective domestic remedy which should have been used; in fact most of the Government's arguments had already been rejected by the Court in its judgment in the case of *Aden Ahmed v. Malta* (no. 55352/12, 23 July 2013) concerning an immigrant detained at around the same time as the applicant in the present

case. The Court's conclusions in that case were in line with the findings of the European Commission Directorate-General for Justice in a report entitled The EU Justice Scoreboard – A tool to promote effective justice and growth (2013), which showed that the Maltese judicial system was one of the systems with the longest delays among the member States. By means of example, the case of *The Police vs Pauline Vella* (42/2007), lodged in 2007, which looked at the conditions of detention at Mount Carmel Hospital, was decided on appeal on 30 September 2011.

55. As to the use of interim measures by the constitutional jurisdictions, the applicant submitted that in the very specific circumstances of the example given by the Government, the first-instance constitutional jurisdiction itself repeatedly stressed, in its decree, the exceptional nature of interim orders. It finally considered that that specific case was serious enough to warrant such a measure. The applicant considered that the circumstances of that case, which pointed towards a wrongful conviction, could not be compared to that of the applicant, and nothing indicated that persons in the applicant's position would obtain provisional release pending a complaint on conditions of detention.

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

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

(b) The Court's assessment

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

59. Further, the Court notes firstly, that the circumstances of the present case are different to those in the case of *Abdi Ahmed and Others v. Malta* ((dec.), no. 43985/13, 16 September 2014), relied on by the Government. That case concerned a determination as to whether, following the Court's decision under Rule 39 of the Rules of Court to indicate to the Government that they should desist from deporting the applicants - a decision which had been respected by the Maltese Government - the applicants in that case had access to an effective remedy (for the purposes of, *inter alia*, their Article 3 complaint, which did not concern conditions of detention) which they were required to use before continuing their application before this Court.

60. The Court notes that in the present case, when the applicant lodged her application with the Court (on 4 February 2013) complaining, *inter alia*, about her conditions of detention, the applicant was still in detention, and thus, apart from requiring a remedy providing compensation, she required a preventive remedy capable of putting an end to the allegedly ongoing violation of her right not to be subjected to inhuman or degrading treatment. The Court will thus proceed to assess the matter.

61. The Court has already considered in *Aden Ahmed* (cited above, § 73) that it had not been satisfactorily established that an action in tort may give rise to compensation for any non-pecuniary damage suffered and that it clearly was not a preventive remedy in so far as it cannot impede the continuation of the violation alleged or provide the applicant with an improvement in the detention conditions (see *Torreggiani and Others v. Italy*, nos. 43517/09, 46882/09, 55400/09, 57875/09, 61535/09, 35315/10 and 37818/10, 8 January 2013, particularly § 50, and the case-law cited therein). It thus concluded that it cannot be considered an effective remedy for the purposes of a complaint about conditions of detention under Article 3 (see also, *Mikalauskas v. Malta*, no. 4458/10, § 49, 23 July 2013). Nothing has been brought to the attention of the Court which could cast doubt on that conclusion.

62. As to constitutional redress proceedings, again, in *Aden Ahmed* (cited above, §§ 61-63), the Court held that such an action provides a forum guaranteeing due process of law and effective participation for the aggrieved individual. In such proceedings, courts can take cognisance of the merits of the complaint, make findings of fact and order redress that is tailored to the nature and gravity of the violation. These courts can also make an award of compensation for non-pecuniary damage and there is no limit on the amount which can be awarded to an applicant for such a violation. The ensuing judicial decision will be binding on the defaulting authority and enforceable against it. The Court was therefore satisfied that the existing legal framework rendered this remedy capable, at least in theory, of affording appropriate redress. However, given the delay in those proceedings, the Court held that while it could not rule out that constitutional redress proceedings dealt with urgently (as should be the case concerning complaints of conditions of detention) may in future be considered an effective remedy for the purposes of such complaints under Article 3, the then state of domestic case-law could not allow the Court to find that the applicant was required to have recourse to such a remedy. In the present case the Government have not submitted any further examples enabling the Court to revisit its conclusion concerning the delay in such proceedings. On the contrary, they appear to acknowledge the existence of such delays, arguing however that such delays are counterbalanced by the possibility of interim measures being issued by constitutional jurisdictions pending proceedings.

63. In this connection, the Court notes that the example put forward by the Government is indeed very specific and unrelated to circumstances such as those of the present case. Accepting that the provision of examples may be more difficult in smaller jurisdictions, such as in the present case, where the number of cases of a specific kind may be fewer than in the larger jurisdictions, nevertheless the Court notes that the applicant's example concerning a case of conditions of detention did not have such a measure applied, despite the excessive duration, extending to four years. Similarly, the case of *Tafarra Besabe Berhe*, referred to by the applicant (in her submissions below, at paragraph 111) concerning the lawfulness of immigrants' detention and the conditions of such detention, which was still pending six years after it was lodged, also does not appear to have applied such a measure. Admittedly, the Court is aware that no examples may exist because applicants fail to make such requests. However, in the absence of any other comparable examples, the Court finds no indication that the constitutional jurisdictions would be willing on a regular basis to release immigrant detainees pending a decision on their claims on conditions of detention.

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

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

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

2. Conclusion

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

B. Merits

1. The parties' submissions

(a) The applicant

68. The applicant considered the conditions of detention to be basic. She noted in particular the lack of access to constructive or recreational activities, insufficient provision of basic needs, lack of information, difficulties communicating with the outside world, limited access to open air, and obstacles in obtaining the most basic services. Other factors which had to be taken into consideration were her young age and her inability to communicate in English.

69. Each zone (measuring 300 sq. m according to a Médecins Sans Frontières report) consisted of a landing, three adjacent dormitories all opening on to a narrow corridor, nine or ten showers and toilets, a small room used as a kitchen with one or two hotplates, a common room containing metal tables and benches screwed to the ground, and one television. Free movement between zones was not possible, and for most of the day the detainees were confined to their respective zones.

70. The applicant further submitted that conditions in her zone were particularly difficult in the summer months, as it became crowded because of increased arrivals. When the zone was at its full capacity (sixty people), bearing in mind the areas of the dormitories and the common areas, each detainee had an average 5 sq. m. of shelter space, which meant that in August, when the applicant's zone hosted sixty-nine persons, the average shelter space was of 4.3 sq. m. She further noted that between her arrival in May and July 2012 the detainees were not allowed out of the zone, and thus they spent twenty-four hours inside the cramped space. The applicant felt that it was difficult to live in a room with twenty women, each having different sleeping times, who were noisy when it suited them, and where basic necessities were lacking.

71. The applicant particularly complained about the lack of warm clothing, which was never adequately dealt with by the detention centre authorities. The situation was made worse by the lack of heating, the fact that the building was exposed to the elements and had missing windowpanes.

72. The food provided was also of poor quality, lacked variety and was culturally inappropriate. According to reports by Médecins Sans Frontières and the JRS (relevant links submitted to the Court) the diet provided had led to a number of gastrointestinal problems among detainees.

73. The applicant also complained about the difficulties she had in obtaining information about her situation and the ongoing age assessment procedure. Detainees had nothing to do all day except watch television, and only very limited access (one and half hours) to the open air, in a small

dusty yard – indeed she rarely used the yard, for fear of verbal abuse by male detainees who would look at her and sometimes address questions to her – a treatment she found to be humiliating and inappropriate for a Somali woman. She noted that the books in the library were in English, and that the classes held by Integra mentioned by the Government only started after her release as did the telephone service offered by the Red Cross. Any other projects did not consist of more than one activity per week.

74. Detainees had limited contact with the outside world, as no Internet was available and telephone credit was insufficient for overseas calls. Moreover, in the applicant's case, her mobile phone had been confiscated on arrival, exacerbating her sense of isolation.

75. The detention centre lacked female staff, and only one woman worked on the shift with the zones. This meant that all the care of detained women was carried out by male staff (most having a security background) who guarded the facility, conducted headcounts (in the dormitories twice daily, including the mornings when the women were asleep), took care of the distribution of basic necessities, including items of personal hygiene and underwear, and accompanied them to medical appointments. This state of affairs was confirmed by a local report drawn up by a Maltese magistrate (the Valenzia Report). The applicant also referred to international reports on the matter (see paragraphs 42 and 43 above), and considered that the situation was even more frustrating given that under the domestic system there was no mechanism to complain about ill-treatment or abuse by detention staff.

76. Thus, given her young age and all the factors mentioned above, the applicant considered that she had suffered a breach of Article 3, despite the absence of any medical condition affecting her.

(b) The Government

77. As to the structure of Hermes Block, the Government submitted that it consisted of three equally sized rooms that together had a total capacity to accommodate sixty people. Records held by detention services showed that during the period that the applicant was housed in Hermes Block, in the month of May 2012, there were sixty-one occupants, while during the peak August month there were sixty-nine detainees.

78. The Government submitted that the zones were well kept and that the Government provided shelter, food, clothing, and medical assistance to migrants. In the Government's view the facility catered for all the needs of the migrants. Gates which separated the different zones were intended to protect the migrants, and separation was provided in relation to migrants having different ethnicities and religious beliefs as well as gender.

79. According to the Government, upon arrival an emergency bag is distributed, containing a towel, two bed sheets, a pair of flip-flops, two T-shirts, two pairs of shorts, a face soap, a shower gel (which can also be

used as shampoo), a bar of laundry soap, a toothbrush and toothpaste, a pillow and pillow case, toilet paper, a plastic cup, a plate and cutlery set, a blanket, a five-euro telephone card, a packet of sanitary towels, and a quilt (for winter arrivals only). A second bag is supplied on the second day, containing bras and underwear, slippers or running shoes, a tracksuit, and other items of clothing. Further supplies are provided on a regular basis, such as cleaning products every two weeks in order to secure the cleanliness of the areas. The applicant was also given clothing and supplies to cater for her personal hygiene, and had access to sanitary facilities equipped with hot and cold water, as well as secluded showers.

80. The Government submitted that whilst in detention the applicant was housed in a sheltered compound with adequate bedding and was provided with three meals a day on a daily basis. Meals were provided from a pre-set menu, however, particular dietary requests were regularly respected and the food supplied respected the relevant religious traditions. The detention centres had a medical practitioner and a nurse who provided on-site treatment and could make referrals to hospital treatment, and "custody clinics" are set up in all compounds housing migrants.

81. Immigration detainees are provided with telephone cards and various telephones can be found in the detention centre. Moreover, the Red Cross also operates a mobile phone calling service on a daily basis. Interpreters are provided for free at the detention centres and while the applicant was in detention, two female detention officers were assigned to the zones where females were held. The detainees are further provided with stationery and books on request. They have access to a television, as well as a kitchen offering basic cooking facilities and a common room with tables and benches. They are free to practise their religion and have unlimited access to NGOs and legal assistance (*sic*). They also have the opportunity to attend language and integration classes provided by NGOs.

82. The Government submitted that access to outside exercise was limited to one and a half hours daily per zone. If one zone refused to use its time the allotted time would be added to that of the other zones. During the period of April to July 2012 access to the yard had only been limited because of the significant number of break-outs, and thus was justified for security reasons. According to the Government, on various occasions it was the migrants themselves who refused to go out into the yard. They further noted that the applicant had never complained to the detention officers about any verbal abuse, nor had she ever enquired with the same officers about her age assessment procedure.

83. As to the absence of heating (which was installed after the applicant's release), the Government considered that this was counterbalanced by the provision of warm clothing and blankets. In Malta winters were mild and while the coldest temperatures were experienced from January to March, the applicant, who had started her detention in May,

had been released in February. The Government also noted that the detention centre made prompt arrangements to remedy broken windows.

84. As to the detention staff, the Government considered that it was not debasing to have male staff, given that they were trained. As to the headcounts, they considered that in any event female detainees had to dress appropriately even with respect to other detainees in the dormitory. The Government contested the applicant's allegation that there was no complaint mechanism, and alleged that instances of misbehaviour were brought to the attention of the Head of Detention Services, either directly by the detainee or through NGOs. Without giving examples, the Government alleged that such complaints were investigated and, where necessary, disciplinary proceedings undertaken.

85. The Government referred to the Court's case-law (*Sizarev v. Ukraine*, no. 17116/04, 17 January 2013; *Selcuk and Akser v. Turkey*, nos. 23184/94 and 23185/94, 24 April 1998; *Pretty v. the United Kingdom*, no. 2346/02, ECHR 2002-III); and particularly *Aden Ahmed* (cited above), and the principles cited therein. They considered that the conditions of detention at issue could not be compared to those in facilities in respect of which the Court had found a violation (for example, *Dougoz v. Greece*, no. 40907/98, ECHR 2001-II; *S.D. v. Greece*, no. 53541/07, 11 June 2009; and *A.A. v. Greece*, no. 12186/08, 22 July 2010). While shared facilities could create some discomfort, this could not reach the relevant Article 3 threshold. In the present case the applicant had been given ample personal space with adequate ventilation and bedding as well as exercise time. She had a balanced and varied diet, and in the absence of heating was supplied with blankets in the winter months, and would have been provided with more had she asked for them. Ceiling fans helped with the heat of the summer months. The Government distinguished the case from that of *Aden Ahmed* (cited above) in that the detention period in the present case was shorter, and the applicant was not particularly fragile. Bearing in mind all the above, and the fact that the applicant was not a minor, the Government considered that there had not been a violation of Article 3.

2. The Court's assessment

(a) General principles

86. 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).

87. 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*, cited above, § 47; and *A.A. v. Greece*, cited above, § 55). 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*, cited above, § 46). The length of the period during which a person is detained in specific conditions also has to be considered (see, among other authorities, *Alver v. Estonia*, no. 64812/01, § 50, 8 November 2005, and *Aden Ahmed*, cited above, § 86).

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

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

open air every day and preferably as part of a broader programme of out-of-cell activities (see *Ananyev and Others*, cited above, § 150).

(b) Application to the present case

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

The same must be said for the month of August, where the applicant's zone had sixty-nine inmates, and thus her average shelter space was 4.3 square metres. Further, the Court notes that in certain months, as for example at the time of the introduction of the application (see paragraph 22 above), the applicant was sharing her zone with only twenty-five people, thus her living space during that period was ample, and at least double that mentioned above. In these circumstances the Court cannot find that the overcrowding was so severe as to justify in itself a finding of a violation of Article 3.

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

92. The Court notes that even scarce space in relative terms may in some circumstances be compensated for by the freedom to spend time away from the dormitory rooms (see *Valašinas v. Lithuania*, no. 44558/98, § 103 and 107, ECHR 2001-VIII, and *Nurmagomedov v. Russia* (dec.), no. 30138/02, 16 September 2004). The Court observes that while it is true that adjacent to the dormitories the applicant could move around in the common room as well as the corridors, by the Government's own admission, during the period of April to July 2012, access to the yard was limited because of the significant number of break-outs. In the Government's view this limitation was justified for security reasons. The Court observes that no specific date as to when this limitation came to an

end in July 2012 was submitted by any of the parties, thus, the applicant having been detained on 27 May 2012, this meant that the applicant had no access to any outdoor exercise for anything between about five and nine weeks.

93. The Court reiterates that access to outdoor exercise is a fundamental component of the protection afforded to those deprived of their liberty under Article 3, and as such it cannot be left to the discretion of the authorities (see *Yarashonen*, cited above, § 78); according to the CPT, all detainees, even those confined to their cells as a punishment, have a right to at least one hour of exercise in the open air every day regardless of how good the material conditions might be in their cells (see the CPT standards, document no. CPT/Inf/E (2002) 1-Rev. 2013, § 48). These standards also say that outdoor exercise facilities should be reasonably spacious and whenever possible provide shelter from inclement weather (see *Neshkov and Others v. Bulgaria*, nos. 36925/10, 21487/12, 72893/12, 73196/12, 77718/12 and 9717/13, § 234, 27 January 2015, with further references). The physical characteristics of outdoor exercise facilities are also relevant. For instance, an exercise yard that is just two square metres larger than the cell, is surrounded by three-metre-high walls, and has an opening to the sky covered with metal bars and a thick net does not offer inmates proper opportunities for recreation and recuperation (see *Ananyev and Others*, cited above, § 152, with further references).

94. The Court has already had occasion to comment on the yard referred to in the present case, in *Aden Ahmed* (cited above, § 96), where it noted that it was considerably small for use by sixty people (recreation being available in one zone at a time), it was secured on three sides by wire fencing topped with barbed wire, and left much to be desired given that it was the only outdoor access enjoyed by detainees for a limited time daily. Further, it is not disputed that in the present case there was not even any access to this yard for an unspecified period of time. The Court considers that the Government's security argument is no justification, and indeed the authorities should be in a position to provide safe exercise space irrespective of any fears of breakouts. The latter concerns may be addressed by other relevant measures falling under the authorities' responsibility, without impinging on the well-being of all the detainees indiscriminately.

95. Indeed, the Court has already found that the detention of an asylum seeker for three months on police premises pending the application of an administrative measure, with no access to any recreational activities and without proper meals, has been considered to be degrading treatment (see *Tabesh v. Greece*, no. 8256/07, §§ 38 to 44, 26 November 2009). Moreover, the Court highlights that the detention in the present case was imposed in the context of immigration, and was therefore a measure which is applicable not to those who have committed criminal offences but to aliens who, often fearing for their lives, have fled their own country. However, in the present

case, the Court notes the uncertainty of the period during which no access to the yard was possible, a period of between five and nine weeks. Given the unspecified duration of this limitation which appears to have been due to specific circumstances occurring at the time, the Court considers that while the situation was highly regrettable, this element on its own cannot be considered as reaching the relevant threshold, even if accompanied by the fact that applicant did not benefit from regular recreational activities indoors either. This is so, particularly given that the applicant herself admitted that she often did not choose to make use of the allotted yard time. It is however, a matter which must be given its due importance when assessing the cumulative effects of detention.

96. As regards the other aspects raised by the applicant, the Court reiterates that suffering from cold and heat cannot be underestimated, as such conditions may affect one's well-being, and may in extreme circumstances affect health (see *Aden Ahmed*, cited above, § 94). Nevertheless, the applicant admits that ceiling fans were in place, and despite the fact that Malta is an extremely hot country in the summer months the Court considers that the authorities cannot be expected to provide the most advanced technology. However, the Court is concerned by the applicant's allegation that detainees suffered from the cold despite the distribution of blankets (see paragraph 23 above). Little comfort can be found in the Government's argument that the applicant was only detained until February, given that January and February are the coldest months. However, the Court welcomes the Government's action in this regard, and notes that heating has now been installed. While the latter action had no consequence for the applicant, who had been released by then, the Court observes that the provision of blankets must have aided the situation to some extent.

97. For the same reasons as those given in various reports (see paragraphs 40, 43-44 above), the Court also finds disconcerting the lack of female staff in the centre (see also *Aden Ahmed*, cited above, § 95). The Government admitted that only two females had been working in the detention centre at the time, and did not dispute that only one of them was working in the applicant's zone. The Government's submission that male staff were trained to distribute intimate products, even if it were true, cannot counteract the degree of discomfort to the female detainees who were for the most time dealt with and surrounded by male officers for their detention over several months. Of some apprehension, is also the fact that little privacy is found in the dormitories, which moreover lack any type of furniture where individuals could store their personal belongings.

98. Against these factors of concern, the Court, however, observes that according to the CPT report cited above (paragraph 40), various improvements have been put in place, both structurally and activity wise, at Lyster barracks. No concern seems to arise about the hygiene facilities, and

the applicant has had access to a common area equipped with a television, as well as telephone cards and three meals a day. The meals of which the applicant complains do not appear to have been entirely unbalanced or to have affected her health, nor has the applicant explained what made them culturally inappropriate. Further, the applicant's basic needs have been seen to by the distribution of materials free of charge, and even if it is regrettable that certain materials were not readily available, the applicant was not left unclothed or in unhygienic conditions – even if partly with private help.

99. The Court observes that this situation and the aforementioned conditions persisted for a period of eight months and ten days, a period which it appears could have been shorter had it not been for the applicant's claim that she was a minor – a claim which turned out to be untruthful. In this connection the Court also highlights the importance of individuals being informed of the stage of their claims to avoid any further anxiety but it also considers that applicants should pursue the matter with the appropriate avenues, or detention officers, orally or in writing.

100. Lastly, while it is true that the applicant, being an asylum-seeker, was particularly vulnerable because of everything she had been through during her migration and the traumatic experiences she was likely to have endured previously (see *M.S.S. v Belgium and Greece*, cited above, § 232), a state of vulnerability which exists irrespective of other health concerns or age factors, the Court does not lose sight of the fact that the applicant in the present case was not more vulnerable than any other adult asylum seeker detained at the time (see, *a contrario*, *Aden Ahmed*, cited above, § 97-99).

101. To sum up, while remaining concerned about the lack of access to outdoor exercise, as well as the lack of heating and of female staff, at the time, given the sufficient living space, the provision of basic as well as other needs and appropriate hygienic standards, the Court is of the opinion that the cumulative effect of the conditions complained of did not reach the threshold of Article 3. It follows that in the present case the Court considers that the conditions of the applicant's detention in Hermes Block did not amount to degrading treatment within the meaning of the Convention.

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

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

103. The applicant complained that she did not have a remedy which met the requirements of Article 5 § 4, as outlined in the Court's jurisprudence, to challenge the lawfulness of her detention. The provision reads as follows:

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

A. Admissibility

1. The Government's objection ratione materiae

104. The Government submitted that Article 5 § 4 did not apply to the present case since, according to the Court's case-law, such a remedy is no longer required once an individual is lawfully free. They noted that the applicant had been released on 7 February 2013.

105. The applicant noted that she was entitled to raise this complaint, since she had not had such a remedy during her detention, and had instituted proceedings before the Court while she was still in detention.

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

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

2. Conclusion

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

B. Merits

1. The parties' submissions

(a) The applicant

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

those overstaying visas). In any event the applicant highlighted that a request for bail concerned temporary release and was independent from a review of the lawfulness of the detention.

110. Following the *Louled Massoud* judgment the only change in the law concerned the transposition of the EU Return Directive. Nevertheless, the "new" remedy envisaged, namely an application to the Immigration Appeals Board pursuant to Regulation 11 (10) of the mentioned directive, also failed to meet the requirements of speediness, accessibility and certainty. Further, it was not even clear whether such a remedy was available in cases such as that of the applicant, in view of the limitations under Regulation 11 (1). This also appeared to be the case given the lack of reference to this remedy by the Government in their first round of observations. Also, there was no information on the possibility of using this remedy to challenge the lawfulness of detention, nor any access to legal aid to attempt the remedy. In any event, to the applicant's knowledge, of four such applications lodged only one had been determined before the claimants in those cases were released (between two and nine months after the application had been lodged), and the only one determined was decided twelve months after it was lodged.

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

(b) The Government

112. In their observations concerning the complaint under Article 5 § 4 the Government submitted that the Court's findings in *Aden Ahmed* and *Suso Musa*, both cited above, concerning the ineffectiveness of constitutional proceedings should be revisited by the Court, given the evidence that showed that constitutional jurisdictions could give interim relief pending proceedings (see paragraph 49 above). The Government also

contended that it was impossible (*sic*) to provide a number of examples, given the limitations on small States.

113. On indication by the applicant, the Government submitted in their last round of observations that the remedy provided by Regulation 11 was available to the applicant, and could have allowed her release.

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

2. The Court's assessment

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

116. The Court notes that it has repeatedly examined in detail the remedies available in Malta for the purposes of Article 5 § 4, and has held that applicants seeking to challenge the lawfulness of their immigrant detention, in the Maltese context, did not have at their disposal an effective and speedy remedy under domestic law (see, for example, *Aden Ahmed* and *Suso Musa*, both cited above, § 60 and 123 respectively). Nevertheless, the Government claimed that the Court's findings should be revised concerning constitutional redress proceedings, despite their inability to submit any examples. They also submitted that the remedy provided by Regulation 11 was available to the applicant and they referred to the possibility of applying for bail before the IAB.

117. As to the remedy provided by Regulation 11, the Court observes that the latter regulation states that the provisions of Part IV of the subsidiary legislation 217.12, do not apply to individuals apprehended or intercepted in connection with irregular crossing by sea. The Court notes that Regulation 11 is part of Part IV of the subsidiary legislation mentioned, and the applicant was intercepted in connection with an irregular crossing by sea. Despite the Court's findings in the cases of *Suso Musa and Aden Ahmed* (both cited above, §§ 58-59 and §§ 121-122 respectively) that, even assuming that such a remedy applied in the applicant's case, it was also not effective, the Government failed to explain why such a remedy was still available to the applicant despite such limitation and the circumstances as

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

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

119. As to constitutional redress proceedings, while the illustration of the practical effectiveness of a remedy with examples of domestic case-law may be more difficult in smaller jurisdictions (see *Aden Ahmed*, cited above, § 63), the Court cannot ignore the fact that the examples from the Maltese context previously brought to the Court's attention, and reiterated by the applicant in the present case, continue to show that constitutional redress proceedings, are not effective for the purposes of Article 5 § 4, in view of their duration.

120. In so far as, in connection with constitutional redress proceedings, the Government relied on the possibility of obtaining interim relief pending lengthy proceedings, the Court refers to its findings at paragraph 64 *in fine*, above, and for those reasons considers that it is unlikely that constitutional jurisdictions would be willing on a regular basis to release immigrant detainees pending a decision on their claims of unlawful detention. It follows that, in the Court's view, constitutional redress proceedings are still not an effective remedy for the purposes of Article 5 § 4.

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

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

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

123. The applicant further complained that her continued detention for more than eight months was arbitrary and unlawful, as it did not fall under either of the two limbs under Article 5 § 1 (f). In any event the law was not precise and did not provide for procedural safeguards. Moreover, her continued detention could not be considered reasonably required for the purpose, nor closely connected to the purpose of preventing an unauthorised entry. Furthermore, she had been detained in conditions which were not appropriate for a young single asylum seeker. She relied on Article 5 § 1 of the Convention, which reads as follows:

> "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."

124. The Government contested that argument.

A. Admissibility

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

125. The Government submitted that the applicant had not brought her complaint before the domestic authorities. She had not filed a request for bail before the IAB, nor had she filed constitutional redress proceedings.

126. The Court has already held that the applicant did not have at her disposal an effective and speedy remedy by which to challenge the lawfulness of her detention (see paragraph 121 above). It follows that the Government's objection must be dismissed.

2. Conclusion

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

B. Merits

1. The parties' submissions

(a) The applicant

128. The applicant submitted that her initial detention was for the purpose of deportation as a result of the Removal Order and was in line with Article 14 (2) of the Immigration Act. Nevertheless once she applied for asylum, she could no longer be detained under either limb as, in her view, Maltese law provided that once such application was lodged the asylum seeker "shall not be removed ... and the applicant shall be allowed to enter or remain in Malta pending a final decision" (see *Suso Musa*, cited above, § 31). However, even assuming that her detention was to be considered as falling under the first limb, she considered that an eight-month detention was arbitrary, as it exceeded the time reasonably required for its purpose, and thus could not be closely connected to the purpose of preventing an unauthorised entry.

129. Furthermore, she submitted that she had not been kept in conditions which were appropriate for a young single female, and that she had no access to procedural safeguards.

130. The applicant submitted that in spite of the fact that the AWAS procedure can contribute to the continued detention of individuals detained in terms of the Immigration Act, it was not adequately regulated by law or by publicly available rules or procedures. The only reference to age assessment procedures was that in the Government's policy document and subsidiary legislation (see relevant domestic law above). She considered that seven and a half months to reach a determination on her age was unjustifiable irrespective of the result of that process. The applicant submitted that had she withdrawn her claim that she was a minor, she would have been released before, especially because she knew that she would likely get protection, as she was from South Central Somalia. However, the fact that she maintained her claim indicated that she strongly believed that she was a minor. Indeed the applicant noted that according to the Aditus report (see paragraph 42 above, *in fine*), age assessment was not always accurate. As to the duration of her detention, the applicant relied on the Court's findings in *Suso Musa*, cited above.

131. Regarding the five day detention following the grant of subsidiary protection, the applicant considered that this period did not come under any of the list of exceptions under Article 5 and had no basis in domestic law. Moreover, while a delay of a few hours to carry out administrative formalities might be justified (she referred to *Giulia Manzoni v. Italy*, 1 July 1997, *Reports of Judgments and Decisions* 1997-IV), five days to conduct medical clearance, which consisted of a simple chest X-ray, and to find a place in an Open Centre was not justified.

(b) The Government

132. The Government submitted that the applicant's deprivation of liberty was required for the purpose of repatriation (until she was granted subsidiary humanitarian protection), at the same time they also submitted that it fell within the first limb of Article 5 § 1 (f). They noted that practically all immigrants reaching Malta did not carry documents and thus ascertaining their identities upon entry was a lengthy process which was dependent on the cooperation of the migrants themselves.

133. The Government considered that the detention was carried out in good faith, as the centre at issue had been set up especially for that purpose, and the detention had fulfilled all the conditions indicated by the Court in *Saadi v. the United Kingdom* [GC] (no. 13229/03, ECHR 2008). They also considered that detention was based in law and was not discriminatory, nor was it applied across the board. Indeed they noted that vulnerable persons, including unaccompanied minors, women with children, pregnant women, elderly persons and disabled persons were not subject to detention, more than would be necessary until medical clearances were obtained. The Government claimed that since many persons alleged to pertain to such categories, procedures were in place to screen such requests accurately and expeditiously. As an example they submitted that in the first half of the year of 2012, out of 1, 065 persons who arrived in Malta irregularly, seventy-five claimed to be minors. AWAS processed and determined all the cases and forty-six persons were issued with a care order. They further noted that age assessment of persons who were quite young was fast tracked as in such cases there was little difficulty in assessing the age. On the other hand with teenagers or alleged teenagers, close to the age of adulthood, the procedure involved more steps and thus inevitably took longer.

134. In the present case the applicant had only claimed to be a minor at a later stage, after having originally claimed she was twenty-six. The interviews in her respect were inconclusive, and it was only the bone density test which confirmed that she was not a minor – a decision to this effect was issued on 14 January 2013 and her asylum claim was decided in her favour two weeks later. The Government submitted that had the applicant not lied, her asylum claim would have been processed without the need to assess her age and she would surely have been released from detention earlier, given that, at the domestic level, subsidiary protection was regularly granted to Somalis.

135. As to the detention following the subsidiary protection decision of Saturday 2 February 2013, the Government considered that since medical clearance needs to be given and accommodation found for the migrant, the lapse of five days before her release could not be considered incompatible with Article 5, particularly because such waiting time had been in the interest of the applicant.

2. The Court's assessment

(a) General principles

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

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

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

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

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

(b) Application to the present case

141. The Court observes that the applicant, an asylum seeker, was kept in detention for eight months and ten days, from the date of her arrival by boat on 27 May 2012 to 7 February 2013, the date of her release following a decision of 2 February 2013 to grant her subsidiary protection, awaiting the outcome of age assessment procedures and/or the outcome of her application for asylum, and subsequently her actual release.

142. It is noted that the applicant does not complain about the lawfulness and compliance with Article 5 of her detention between 27 May 2012 and a few days later (an unspecified day in June), when she applied for asylum (see paragraph 128 above, *in primis*).

143. The Court will assess compliance with Article 5 § 1 of the subsequent periods separately.

(i) Pending her asylum claim (June 2012 – 2 February 2013)

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

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

146. The Court has already noted a series of odd practices on the part of the domestic authorities when dealing with immigrant arrivals and

subsequent detentions and it expressed its reservations as to the Government's good faith in applying an across-the-board detention policy (save for specific vulnerable categories) and the by-passing of the voluntary departure procedure (see *Suso Musa*, cited above § 100) - reservations which it maintains, noting that the two practices persisted in the present case (see paragraphs 7 and 10 above).

147. Nevertheless, the focus of the applicant's complaint concerns the fact that she was detained despite the fact that at the time she was an alleged minor. The Court considers that the necessity of detaining children in an immigration context must be very carefully considered by the national authorities. It is positive that in the Maltese context, when an individual is found to be a minor, the latter is no longer detained, and he or she is placed in a non-custodial residential facility, and that detention of minors should be no longer than what is absolutely necessary to determine their identification and health status (see paragraphs 31 and 36 above). An issue may however arise, *inter alia*, in respect of a State's good faith, in so far as the determination of age may take an unreasonable length of time - indeed, a lapse of various months may also result in an individual reaching his or her majority pending an official determination.

148. The Court is, on the one hand, sensitive to the Government's argument that younger looking individuals are fast tracked, and that the procedure is lengthier only in cases of persons close to adulthood, as well as their statement that only forty-six of seventy-five alleged minors (in 2012) were actually minors. On the other hand, the Court observes that in 2012, out of 1,065 arrivals only seventy-five individuals claimed to be minors, that is, less than 10 %. In this connection, the Court considers that despite the fact that "borderline" cases may require further assessment, the numbers of alleged minors per year put forward by the Government cannot justify a duration of around seven months to determine the applicant's claim. Indeed, the Government have not explained why it was necessary for the applicant in the present case to wait for two months for her first age assessment interview (see paragraph 14 above) and a further two months to perform an X-ray on her wrist (see paragraph 15 above) following a second interview, and more than three months to have a decision following a standard medical test (see paragraph 14 above).

149. However, in the circumstances of the present case the Court cannot ignore that the applicant turned out to be an adult (compare *Ahmade v. Greece*, no. 50520/09, § 79, 25 September 2012), and whether willingly or unwillingly, such false claims burden the system. Moreover, this result casts doubts on the applicant's version of events concerning the first statement she made to the authorities about her age (see paragraph 11 above), and in any event there is no indication that the applicant's first statement to the authorities had been erroneously written down by the

authorities in bad faith (compare, *Aarabi v. Greece*, no. 39766/09, § 44, 2 April 2015).

150. As to whether the detention was closely connected to the ground of detention relied on, the Court notes that the purpose of the detention fell under the first limb of Article 5 § 1 (f) namely to prevent an unauthorised entry, and in practice to allow for the applicant's asylum claim to be processed. It is true that the asylum claim could not be processed before the applicant's age was determined, given that a number of procedural safeguards are attached to asylum claims lodged by minors. However, considering that age assessment is a preliminary step of an asylum assessment, as regrettable as the delay in determining the applicant's age may have been in the present case, it cannot be said that the seven months of detention until her age was determined, as well as the subsequent two weeks until her asylum claim was verified, were not closely connected to the ground relied on.

151. As to the place and conditions of detention, the Court notes that the applicant in the present was an adult, and, as held above (paragraph 102), the conditions of detention in Lyster barracks did not amount to a violation of Article 3.

152. Further, the Court considers that despite the lack of procedural safeguards (as shown by the finding of a violation of Article 5 § 4, at paragraph 121 above) the overall duration of the applicant's detention for the purposes of the first limb of the provision which amounted to a total of around eight months (June 2012 – 2 February 2013) is not unreasonable for the purpose pursued.

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

(ii) Following the acceptance of her asylum claim (2-7 February 2013)

154. The Court observes that the applicant remained in detention for five days following a decision granting her subsidiary protection. It reiterates that no deprivation of liberty will be lawful unless it falls within one of the grounds announced in Article 5 § 1.

155. Indeed the Government did not rely on any of the listed grounds, and thus, in principle, the detention during this period cannot be considered in compliance with the relevant provision.

156. Nevertheless, the Court observes that, in the criminal detention context, for the purposes of Article 5 § 1 (c), detention ceases to be justified "on the day on which the charge is determined" and that, consequently, detention after acquittal is no longer covered by that provision. However, "some delay in carrying out a decision to release a detainee is often

inevitable, although it must be kept to a minimum" (see *Labita v. Italy* [GC], no. 26772/95, § 171, ECHR 2000-IV).

157. Applying these principles *mutatis mutandis* to the immigration context, the Court could accept that the original detention falling under Article 5 § 1 (f), some delay may be envisaged in informing the applicant, as an immigration detainee, that she was granted subsidiary protection status and in actualising her release. However, in the present case the applicant was detained for five more days following that decision, and the reasons advanced by the Government cannot justify such duration. It has not been suggested that the applicant would have been homeless and destitute in those five days had it not been for the lodging proposed by the Government, nor can it be accepted that an individual is detained for five days, without any lawful ground, pending a medical clearance based on a simple X-ray.

158. Thus, this supplementary period of detention did not come within sub-paragraph 1 (f), or any other sub-paragraph, of Article 5.

159. It follows that there has been a violation of Article 5 § 1 concerning the applicant's detention following the determination of her asylum claim.

IV. ALLEGED VIOLATION OF ARTICLE 5 § 2 OF THE CONVENTION

160. The applicant further complained under Article 5 § 2 that the Return Decision and Removal Order, provided to her in English, a language she did not understand, did not contain sufficient information enabling her to challenge her detention. The provision reads as follows:

> " Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him."

161. The Government contested that argument. They submitted that the applicant had failed to exhaust domestic remedies. Without prejudice to the latter objection, they considered that in the absence of a remedy the complaint had been lodged out of six months from the date when the applicant was detained.

162. As to the merits, the Government submitted that the applicant was served with a removal order and a booklet containing information on her rights. In practice, detainees are also informed orally about this, when they are put on a bus following their arrival. Once they arrive at the detention centre they are orally informed by the staff of the detention centre about their detention and their rights in detention. The immigrants have access to interpreters as well as to NGOs, and also have an interview with the Commissioner for Refugees.

163. The applicant submitted that, at the time, she was not in a position to raise a complaint and institute legal proceedings due to the difficulties faced by detainees in pursuing such proceedings.

164. The applicant submitted that the only documents she received concerning her detention, namely copies of the Return Decision and Removal Order, were standard forms, in English - a language she could not read or understand. Their content solely indicated the reasons why she had been declared a prohibited immigrant in terms of Article 5 of the Immigration Act and stated that in terms of the same provision she would remain in custody until her removal was affected. Thus, this information could not have enabled her, if she deemed fit to challenge the lawfulness of her detention.

165. The Court notes that in the absence of a remedy (see paragraph 121 above), in principle, the six-month time-limit must be calculated from the date of the omission complained of (see *Aden Ahmed*, cited above, § 69).

166. Even assuming that in the early stages of her detention the applicant was unable to contest such a measure because of her inability to understand the factual circumstances and her lack of knowledge of the English language, the Court observes that no specific reasons have been brought to the Court's attention, explaining why she was able to bring proceedings around eight months after her arrival and subsequent detention, but not two months earlier, in order to comply with the six-month rule.

167. In such circumstances the Court considers that, the applicant having been informed of the reasons of her detention on 27 May 2012, and having lodged her application on 4 February 2013, the complaint is inadmissible for non-compliance with the six-month rule set out in Article 35 § 1 and must be rejected pursuant to Article 35 § 4 of the Convention.

V. APPLICATION OF ARTICLE 41 OF THE CONVENTION

168. 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

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

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

171. The Court notes that it has found a violation of Article 5 § 1 solely in relation to a five day period, as well as a violation of Article 5 § 4. In that light it considers it equitable to award the applicant EUR 4,000 in respect of non-pecuniary damage.

B. Costs and expenses

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

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

174. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the above criteria and the documents in its possession, as well as to the fact that most of the applicant's complaints have not been upheld, the Court considers it reasonable to award the sum of EUR 1,500 covering costs for the proceedings before the Court.

C. Default interest

175. 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

1. *Declares*, unanimously, the complaint under Article 5 § 2 inadmissible and the remainder of the application admissible;

2. *Holds*, by six votes to one, that there has been no violation of Article 3 of the Convention concerning the applicant's conditions of detention;

3. *Holds*, unanimously, that there has been a violation of Article 5 § 4 of the Convention as the applicant did not have a remedy fulfilling the requirement of this provision, by which to challenge the lawfulness of her detention;

4. *Holds*, unanimously, that there has been no violation of Article 5 § 1 of the Convention concerning the applicant's detention pending her asylum claim;

5. *Holds*, unanimously, that there has been a violation of Article 5 § 1 of the Convention concerning the applicant's detention in respect of the period following the decision on her asylum claim;

6. *Holds*, unanimously,
   (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 amounts
      (i) EUR 4,000 (four thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
      (ii) EUR 1,500 (one thousand and five hundred euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

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

Done in English, and notified in writing on 26 November 2015, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Milan Blaško	Josep Casadevall
Deputy Registrar	President

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

J.C.M.
M.B.

PARTLY DISSENTING OPINION OF JUDGE CASADEVALL

(Translation)

1. Broadly speaking, for the same reasons as I mentioned in my partly dissenting opinion in the *Story and Others v. Malta* judgment (nos. 56854/13, 57005/13 and 57043/13, 29 October 2015), I am unable to follow the majority decision as regards the finding of no violation of Article 3 of the Convention in the present case.

2. In my view the conditions of detention imposed on the applicant in the Lyster Barracks detention centre (Hermes block) are no better than those experienced by the applicants in the case of *Story and Others* in Division 3 of the Corradino Correctional Facility. Accordingly, having regard to the cumulative effect, I consider that those conditions of detention amount to humiliating and degrading treatment in breach of Article 3.

3. Once again, just as in the *Story and Others* judgment, the majority accept the existence of several shortcomings in the general conditions prevailing in the Lyster Barracks centre (see paragraphs 94 to 100 of the judgment), but on each examination minimise them to conclude (in paragraph 101) as follows: " ...while remaining concerned about the lack of outdoor exercise, as well as the lack of heating and female staff...", [the Court considers that] the cumulative effect did not reach the threshold of Article 3 of the Convention.

4. I disagree. In my view it is time the Maltese State once and for all took the requisite action to ensure that detainees enjoy conditions of detention consonant with human dignity.