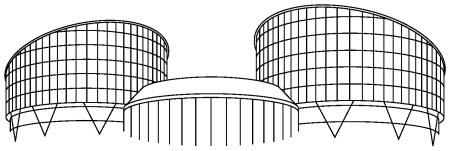

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

CASE OF ABDI MAHAMUD v. MALTA

(Application no. 56796/13)

JUDGMENT

STRASBOURG

3 May 2016

FINAL

03/08/2016

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

In the case of Abdi Mahamud v. Malta,

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

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

and Fatoş Aracı, *Deputy Section Registrar,*

Having deliberated in private on 15 March 2016,

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

PROCEDURE

1. The case originated in an application (no. 56796/13) 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 Sagal Abdi Mahamud ("the applicant"), on 19 August 2013.

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

3. The applicant alleged that her continued detention 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 and 4.

4. On 28 August 2014 the application was communicated to the Government.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1992, and at the time of the introduction of the application was detained in Lyster Barracks Detention Centre, in Ħal Far.

A. Background to the case

6. The applicant entered Malta in an irregular manner by boat on 6 May 2012. On arrival she was registered by the immigration police, given an identification number (12D-001) and presented with a Return Decision and a Removal Order. The applicant was immediately detained in Lyster Barracks; her detention was based on Article 14 (2) of the Immigration Act (see Relevant domestic law below).

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. On 9 May 2012 the applicant was assisted to submit a 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. On 21 May 2012 the applicant was called for an interview by the Office of the Refugee Commissioner (ORC).

9. On 30 June 2012 the ORC rejected her application on the basis, *inter alia*, that she had failed to support her claim that she was from central/southern Somalia with convincing evidence (in particular, she had shown insufficient knowledge about Mogadishu and her speech displayed phonological, grammatical and lexical features not typical of those spoken in Mogadishu). Her appeal was also rejected by the Refugee Appeals Board (the "RAB") on 18 December 2012. The appeal decision reads as follows:

> "The Refugee Appeals Board refers to a fill-in-the-blanks form received in its Office on 18 July 2012 and to a legal submission on your behalf received in its Office on 8 October 2012.
>
> The Board notes that you travelled to Libya in December 2011, first via Kenya and then via Sudan. In none of these countries did you consider applying for refugee status. During the popular insurrection against the Gaddafi regime in Libya you disembarked on the island of Malta, illegally and undocumented on 6 May 2012, claiming that you were looking for peace, although seven of your siblings still live in Somalia. You also claim that your brother had been killed by a terrorist Islamic organization, Al Shabab, because they thought he worked for the Government. However, you also claim that if there was peace back home, you would be prepared to return. Since you left, as you may know, Al Shabab has been driven out of Mogadishu and Presidential elections have been successfully held and several Somalis are repatriating.

> Your appeal for the grant of refugee status by Malta cannot be upheld according to law."

10. Up to the date of the lodging of her application with the Court on 19 August 2013 the applicant had heard no news about any steps being taken in connection with her removal. In practice Malta effected no removals to Somalia or Somaliland.

B. The AWAS Adult Vulnerability Assessment Procedure

11. Ever since her arrival in Malta the applicant suffered from several medical problems, such as headaches, earaches and fainting, and was frequently hospitalised (see paragraphs 16-19 below). She showed signs of severe anxiety and depression which got worse following the refusal of her asylum request. In consequence, on 1 October 2012, she was referred to the Agency for the Welfare of Asylum Seekers (AWAS) by the Jesuit Refugee Service (JRS). This referral was made with a view to obtaining her release from detention in terms of government policy on the grounds of vulnerability due to physical and psychological ill-health. According to the referral form, filled in by an official of the JRS:

> "Sagal has been complaining of several medical problems ever since she arrived in Malta. She had several appointments in hospital was also taken to emergency by ambulance after collapsing in detention. Sagal was also rejected by the Office of the Refugee Commission, causing her to be very depressed. Every time we visit she is in her bed crying and showing signs of severe anxiety."

12. In December 2012 the applicant was interviewed (for a few minutes) by the Vulnerable Adults Assessment Team of AWAS, with a view to determine whether she should be released on the grounds of vulnerability. The interview was held in English and the applicant was assisted by another detainee who was not fluent in the language. Her impression is that she was verbally informed that she would be released. On 10 August 2013, that is just under one year after the referral, the interviewers verbally informed her that she would be released. The Government also confirmed that eventually the applicant's request for release on the ground of vulnerability was acceded to by AWAS.

13. Nevertheless, up to the date of the lodging of her application with the Court on 19 August 2013 the applicant was still in detention. She hoped to be released in November 2013 after the lapse of an eighteen month detention as per domestic practice at the time.

14. The applicant submitted that the Vulnerable Adult Assessment Procedure operated by AWAS was developed by the said organisation in order to give effect to a government policy introduced in January 2005 which stated that vulnerable individuals should not be detained. The applicant submitted that although AWAS was not formally charged with the responsibility of this procedure by the law which set it up, in practice the

agency had full responsibility for the procedure. However, in spite of the fact that this procedure can have a determining impact on 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 determining authority does not give written reasons for its decision and there is no possibility of appeal, although it may be possible to request a review if more evidence is available or there is a degeneration of the individual's condition.

15. According to the Government the Vulnerable Adult Assessment Procedure, which was operated to assess vulnerability, was widely known within the migration sector and a policy document had been issued about it. Forms were distributed to individuals working in the sector such as NGOs. The Government submitted that the Vulnerable Adult Assessment Procedure was a quick process in straightforward cases (such as pregnant women and families with very young children) which were usually determined within two weeks. However, less straightforward cases such as assessments on the grounds of mental health, psychological problems or chronic illness, required a more complex assessment procedure which was therefore lengthier.

C. The applicant's medical condition

16. A certificate issued by a doctor in May 2012 confirmed that the applicant had been hospitalised on 7 and 8 May 2012 (upon her arrival in Malta) for dehydration, she was seen again on 15 May and 15 June of the same year. She suffered "fits" and was waiting for an appointment.

17. According to the documents provided by the applicant, after her initial hospitalisation, and apart from the two visits mentioned above, she was seen by a doctor at the state hospital around sixteen times between May and September 2012, and each time was prescribed medication. On these occasions she suffered from, *inter alia*, epigastric pain and nausea (repeatedly), bilateral conjunctivitis, inflammation, bleeding gums, insomnia, otalgia/earaches (also repeatedly) causing reduced hearing, as well as headaches and toothaches, and dizziness. In none of these occasions was she kept under observation overnight, or hospitalised. In June 2012 following claims by the applicant that she had been falling repeatedly, and that she was having episodes of jerking and tongue biting (which had left evident marks), the doctor requested her referral to a specified department to run the relevant tests to exclude epilepsy – the result of these tests, if undertaken, are unknown to the Court.

18. A medical certificate issued in March 2013 states that at the time the applicant was suffering from "low mood and insomnia" and had been "complaining of somatic symptoms such as chest pain". The doctor noted

"evident deterioration of her mental state" and suggested she be considered as vulnerable.

19. An attestation issued by a doctor in May 2013 states that according to available records "she has stayed unwell and been treated or referred to Mater Dei Hospital [the State hospital] more than usual" and that "her health has posed challenges in keeping her at the Ħal Far detention centre and any assistance will be appreciated".

D. Conditions of detention

20. The applicant was detained in Hermes Block in Lyster Barracks, in conditions which she considered prison-like and basic. She explained that the Block is divided into five zones alike in terms of layout and facilities. The applicant was detained in Zone C for the first seven to eight months and was afterwards transferred to Zone D for a number of months until she moved to Zone A.

21. She noted that in Zone C there were over eighty (*sic*) single women and at one point the detention centre was so crowded that there were not enough beds and people had to sleep on metal tables in the television room. She noted that Zone D was less crowded but that it still lacked privacy and sanitation.

22. She complained about the lack of constructive activities to occupy detainees, overcrowding (particularly during the summer months), lack of privacy, limited access to open air, difficulties in communication with staff, other detainees and with the outside world, lack of information about their own situations, and the lack of proper arrangements for heating and cooling, leading to extreme cold in winter and extreme heat in summer. The applicant highlighted the lack of female staff - in particular she noted that every morning male soldiers barged into her dormitory while the inmates were still asleep to make a head count, during which they removed the sheets to check for their presence. This meant that the applicant had to sleep fully dressed every night, including her headscarf, to avoid embarrassing moments.

23. The applicant also complained of limited access to medical care, also because of a lack of interpreters to enable communication with medical staff.

E. Latest Developments

24. The applicant was informed of the AWAS decision to accede to her request and was released from detention on 12 September 2013.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. The Immigration Act and the Refugees Act

25. 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

26. 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".

C. AWAS

27. 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 provide statistics to appropriate policy-making bodies;
>
> (g) advise 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."

D. Other relevant law and Subsidiary Legislation

28. Further relevant domestic law concerning the case is to be found in *Suso Musa v. Malta* (no. 42337/12, §§ 23-32, 23 July 2013).

29. 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* (cited above, §§ 31-35).

III. RELEVANT MATERIALS

30. 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."

31. 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."

32. 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."

33. 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."

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

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

35. The applicant complained about her conditions of detention, which in her view amounted to inhuman and degrading treatment 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."

36. 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

37. 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.

38. 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.

39. 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).

40. 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.

41. 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.

42. 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

43. 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.

44. 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.

45. 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.

46. 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

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

48. 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 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.

49. The Court notes that in the present case, when the applicant lodged her application with the Court (19 August 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 was required to have 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.

50. 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.

51. 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.

52. In this connection, the Court notes that the example put forward by the Government is indeed very specific and is 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 100) 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.

53. 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.

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

55. 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

56. 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

57. 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 age and her inability to communicate in English.

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

59. The applicant further submitted that conditions in her zones (C, D and A) were particularly difficult in the summer months, as it became crowded because of increased arrivals. When the zone was at full capacity (sixty people), bearing in mind the areas of the dormitories and the common areas, each detainee had an average 5 sq. m of shelter space, which meant that in August, when the applicant's zone had sixty-nine inmates, the average shelter space was of 4.3 sq. m, and in May when it had sixty-one the average shelter space was 4.9 sq. m. She further noted that between her arrival on 6 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.

60. 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.

61. The food provided was also of poor quality, was not nutritious enough, lacked variety (chicken was served every evening) 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.

62. The applicant also complained about the difficulties she had in obtaining information about her situation and the ongoing vulnerability 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 – which could be arbitrarily closed from one day to another because of security concerns or escapes. 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 with the telephone service offered by the Red Cross). Other projects did not consist of more than one activity per week.

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

64. The detention centre lacked female staff, and only one woman worked on the shift with the zones. This meant that all the care of detained women was carried out by male staff (most having a security background) who guarded the facility, conducted headcounts (in the dormitories twice daily, including the mornings when the women were asleep – thus the applicant had to sleep fully clothed including headscarf), took care of the distribution of basic necessities, including items of personal hygiene and underwear, and accompanied them to medical appointments. This state of affairs was confirmed by a local report drawn up by a Maltese magistrate (the Valenzia Report). The applicant referred to international reports on the matter (see paragraphs 30-32 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.

65. She further complained that the detention itself had an impact on her physical and mental wellbeing. She noted that she had nothing to do apart from read and all she did in detention was worry about her problems, she did not watch TV and did not go to the yard because she did not enjoy it, and got dizzy walking down two flights of steps to reach it. Her detention conditions were particularly unfortunate given her state of health. She explained that already in Somalia she used to experience headaches and

earaches, at a time during which she was experiencing considerable hardship and trauma because of the war, and subsequently her voyage across the desert and eventually the Mediterranean. While in Libya she began to experience intense bouts of nervousness/anxiety followed by blackouts. This happened several times but she was not seen by a doctor. In Benghazi, while imprisoned, she became ill again, was taken to hospital and transferred to a UNHCR camp. In Malta too she continued to experience both physical symptoms and psychological ill-health, which she considered were linked to her long-term detention and the anxiety caused by the rejection of her asylum application. She continued to suffer from headaches and earaches which were exacerbated by the noise in detention (people talking loudly and the television). She stated that the pain was sometimes so bad that she felt dizzy and fainted. She claims that her health degenerated after her asylum application was rejected at first instance. She was fainting more often and was constantly crying. She referred to her medical records (see paragraphs 16-19 above), which showed repeated visits to the clinic for a variety of ailments, including fainting, dizziness and possible fits. In fact, she had been referred to AWAS for assessment with a view to possible release on grounds of vulnerability on account of her ill-health and her poor psychological health. In her view it was in the light of her particular circumstances that the conditions of her detention had to be evaluated.

(b) The Government

66. 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. Indeed the dimensions shown by the applicant herself had shown that there was no issue of overcrowding according to the Court's standards.

67. 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.

68. 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 bar of face soap, 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.

69. 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. It surely could not be said that the fact that chicken was served regularly would be of any concern. 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.

70. 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 and any restrictions on the use of mobile phones and internet were due to security reasons. Further, the Government noted that while the applicant was in detention, two female detention officers were assigned to the zones were 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.

71. 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.

72. As to 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 the coldest temperatures were felt from January to March.

73. 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.

74. The Government submitted that immigrants were given information on their arrival, by means of an information leaflet and verbally, and the Commissioner for Refugees holds information sessions with the aid of interpreters. As to information concerning the AWAS procedure the Government submitted that information was easily available had the applicant asked for it from the staff at the detention centre;

75. 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 warm clothing and she had a balanced and varied diet.

76. The Government distinguished the present case from that of *Aden Ahmed* (cited above) in so far as that case had concerned a detention of eighteen months (sic.), but not the present one. Moreover, in that case the applicant had been in a particularly vulnerable situation which combined to the conditions of detention led to a violation of Article 3. However, in the present case the applicant had been referred to the Vulnerable Adult's Assessment Procedure only on 1 October 2012, five months after her arrival and two months from the rejection of her asylum application. The Government considered that the applicant's aim was to obtain a monetary award, which was why she tried to compare the two cases, a comparison which in their view was not well founded.

77. The Government noted that available medical officers made referrals to hospital if need arose and the applicant had received "constant medical assistance even though her condition could not be defined as that of a seriously ill person". This was also shown by the evidence submitted by the applicant herself. They further noted that the noise in the centre could not be considered as a health hazard and that the Maltese Government was not responsible for any treatment she had suffered before arriving in Malta. Furthermore, her asylum claim was swiftly determined, at first instance, after two months, and conclusively a little more than seven months later, it was thus not correct for the applicant to claim that the concern about her

claim made her increasingly unwell and depressed. Thus, in their view, the circumstances as a whole could not amount to a violation of Article 3.

2. The Court's assessment

78. The Court makes reference to its general principles concerning conditions of detention, as reiterated in *Aden Ahmed* (cited above, §§ 85-90).

79. 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 were held in May, the applicant had approximately 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 v. Turkey*, no. 72710/11, § 76, 24 June 2014, and *Torreggiani and Others*, cited above, § 75), 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. 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.

80. 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.

81. 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

the premises since 8 May 2012 (following her release from hospital), this meant that the applicant had no access to any outdoor exercise for anything between eight and twelve weeks (compare, *Aden Ahmed*, cited above, § 96, concerning a period of three months). This is a matter which must be given due weight when assessing the cumulative effects of detention. To cite one example, 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 for the purposes of Article 3 (see *Tabesh v. Greece*, no. 8256/07, §§ 41- 44, 26 November 2009).

82. 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*, cited above, § 152, with further references).

83. 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 small for use by sixty people (recreation being available in just 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 between eight and twelve weeks. The Court considers that the Government's argument is no justification, and indeed the authorities should be in a position to provide safe exercise space irrespective of any fears of escape. 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.

84. As regards the other aspects raised by the applicant, the Court considers that the fact that the detention centre was basic cannot in itself raise an issue, particularly given that from the Government's explanation it

appears that sanitary and other standards were better than those often assessed by this Court. Moreover, the applicant 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 worsened 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. Nevertheless, the Court notes with concern the applicant's statements that dormitories were shared by so many people with little or no privacy, that she suffered from heat and cold, and that there was a lack of female staff to deal with the women detainees (see *Aden Ahmed*, cited above, § 92).

85. 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. Little comfort can be found in the Government's argument that January to February are the coldest months, given that the applicant was detained from May 2012 to September 2013. While, the Court observes that the provision of blankets must have alleviated the situation to some extent, individuals who are vulnerable because of their health may require further measures.

86. For the same reasons as those given in various reports (see for example paragraph 31 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. Moreover, it has not been submitted by the Government that it was impossible, or even difficult, to staff the centre with female personnel. Of some concern too is the fact that little privacy is found in the dormitories, which moreover lack any furniture of the kind in which individuals could store their personal belongings.

87. The Court observes that this situation and the aforementioned conditions persisted for a period of sixteen months and one week. Moreover, the detention 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 asylum seekers (see *Aden Ahmed*, cited above, § 98).

88. Further, the Court notes that, contrary to what was stated by the Government, the case is akin to that of *Aden Ahmed*, repeatedly cited above. Indeed the present case concerns the same premises during more or less the same period, and the duration of the detention is comparable - namely fourteen and a half months in the case of *Aden Ahmed* (§ 98, on the basis of §§ 18 and 30 concerning the facts) and more than sixteen months in the present case. Most importantly, as in the case of *Aden Ahmed* the applicant in the present case was also vulnerable.

The Court notes that in *Aden Ahmed* the domestic authorities, through the AWAS procedure, had not acknowledged the applicant's vulnerability. Nevertheless, the Court considered that that applicant was in a vulnerable position, not only because of the fact that she was an irregular immigrant and because of her specific past and her personal emotional circumstances (see also *M.S.S. v. Belgium and Greece* [GC], no. 30696/09, § 232, ECHR 2011), but also because of her fragile health (§ 97).

In the present case, the domestic authorities, through the AWAS procedure, had established that the applicant was vulnerable and had to be released (see paragraph 24 above). This finding appears to have been clear already after her interview in December 2012 (see paragraph 12 above) despite the fact that it took eight months (until 10 August 2013) for the authorities to formally issue their decision - months during which no further interviews with the applicant were held. In the circumstances of the present case, the Court finds no reason to second guess the domestic assessment.

89. In view of the applicant's vulnerability as a result of her health, all the above-mentioned circumstances, namely the fact that the applicant had no access to outdoor exercise for anything between eight and twelve weeks, the poor environment for outdoor exercise in the remaining period, the lack of specific measures to counter act the cold, the lack of female staff, the little privacy offered in the centre, and the fact these conditions persisted for over sixteen months, lead the Court to conclude that the cumulative effect of the conditions complained of, diminished the applicant's human dignity and aroused in her feelings of anguish and inferiority capable of humiliating and debasing her and possibly breaking her physical or moral resistance. In sum, the Court considers that the conditions of the applicant's detention in Hermes Block amounted to degrading treatment within the meaning of Article 3 of the Convention.

90. There has accordingly been a violation of Article 3 of the Convention.

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

91. The applicant also 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:

> "4. 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."

92. The Government contested that argument.

A. Admissibility

1. The Government's objection ratione materiae

93. 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 (*sic*).

94. 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.

95. 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, namely on 19 August 2013, contrary to that claimed by the Government, she was still detained, given that as confirmed by the Government in their earlier submissions she was only released on 12 September 2013 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).

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

2. Conclusion

97. 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

98. The applicant relied on the Court's findings in *Louled Massoud v. Malta* (no. 24340/08, 27 July 2010), whereby the Court held that the available remedies in the Maltese domestic system were ineffective and insufficient for the purposes of Article 5 § 4. In respect of Article 25 A (6) of the Immigration Act, 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) mentioned above at paragraph 29. 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.

99. Following the *Louled Massoud* judgment the only change in the law concerned the transposition of the EU return directive. Nevertheless, the "new" remedy envisaged, namely an application to the Immigration Appeals Board in terms of Regulation 11 (10), also failed to meet the requirements of speediness, accessibility and certainty. Further, it was not even clear whether such a remedy was available in cases such as that of the 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, in 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.

100. 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 vs 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

101. 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 38 above). The Government also contended that it was impossible (*sic*) to provide a number of examples, given the limitations on small States.

102. 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.

103. 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

104. 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).

105. 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.

106. 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 v. Malta* (no. 42337/12, §§ 58-59) and *Aden Ahmed* (cited above, §§ 121-22) 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 §§ 121-22 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.

107. 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, §§ 115-24; *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.

108. 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 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.

109. 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 53 *in fine* above, and reiterates its consideration 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.

110. 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.

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

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

112. The applicant further complained that her lengthy detention, more than seven months of which pending a decision on her asylum request and the rest allegedly pending her removal, despite no steps having been taken, was contrary to Article 5 § 1 of the Convention. She relied on the case of *Suso Musa v. Malta* (no. 42337/12, 23 July 2013). The provision 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."

113. The Government contested that argument.

A. Admissibility

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

114. The Government submitted that the applicant had not brought her complaint before the domestic authorities. She had not made a request for bail before the Immigration Appeals Board, nor had she brought constitutional redress proceedings.

115. 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 110 above). It follows that the Government's objection must be dismissed.

2. Conclusion

116. 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

117. 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 had applied for asylum she could no longer be detained under either limb as, in her view, Maltese law provided that once such an 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 the first part of her detention, before her asylum claim was rejected, was to be considered as falling under the first limb, she considered that seven and a half months' 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.

118. Furthermore, she had been held in a detention facility within an army barracks, in conditions that were far from appropriate for the detention of a young single female asylum seeker. The applicant relied on the Court's findings in *Suso Musa* (cited above, §100-102) and *Aden Ahmed*, cited above. In the latter case the Court had decided that in the circumstances of that case, the conditions in Lyster barracks had amounted to a violation of Article 3. The applicant submitted that no changes had been made to that facility in the meantime.

119. As to the detention subsequent to the rejection of her asylum claim, the applicant submitted that during those eight months she was not once approached by the immigration authorities concerning her removal, nor was she ever informed about the stage of the removal procedures. The applicant conceded that nothing had been done not so much because of inefficiency or lack of willingness on behalf of the national authorities but because of the real logistical difficulties presented by removal to Somalia, indeed the Maltese authorities had never effected removals of rejected asylum seekers to Somalia or Somaliland. It followed that her eight-month detention was not in pursuit of any eventual deportation, the impossibility of which was evident in the early stages of her detention. Thus, the detention was not

closely connected with the ground relied on. It was also important to note, that unlike that stated by the Government, the applicant was released not when it had become evident that she could be repatriated but only when AWAS had acceded to her request for release on grounds of vulnerability.

120. Indeed, detention policy in Malta established fixed terms of detention, which applied to all cases (except those concerning most vulnerable people). Thus, the applicant's detention was not determined by an individual assessment of her situation, including the possibility of return, but solely on the applicable policy. Moreover, even if removal had been in any way possible, an eight-month detention to that effect was excessive.

121. In addition the applicant submitted that her detention had been governed by unclear laws and policies, which were vague as to the exceptions to detention concerning vulnerable persons. There were no clear publicly available rules regulating the procedure, the criteria on which decisions were to be based, or the time-limit within which a decision is to be taken. This meant that the procedure was anything but certain in practice, as the applicant's case exemplifies. Moreover, contrary to what the defendants submitted, in many cases it was also far from expeditious. In fact between July 2011 and June 2012, according to JRS records, out of a total of thirty-nine adults released on grounds of vulnerability due to mental health problems or serious chronic illness, one was released within two weeks of referral; six within one month; thirteen within two months; six within three months; seven within four months; two within five months; one within seven months and three within eight months. This effectively meant that one-third of these vulnerable persons spent over three months in detention awaiting the outcome of vulnerability assessment procedures. In view of these factors national rules regulating detention failed to meet the standard set by Court, which has repeatedly stressed that "where national law authorizes deprivation of liberty, it must be sufficiently accessible and precise to avoid ail risk of arbitrariness" (*Dougoz v. Greece*, cited above, § 55).

122. Lastly, the applicant noted that throughout all the detention period she had no access to adequate guarantees against arbitrary detention, as had been held by the Court in the above mentioned *Suso Musa* and *Aden Ahmed* judgments as well as in *Louled Massoud* (cited above, § 71).

(b) The Government

123. The Government submitted that the "first part" of the applicant's detention fell within the first limb of Article 5 § 1 (f). They further submitted that the applicant's deprivation of liberty was required for the purpose of repatriation. It had continued until there were no longer any prospects of her return, and at that point she was released on 12 September 2013 given that, while it transpired that she was not Somali, the

Government were unable to establish the exact country of origin of the applicant.

124. They noted that practically all immigrants reaching Malta did not carry documents and thus ascertaining their identities upon entry was a lengthy process which dependent on the cooperation of the migrants themselves, which was rarely forthcoming.

125. The Government considered, however, 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.

2. The Court's assessment

126. The Court refers to its general principles concerning Article 5 § 1, as established in its case-law and reiterated in *Aden Ahmed* (cited above, §§ 138-141).

127. The Court observes that the applicant was kept in detention from 6 May 2012 until 12 September 2013 that is a total of sixteen months and one week. It is noted that the applicant does not complain about the lawfulness and compliance with Article 5 § 1 of her detention between 6 May 2012 (the date of her arrival by boat) and 9 May 2012, when she applied for asylum (see paragraph 117 above, *in primis*).

128. The Court has already held, in *Suso Musa* (cited above, § 99) 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". There is no reason to find otherwise in the present case concerning the first period of seven and half months, between 9 May 2012 and 18 December 2012, the latter being the date when the applicant's asylum claim was finally determined, and rejected.

129. The Court observes that the applicant has been detained in terms of the provisions of the Immigration Act (Articles 5 and 14(2), Chapter 217 of the Laws of Malta). While expressing reservations about the quality of all the applicable laws seen together in such context, the Court has already accepted that in cases similar to those of the applicant, the detention had a sufficiently clear legal basis (see *Suso Musa*, cited above, § 99).

130. In so far as the applicant complained about the quality of the rules regulating the AWAS procedure (see paragraph 121 above), the Court considers that there is room for improvement. Nevertheless, given that the provisions mentioned above - which provide a lawful basis for immigration detention - do not exempt vulnerable individuals from detention, the legal framework regulating the procedure for release of vulnerable individuals is not subject to the same scrutiny. However, the application of such framework in practice may have an incidence on the determination of

whether the detention was arbitrary, in particular in connection with whether the detention 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.

131. 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 has 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 6 and 7 above).

132. More specifically of relevance to the present case is the fact that Government policy allowed allegedly vulnerable individuals to apply for release from detention on the ground of their vulnerability. The Court observes that the applicant's vulnerability assessment took eleven months to be concluded (October 2012 – September 2013). No explanation has been given as to why it took two months from the lodging of her request for the applicant to be interviewed, or why it took another eight months to indicate to the applicant that she may be released (see paragraph 12 above), and yet another month to actually release her on the basis of a decision stating that her claim was acceded to (see paragraph 24 above). The examples referred to by the applicant (see paragraph 131 above) and not rebutted by the Government, go to show that this is often a lengthy procedure, which has reached deplorable delays in the present case.

133. Furthermore, the Court notes that while it is true that the applicant benefited from the opportunity to apply for the AWAS Adult Vulnerability Assessment Procedure, she did this only in October 2012, six months after her detention. It is unclear whether this delay was due to her situation having deteriorated to a relevant extent only at that time, or whether it was due to the applicant's unawareness of this procedure. While the Government claimed that this procedure "was widely known within the migration sector and a policy document had been issued about it" and that "Forms were distributed to individuals working in the sector such as NGOs" (see paragraph 15) it has not been submitted that detainees were directly informed of this possibility, nor has it been claimed that the authorities take any active steps to detect any such vulnerable detainees. It appears, to the contrary, that the authorities limit themselves to strongly relying on any goodwill gestures by NGOs.

134. The Court considers that such a lack of relevant information and active steps by the authorities in this regard, as well as the exorbitant delays in the vulnerability assessment procedure, certainly defeat the point of

exempting vulnerable persons from detention and raise serious questions as to the Government's good faith. This is even more disconcerting, given that it is one of the few applicable exceptions to the "across-the-board" detention policy.

135. Thus, even accepting that the applicant's first period of detention remained connected to the ground of detention relied on (see paragraph 128), the delays in the AWAS procedure in the applicant's case raise serious questions as to the Government's good faith. These delays are of serious concern when coupled with the fact that the applicant had no other procedural safeguards to rely on (see paragraphs 110 and 111 above), and bearing in mind that, as a result of the delay in her assessment, the applicant endured several months of detention in inappropriate conditions (see paragraph 89 above) despite her ill-health. Thus, the national system failed as a whole to protect the applicant from arbitrary detention.

136. This situation persisted, at least, in respect of the last part of the applicant's first period of detention (amounting to more than two and half months), which fell under the first limb of Article 5 § 1 (f), as well as to the entire part of her second period of detention.

137. As to the second period of nearly nine months (19 December 2012 to 12 September 2013) subsequent to the determination of the applicant's asylum claim (which was rejected on 18 December 2012), the Court is, in principle, ready to accept that it fell under the second limb of Article 5 § 1 (f) (see *Aden Ahmed*, § 144), namely, for the purposes of deportation. The Court reiterates that detention falling under the second limb of Article 5 § 1 (f) will be justified only for as long as deportation or extradition proceedings are in progress.

138. The Government submitted that the applicant was released when it became obvious that there were no prospects of establishing the applicant's exact country of origin, and thus no prospects of deportation. The Court notes a number of inconsistencies and lacunae in the Government's defence. Primarily, while the Government considered that the applicant's country of origin could not be established, it transpires that (unlike the first-instance asylum decision) the appeal decision rejecting the applicant's asylum claim was based on considerations related to Mogadishu, Somalia and her possibility of returning there (see paragraph 9 above). It follows that, already in December 2012, it had been established by the domestic authorities that the applicant was Somali. Nevertheless, by Government's implied admission, no steps were taken to return her there, following the final rejection of her claim. Even assuming that the authorities considered that such a decision was not "reliable" – a matter which would raise serious concerns about the asylum system and its functioning - the Government did not submit the slightest detail as to in what way they tried to establish the applicant's origin, and what went on in those nine months of detention, and thus it cannot be said that any return procedures were at all initiated, let

alone pursued with due diligence. Furthermore, the Court cannot but note that the Government's claim that the applicant was released only when it transpired, for some unspecified reason, that her identification would not be possible, is in stark contrast with the facts as established above, which show that the applicant was released solely because her vulnerability assessment request had been accepted. In consequence, the latter period of detention cannot be considered compatible with Article 5 § 1 (f).

139. In conclusion, having regard to the above, the Court finds that there has been a violation of Article 5 § 1 in respect of both the first and the second period of the applicant's detention.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

140. 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

141. 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.

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

143. The Court notes that it has found a violation of Articles 3, 5 § 1 and 5 § 4 in the present case, and therefore awards the applicant EUR 12,000 in respect of non-pecuniary damage.

B. Costs and expenses

144. 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.

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

146. 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, the Court considers it reasonable to award the sum of EUR 2,500 covering costs for the proceedings before the Court.

C. Default interest

147. 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 application admissible;

2. *Holds*, by six votes to one, that there has been a violation of Article 3 of the Convention;

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

4. *Holds*, by six votes to one, that there has been a violation of Article 5 § 1 of the Convention in respect of the first period of the applicant's detention;

5. *Holds*, unanimously, that there has been a violation of Article 5 § 1 of the Convention in respect of the second period of the applicant's detention;

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 12,000 (twelve thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
      (ii) EUR 2,500 (two thousand 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 3 May 2016, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Fatoş Aracı	András Sajó
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 Sajó is annexed to this judgment.

A.S.
F.A.

PARTLY DISSENTING OPINION OF JUDGE SAJÓ

To my regret I have to disagree with the majority in the present case regarding their finding of a violation of Articles 3 and 5 § 1 of the Convention.

The Court finds that the applicant's conditions of detention amounted to inhuman and degrading treatment. I beg to differ. For the Court the detention was unacceptable on account of the applicant's vulnerability resulting from her state of health. It was because of that vulnerability that the cumulative effect of her harsh conditions of detention amounted to degrading treatment (see paragraphs 88-89). As to the presumed "cumulative" conditions, the applicant did in fact have opportunities to move around in the area, (see paragraph 79), rendering the comment concerning the lack of opportunity to exercise less important: the female internees were free to choose their own activities.

The Court's finding is based on a release on grounds of "vulnerability" determined by the domestic authorities. The Court considers that this situation had clearly already been in existence in December 2012 despite the fact that it took eight months (until 10 August 2013) for the authorities to formally issue their release decision.[1]

In determining whether detention conditions have attained the level of degrading treatment, 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).

The object of the treatment (detention) in the present case was not to humiliate the person. (It is a different matter to what extent holding someone in detention for such a long time can be justified on grounds of prevention of entry and whether detention that is not serving a legitimate goal is tantamount to debasing the person detained; see below). There is nothing in the file to suggest that the consequences are adversely affecting the applicant's personality. Undeniably, the Court does take into

1 I fail to see how or why her vulnerability as understood in Maltese law could have been obvious to the authorities at the short interview on December 2012. According to the facts established by the Court the signs of depression appeared after the rejection of her asylum application (18 December 2012, that is to say after the AWAS interview) (see paragraph 11).

consideration "in some instances" the applicant's personal situation (circumstances and needs), that is to say his or her sex, age and state of health (see *Arutyunyan v. Russia*, no. 48977/07 § 68, 10 January 2012, and the case-law cited therein), when it has to determine whether ill-treatment attains a minimum level of severity. These are the personal considerations which may lead to particular vulnerability that can transform otherwise acceptable treatment into treatment attaining a minimum level of severity. I do not consider this list exhaustive, as, for example, sexual orientation can be another relevant personal circumstance. However, a vague concept of vulnerability or the fact that migrants, especially asylum-seekers, *often* have a traumatic history of persecution and escape cannot be held to be a relevant personal situation in the above sense, especially without an individual testimony of such a personal history.

The Court is of the view that the applicant is vulnerable "as a result of her health". It was the health-related "vulnerability" of the victim that led the Court to conclude that the minimum level of severity has been attained. I simply cannot see how the symptoms of the applicant can be considered a relevant health problem causing "vulnerability". There is no medical predisposition here that would transform the ordinary treatment (holding someone in harsh conditions) into unnecessary personal suffering. The applicant's actual personal conditions do not raise any particular concern. The applicant saw a doctor in a state hospital sixteen times, with subjective symptoms such as earaches (repeatedly) causing reduced hearing according to the patient, as well as headaches and toothaches. There was a referral to conduct the relevant tests in order to exclude epilepsy, but there is nothing to indicate that she was diagnosed with epilepsy. These symptoms do not point to any illness that would make someone particularly sensitive to the extent that the harsh detention conditions would cause more than the inevitable suffering. More importantly, there was no finding of such illness on the part of the competent medical authorities, who provided prompt and professional medical attention.

I do not consider decisive for the purposes of finding the treatment degrading the fact that the applicant had been considered unfit for detention on the grounds that she was released on account of her "vulnerability" under domestic law. The Court was satisfied that anyone who is described as "vulnerable" in domestic law must be considered to be vulnerable for the purposes of finding a given treatment degrading under the Convention. On this ground it concluded that the failure to release such persons from a detention center where conditions are harsh but do not otherwise reach the threshold of Article 3, not even in their combination, amounts to degrading treatment.

The judgment completely disregards the definition of vulnerability as a ground for release in Malta. The Ministry for Justice and Home Affairs and the Ministry for the Family and Social Solidarity issued a *Policy Document* on *Irregular Immigrants, Refugees and Integration.* The section on vulnerable persons reads as follows: "Vulnerable persons such as elderly persons, persons with a disability, lactating mothers and pregnant women shall, where appropriate, not be kept in detention but will be provided with alternative accommodation. Monitoring is to be conducted on particular cases to confirm whether detention remains admissible." The applicant does not fall into any of these categories requiring closer scrutiny, even by this Court. It should be noted that "vulnerability", in so far as it is defined in Maltese law, does not apply to the applicant, although it was ultimately under this heading that she was released (a fact contested by the authorities). The last sentence of the Policy Document states that one can be released *on any other ground*, including humanitarian and other reasons, including discretionary policy considerations, and this seems to have been the case here. In other words, she was released as a vulnerable person, but this term does not refer to any specific personal circumstance in the sense used by the Court in the Article 3 threshold context. In view of the understanding of "vulnerability" in Maltese law there is no ground to conclude that a domestic finding of vulnerability is of relevance to the present case.

I am prepared to accept that acceptable conditions of detention in the case of asylum-seekers and persons detained pending deportation can differ from those of prison conditions applicable to those who have committed criminal offences, although this conclusion has been drawn in the context of the lawfulness of Article 5 and not in the context of Article 3. The Court applies that consideration without further explanation, relying on paragraph 98 of the *Aden Ahmed* judgment, where the transposition is made without any reference or explanation either.[2]

To my regret I have to disagree with the finding of a violation of Article 5 § 1 with regard to the first period of detention, considered as detention for the purposes of preventing unlawful entry. The Court's finding of a violation is based on the assumption of bad faith on the part of the Government and the fact that the lengthy detention, without the possibility of proper review and in inappropriate conditions, amounted to arbitrary detention. I agree that such conditions may result in a finding of arbitrariness but I do not note those conditions in the present case. The asylum application was rejected quite promptly (in less than two months),

2 As mentioned above, I agree with this reasoning but I find it problematic that standards or considerations developed in the very different context of an Article of the Convention migrate without justification into other Articles where the scope of the principle or standard might be quite different (as is the case here).

and the applicant appealed against that rejection. Given that one can be held in detention during the asylum process under Maltese law and that the Court's case-law (see *Saadi v. the United Kingdom* [GC], no. 13229/03, ECHR 2008) allows for long-term detention in order to prevent entry, I cannot see how in the present circumstances there is bad faith or arbitrariness. However, I have serious reservations concerning the very approach adopted by the Court's case-law *vis-à-vis* the detention of asylum-seekers. In *Saadi v. the United Kingdom*, seven days' detention in very specific circumstances and in view of the need to cooperate with the authorities was considered as non-arbitrary detention for the purposes of preventing entry. That period has been greatly extended in the last decade. I consider this development an extremely problematic extension of the idea of prevention of entry which is, after all, an event limited in time. When it comes to asylum-seekers, once the asylum-seeker has established a prima facie case, only weighty reasons can be accepted as grounds for detention. That is why I consider the present detention problematic. However, within the currently prevailing concepts of the Court I could not reach the same conclusions as my colleagues. Applying *Saadi v. the United Kingdom* within its original parameters would have allowed me to find the detention unlawful and therefore also degrading.