

***SUSO MUSA V MALTA***

***Application No.42337/12***

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**WRITTEN SUBMISSION ON BEHALF OF  
THE INTERNATIONAL COMMISSION OF JURISTS**

*pursuant to the notification dated 21 January 2013 that the President of the Fourth Section  
had granted permission under Rule 44 § 3 of the Rules of the European Court of Human  
Rights*

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***February 2013***

## **I. Introduction**

1. These written comments are submitted on behalf of the International Commission of Jurists (ICJ) pursuant to leave granted by the President of the Fourth Section by letter of 21 January 2013, in accordance with Rule 44.3 of the Rules of Court.

2. The International Commission of Jurists is a non-governmental organisation working to advance understanding and respect for rule of law as well as the protection of human rights throughout the world. It was set up in 1952 and has its headquarters in Geneva (Switzerland). It is made up of some 60 eminent jurists representing different justice systems throughout the world and has 90 national sections and affiliated justice organisations. The International Commission of Jurists has consultative status at the United Nations Economic and Social Council, the United Nations Educational, Scientific and Cultural Organization (UNESCO), the Council of Europe and the African Union. The organisation also cooperates with various bodies of the Organisation of American States and the Inter-Parliamentary Union.

3. This intervention addresses the law and practice of Malta on detention of migrants, and the permissibility of detention of asylum seekers under Article 5.1.f, in light of international refugee law, international human rights law, and the law of the European Union. Part II of the intervention summarises the ICJ's assessment of the Maltese law governing detention of migrants, and the situation of detained migrants in Malta in 2011. It addresses the compatibility of the policy of mandatory detention with Article 5 ECHR; the way in which the period of voluntary return is applied in practice; the length of detention; the system of appeals; and the propriety of the location of detention facilities and conditions of detention. Part III analyses the requirements under Article 5.1.b that detention be closely connected to a permitted purpose; that it be in good faith; that it be subject to effective procedures for review; that it take into account particular vulnerabilities of asylum seekers; and that the location and conditions of detention are appropriate.

## **II. Detention of Migrants in Malta: ICJ report**

4. In 2012, the ICJ issued a report, *Not Here to Stay* which assessed migration and asylum law and practice in Malta, following an ICJ mission there in September 2011. The ICJ's mission took place at a time when the Maltese migration system was under particular pressure due to large numbers of arrivals from North Africa following the conflict in Libya, and shortly after the disturbances involving detained migrants at Safi Barracks of 16 August 2011. The report contained a number of conclusions and recommendations on the compatibility of Maltese migration law with the State's international human rights obligations, including under the European Convention on Human Rights, and on the place and conditions of detention for migrants, as they were in September 2011. The conclusions and recommendations relevant to the issues raised in this case are summarised in this section.

### ***Detention of Migrants under Maltese law***

5. According to the *Immigration Act 1970*, any "prohibited immigrant"<sup>1</sup> subject to a removal order "shall be detained until he is removed from Malta", unless the person is subject to criminal proceedings for a crime punishable with imprisonment or is serving a

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<sup>1</sup> "[a]ny person, other than one having the right to entry, or of entry and residence, or of movement or transit [...] may be refused entry, and if he lands or is in Malta without leave from the Principal Immigration Officer." Article 5.1, *Immigration Act 1970*. The Principal Immigration Officer is appointed by the Prime Minister, and heads the Immigration Police.

sentence, in which case the Minister for Justice and Home Affairs<sup>2</sup> can direct that the concerned person serves the sentence before removal.<sup>3</sup> The detention of undocumented migrants is therefore considered the rule and not the exception or a measure of last resort. Any “prohibited immigrant”, or anyone suspected to be such, “may be taken into custody without warrant by the Principal Immigration Officer or by any Police Officer and while he is so kept in custody he shall be deemed to be in legal custody.”<sup>4</sup>

6. In the case of non-EU nationals subject to the protection of the EU Returns Directive no. 2008/115/EC under Part IV of Subsidiary Legislation no. 217.12, the grounds of detention are limited to the risk of absconding and to when the non-EU national avoids or hinders the return or removal procedure, but only when other sufficient and less coercive measures are not applicable and only in order to carry out the return or removal procedure. Detention must be for the shortest time possible and only for as long as the removal procedure is in progress and is executed with due diligence.<sup>5</sup> However, Part IV is subject to the exception that it does not apply to “irregular” arrivals by sea or air, who make up the vast majority of migrant arrivals in Malta. This exception effectively deprives most of the undocumented migrants, including asylum seekers, arriving to Malta, and subject to its jurisdiction under Article 1 ECHR,<sup>6</sup> of the guarantees provided by EU law and enshrined in Article 5 ECHR. Whether such “irregular” arrivals include asylum seekers, who are authorised under national law to stay in Malta pending the resolution of their asylum application, is unclear.<sup>7</sup>

7. In its report, the ICJ expressed concern that the policy of mandatory immigration detention was incompatible with its obligations under international human rights law, in particular under Article 5 ECHR. It called on the government to revise this policy **and to apply administrative detention on a case-by-case basis and only where necessary as a last resort, taking account of alternative measures to detention.**<sup>8</sup>

### **Voluntary Departure**

8. A period of “voluntary departure” is provided for under *Subsidiary Legislation no. 217.12*, which implements the EU Return Directive 2008/115/EC. It provides that, as a rule, the Principal Immigration Officer (PIO)<sup>9</sup> must offer the undocumented migrant who is determined to be subject to enforced return, a period of seven to 30 days to depart voluntarily from Malta, during which period the migrant should not be detained.<sup>10</sup> The PIO can extend this period or can impose corollary obligations to avoid the migrant absconding.<sup>11</sup> The PIO may refuse to allow a voluntary departure or may decide to shorten the period for voluntary departure when there is a risk of absconding; when the migrant’s application for legal stay is considered as manifestly unfounded or fraudulent; or when the migrant is considered to be a threat to public policy, public security or national security.<sup>12</sup> In these situations, or when the migrant has not complied with the voluntary departure order, the PIO may issue a removal order, which generally implies the detention of the migrant concerned.

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<sup>2</sup> Presently, the Minister for Home Affairs.

<sup>3</sup> Article 14.2, Immigration Act 1970.

<sup>4</sup> Article 16, Immigration Act 1970. The Constitution of Malta provides, in Article 34.1(j), that a person may be detained “for the purpose of preventing the unlawful entry of that person into Malta, or for the purpose of effecting the expulsion, extradition or other lawful removal of that person from Malta or the taking of proceedings relating thereto or for the purpose of restraining that person while he is being conveyed through Malta in the course of his extradition or removal as a convicted prisoner from one country to another.”

<sup>5</sup> Regulation 11.8 of S.L. 217.12

<sup>6</sup> See, *Hirsi Jamaa v Italy*, Application no. 27765/09.

<sup>7</sup> Article 12 of the *Procedural Standards in Examining Applications for Refugee Status Regulations 2008*, L.N. 243 of 2008, which states that any asylum seeker “shall be allowed to enter or remain in Malta pending a final decision of his application.”

<sup>8</sup> ICJ, *Not Here to Stay*, pages 24-25

<sup>9</sup> At present, the office of the PIO is held by the police.

<sup>10</sup> Regulation 5.2, Subsidiary Legislation no. 217.12.

<sup>11</sup> Regulations 4.1 to 3, Subsidiary Legislation no. 217.12.

<sup>12</sup> Regulation 4.4, Subsidiary Legislation no. 217.12.

9. In its report, the ICJ expressed concern at the expulsion decision communication routinely given to undocumented migrants when they arrive in Malta. It stated "The ICJ is particularly concerned at the fact that in such communications contain on the same page the *pro forma* communication of the possibility to apply for voluntary return and an expulsion order on the basis of the rejection of the inexistent voluntary return request. The ICJ notes that this practice constitutes a breach of the EU Return Directive 2008/115/EC. **The ICJ recommends an end the use of these forms and revision of the procedure in order to provide a true possibility of voluntary return as mandated by national and EU law.**"<sup>13</sup>

#### ***Length of Administrative Detention***

10. The 2005 Policy Document of the Government, *Irregular Immigrants, Refugees and Integration*, which is instrumental in shaping Malta's public policies on these categories of migrants, provides that in all cases the maximum length of administrative detention is 18 months for undocumented migrants and 12 months for asylum seekers.<sup>14</sup> The maximum length of 12 months detention for asylum seekers is derived from the obligation to allow the asylum seeker to work after one year from his or her application, expressed in Article 10 of the *Reception of Asylum Seekers (Minimum Standards) Regulation*.<sup>15</sup> The maximum length of administrative detention for those migrants subject to the protection of the EU Return Directive under Part IV of Subsidiary Legislation no. 217.12 is 18 months. The ordinary six-month period is extendable to 18 months, where there is lack of cooperation, delays in obtaining the necessary documents, or at the discretion of the Principal Immigration Officer.<sup>16</sup>

11. In its report, the ICJ pointed out that, by expressing a maximum length of detention only in policy documents rather than in primary legislation, Malta was acting contrary to the principle of legality under international law, including under Article 5.1 ECHR as held by the European Court in *Abdolkhani and Karimnia v Turkey*.<sup>17</sup> In law there is no defined limit to the period for which a migrant may be detained. **The ICJ recommended that maximum terms for administrative detention be defined in primary legislation.**<sup>18</sup>

12. The ICJ report also concluded that "the period of 18 months of administrative detention is *per se* contrary to the requirement under Article 5.1.f of the European Convention on Human Rights and with the proportionality requirement of Article 9 ICCPR, as no deportation procedure lasting that long can be said to have been undertaken with due diligence. The ICJ is mindful that such length is provided for by the EU Return Directive, but only as an option. **The ICJ recommends that Malta reduce the period of maximum detention and that it link, in primary legislation, the length of detention with effective due diligence in deportation procedures.**"<sup>19</sup>

#### ***Location of Migration Detention Centres***

13. In its report, the ICJ expressed concern that the Safi Barracks' detention centres, Warehouse One and B-Block, and the Lyster Barracks detention centres are located in the two military bases. It noted that "the situation of such detainees in such military bases [is] at odds with international law and standards. Guidance of the Committee for the Prevention of Torture (CPT) stipulates that, except for short periods, detained migrants should be held in specifically designed centres in conditions tailored to their legal status and catering for

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<sup>13</sup> *Not Here to Stay*, page 12

<sup>14</sup> 2005 Policy Document, p. 11

<sup>15</sup> Available at <http://www.justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=10662&l=1>

<sup>16</sup> Regulations 11.14-15 of S.L. 217.12

<sup>17</sup> Application no. 30471/08, paras. 125-35),

<sup>18</sup> *Not Here to Stay*, page 26

<sup>19</sup> *Not Here to Stay*, page 26

their particular needs.<sup>20</sup> Furthermore, holding a detainee in a facility which is inappropriate in respect of the grounds on which he or she is held (for example for the prevention of unlawful entry or pending deportation under Article 5.1(f)) may violate the right to liberty.<sup>21</sup> **The ICJ recommended that "Maltese authorities identify promptly and, in conformity with international standards on the treatment of detainees, make operational alternative places of administrative detention outside of military facilities and expeditiously take measures to transfer the detainees to the non-military facilities."**<sup>22</sup>

### **Conditions of Detention**

14. The ICJ report found the conditions of Warehouse One of Safi Barracks, at the time of its visit in September 2011, to be overcrowded. It noted that in Warehouse One, the hygienic needs of the detainees were poorly provided for and that there was a lack of leisure facilities in all three detention facilities visited. The ICJ report concluded that in Safi Barracks, the accumulation of poor conditions of detention, including sanitary conditions, together with the apparent existence of cases of psychological instability, with the lack of leisure facilities, the overcrowded conditions and the mandatory length of 18 months of detention **brought, at the time of the visit, the situation in the detention centre beyond the threshold of degrading treatment, in violation of Malta's international human rights obligations under Article 3 ECHR.**<sup>23</sup>

### **Access to Lawyers**

15. The ICJ report expressed concern at allegations heard from detainees that public lawyers do not always provide effective representation to detained migrants. It was suggested that lawyers sometimes spoke only very briefly to detainees, and did not, or did not have time to, advise them in detail or gather sufficient information on their cases. While it was not suggested that this problem applied to all legal representation for detained migrants, the ICJ **recommended that measures and policies be implemented to ensure that migrants and asylum seekers be guaranteed thorough and effective legal representation for their asylum claims, including for any other legal issues that may arise from their detention.**

### **Means of Appeal**

16. Decisions on detention or removal may be appealed to the Immigration Appeals Board within three days from the decision itself.<sup>24</sup> The IAB has jurisdiction to hear or determine applications from persons in detention requesting release pending determination of applications for international protection, but it may order release only when the detention is unreasonable as regards duration or because there is no reasonable prospect of deportation within a reasonable time.<sup>25</sup>

17. The Appeals Board is composed of at least three people, among whom must be a lawyer and an expert in immigration matters, appointed by the President on the advice of the Minister for Justice and Home Affairs.<sup>26</sup> The members are appointed for a period of three years and are eligible for re-appointment.<sup>27</sup> The IAB's decisions are final except with respect to points of law, from which the decision can be appealed to the Court of Appeal (Inferior Jurisdiction) within ten days of a decision.<sup>28</sup> In *Louled Massoud* this Court found that the system of the Immigration Appeal Board did not constitute an effective remedy to

<sup>20</sup> CPT Standards, op. cit., fn. 115, page 54, Extract from 7th General Report [CPT/Inf (97) 10], para. 29; European Guidelines on accelerated asylum procedures, CMCE, op. cit., fn. 39, Principle XI.7.

<sup>21</sup> *Aerts v. Belgium*, ECtHR, Application No. 25357/94, Judgment of 30 July 1998, para. 46

<sup>22</sup> Not Here to Stay, pages 28-29

<sup>23</sup> Ibid, pages 30-31

<sup>24</sup> Articles 25A.5 and 7, Immigration Act 1970

<sup>25</sup> Article 25A.9-10, Immigration Act 1970

<sup>26</sup> Article 25A.1, Immigration Act 1970. Presently, the Minister for Home Affairs.

<sup>27</sup> Article 25A.3, Immigration Act 1970

<sup>28</sup> Article 25A.8, Immigration Act 1970

guarantee the detainee's right under Article 5.4 to challenge his or her detention. In its report, the ICJ expressed concern that **"the system of appointment and reappointment of the members of the Board by the Executive does not assure the independence of the body, meaning that it cannot be considered to be a court or a tribunal."**<sup>29</sup>

18. The ICJ also noted that:

- the maximum term to present an appeal before the board, three days, is insufficient for the applicant to properly prepare his or her case and undermines the efficacy of the remedy, particularly in light of the practical situation in Malta's detention centres where difficulties have been reported in accessing legal representation;
- the procedure available under the Immigration Appeals Board is not a remedy capable of reviewing and, if necessary reversing, the authority's decisions on detention, due to the limitations imposed on it by Article 25A.11, Immigration Act 1970;<sup>30</sup>
- the limitation to points of law of the grounds of appeal to a court of law against the IAB's decision precludes a full and adequate judicial review of the merits in light of the procedural aspects of the principle of *non-refoulement* and risks undermining the right to an effective remedy.

19. The ICJ concluded that there was **"a need for substantial reform of the system of immigration appeals, including by entrusting a court of law to review in full the decisions taken by executive immigration authorities, or, at least, to review in full the IAB's decision, with an automatic suspensive effect on the execution of the expulsion."**<sup>31</sup>

### **III. Permissibility of detention under Article 5.1.f**

20. Any deprivation of liberty must be in conformity with the purpose of Article 5, to protect the individual from arbitrariness.<sup>32</sup> For detention to be permissible under Article 5.1.f it must be closely connected with one of the permitted purposes under that article; it must be in accordance with national law and procedures, it must be carried out in good faith; the place, regime and conditions of detention must be appropriate, and the length of detention must not exceed that reasonably required for the purpose pursued.<sup>33</sup> This section addresses certain of these criteria of particular relevance to this case.

#### **Detention closely linked to a permitted purpose**

##### ***Detention for the prevention of unauthorised entry***

21. It is established that detention for the purposes of preventing unauthorised entry may be justified only where the detention can be shown to be closely connected to that purpose, for the whole period of the detention. Detention for this purpose may therefore become arbitrary where it is prolonged beyond what is reasonably necessary. This derives from the object and purpose of Article 5 ECHR, which "enshrines a fundamental human right, namely the protection of the individual against arbitrary interferences by the State with his right to liberty".<sup>34</sup> In *Saadi v UK*, for example, the Grand Chamber, in finding that the detention of the applicant was justified to prevent unauthorised entry and ensure the speedy resolution of asylum claims, relied on the short period of detention involved, (seven days) which it

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<sup>29</sup> *Not Here to Stay*, page.17

<sup>30</sup> Under Article 25A.11 of the Immigration Act, the Board is not authorised to grant a release when the identity, including the nationality, of the applicant has yet to be verified, and, in particular, when the applicant has destroyed his travel or identification documents or used fraudulent documents; when determination of certain elements on which the application is based cannot be achieved without detention; and where the release could pose a threat to public security and public order.

<sup>31</sup> *Not Here to Stay*, page 18

<sup>32</sup> *Conka v Belgium*, Application No.51564/99 para.39, *Chahal v UK* Application No.22414/93, para.118

<sup>33</sup> *Saadi v UK*, Application No.13229/03, GC, para.74; *A v UK* Application No.3455/05, GC para.164; *Louled Massoud v Malta*, Application No.24340/08, paras.60-62

<sup>34</sup> *Saadi v UK*, op cit GC, para 63.

considered not to exceed that reasonably required for the purpose pursued.<sup>35</sup> It further relied on the appropriate conditions of detention and access to legal advice of the applicant, as evidence that the detention served the purpose of speedy and effective determination of asylum proceedings.<sup>36</sup>

**22. It is submitted that, in light of international refugee law, as well as relevant European standards, the circumstances in which it is permissible to detain an asylum seeker on the grounds of unauthorised entry must be narrowly drawn.**

*International Refugee Law*

23. Under international refugee law, detention of asylum seekers is not strictly prohibited, but is constrained by Article 31 of the *Convention on the Status of Refugees* which prohibits States from imposing penalties on those entering the State without authorisation, where they come directly from a State fleeing persecution “provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.” More specifically, Article 31.2 prohibits restrictions on the movement of such persons “other than those which are necessary, and requires that they be imposed only until the individual’s status is regularised or they obtain admission into another country”.

24. Based on these provisions, the recently revised *UNHCR Guidelines on Applicable Criteria and Standards on the Detention of Asylum Seekers and Alternatives to Detention*,<sup>37</sup> and the Conclusions adopted by the Executive Committee on the International Protection of Refugees,<sup>38</sup> establish a presumption against detention, and the need to justify individual detentions as necessary for specified purposes.<sup>39</sup> Detention, under the Guidelines, must never be automatic, should be used only as a last resort where there is evidence that other lesser restrictions would be inadequate in the particular circumstances of the case, and should never be used as a punishment.<sup>40</sup> Where detention is imposed, it should be an exceptional measure, and must last for the shortest possible period.<sup>41</sup> The Executive Committee Conclusions (enshrined in the Guidelines, Guideline 4.1) stipulate that detention may only be resorted to where necessary on grounds prescribed by law:

- to verify identity;
- to determine the elements on which the claim to refugee status or asylum is based;
- to deal with cases where refugees or asylum-seekers have destroyed their travel and / or identity documents or have used fraudulent documents in order to mislead the authorities of the State in which they intend to claim asylum; or
- to protect national security, public health or public order”.<sup>42</sup>

25. The new UNHCR Guidelines specify even further the content of these exceptional grounds for detention of asylum seekers. They limit the use of detention to the prevention of absconding;<sup>43</sup> in cases of likelihood of non-cooperation; in connection with accelerated procedures only for manifestly unfounded or clearly abusive claims; for initial identity and/or security verification; and in order to record, within the context of a preliminary interview, the elements on which the application for international protection is based, which

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<sup>35</sup> *Saadi v. UK*, op cit, para.79

<sup>36</sup> *Saadi v. UK*, op cit, para.76-78

<sup>37</sup> *UNHCR Revised Detention Guidelines, Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum Seekers and Alternatives to Detention, 2012*, Guidelines 2, 3 and 4.

<sup>38</sup> *Conclusion No. 44*, UNHCR

<sup>39</sup> *Conclusion No. 44*, UNHCR, UNHCR Revised Detention Guidelines, Guideline 4.1

<sup>40</sup> UNHCR Revised Detention Guidelines, Guideline 4.1.4; 4.2

<sup>41</sup> *UNHCR Revised Guidelines on Detention, op. cit* Guideline 4.1, 4.2, 6

<sup>42</sup> *Conclusion No.44*, UNHCR, op. cit., fn. 580. Reaffirmed in *Conclusion No. 85*, UNHCR, op. cit., fn. 182.

<sup>43</sup> This justification of detention was found by this Court not to be applicable to detention of migrants in Malta in the case of *Louled Massoud v Malta*, op cit para 68 and following: “Moreover, the Court finds it hard to conceive that in a small island like Malta, where escape by sea without endangering one’s life is unlikely and fleeing by air is subject to strict control, the authorities could not have had at their disposal measures other than the applicant’s protracted detention to secure an eventual removal in the absence of any immediate prospect of his expulsion.”

could not be obtained in the absence of detention. Finally, detention is also permitted to protect public health and national security.

26. The Guidelines stipulate that detention of asylum-seekers for other purposes, such as to deter future asylum-seekers, or to dissuade asylum-seekers from pursuing their claims, or for punitive or disciplinary reasons, is contrary to the norms of refugee law.<sup>44</sup>

27. The ICJ submits that, because of UNHCR's role as guardian of the *Geneva Refugee Convention 1951*, the limitations enshrined in its Conclusions and Guidelines should inform the application of Article 5 ECHR to asylum seekers. Given the importance of the 1951 Convention and related guidance in protection of the rights of asylum seekers, inconsistency of national laws or practices with these norms will be an indicator of arbitrariness under Article 5.1.f.

#### *European Union Law*

28. European Union law, which consists in standards binding on and directly applicable to all EU member States, including Malta under Article 291 of the Treaty on the Functioning of the European Union, also limits the detention of migrants on the grounds of unauthorised entry. The Asylum Procedures Directive<sup>45</sup> clearly states in Article 18.1 that a person shall not be held in detention on the sole basis that he or she is seeking asylum. The Reception Directive<sup>46</sup> establishes a presumption against detention in Article 7, which provides for the right of asylum seekers to move freely in the territory, with restrictions to be imposed only where necessary, for example for legal reasons or for reasons of public order (Article 7.3). Even these restrictions of the freedom of movement could not amount to legitimate grounds for detention, as they do not explicitly provide for the measure of detention, as required by this Court's jurisprudence in *Abdolkhani and Karimnia v Turkey*.<sup>47</sup>

29. The Return Directive states in recital 9 of its preamble that "[i]n accordance with [...] Directive 2005/85 [...] a third-country national who has applied for asylum in a Member State should not be regarded as staying illegally on the territory of that Member State until a negative decision on the application, or a decision ending his or her right of stay as asylum seeker has entered into force". EU legislation, therefore, clearly considers asylum seekers as "lawfully staying" in a Member State during the process of their asylum application. As a consequence, their detention on grounds of unauthorised entry cannot be provided for, except for very short periods, in exceptional circumstances, such as those specified in the UNHCR Guidelines.

30. The ICJ submits that European Union Law in the field of asylum should be interpreted as constituting "national law" for the purposes of Article 5 ECHR, unless domestic law provides for higher standards. This is in the light of the fact that EU law on asylum, i.e. the Common European Asylum System, is directly applicable in EU Member States as a minimum standard.

#### ***Detention pending expulsion***

31. Detention pending expulsion may only be justified so long as deportation or extradition proceedings are in progress.<sup>48</sup> This test must be applied strictly, so that there is a real prospect of expulsion that is being diligently pursued, at all stages of the detention.<sup>49</sup> In *A and others v UK*, for example, this Court held that action could not be construed as being taken with a view to deportation during a period in which the applicants could not be

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<sup>44</sup> UNHCR Revised Guidelines on Detention, Guideline 4.1.4.

<sup>45</sup> Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status

<sup>46</sup> Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers

<sup>47</sup> Application no. 30471/08, para 133

<sup>48</sup> *Chahal v UK* op cit para.113; *Louled Massoud v. Malta* op cit paras.68-70

<sup>49</sup> *Chahal v UK*, op cit para.113; *Quinn v. France*, Application No.18580/91para.48; *Kolompar v. Belgium*, Application No. 11613/85.



deported due to a risk of treatment contrary to Article 3, despite the State's claims that the possibility of deportation was being kept under "active review".<sup>50</sup>

32. In the case of asylum seekers, detention will not be justified for any significant length of time, during the course of asylum proceedings, where national and international law prohibits expulsion in the course of those proceedings.<sup>51</sup> In such cases, there will be an insufficiently close link between the detention and the aim of ensuring deportation. This will be even more the case where alternatives to detention are available and appropriate in the circumstances of the particular case, and sufficient to safeguard the public interest.<sup>52</sup>

33. This principle is supported by EU law. In particular, the Return Directive, provides under Article 15.4 that "when it appears that a reasonable prospect of removal no longer exists for legal or other considerations or the conditions laid down in para.1 no longer exist, detention ceases to be justified and the person concerned shall be released immediately."<sup>53</sup>

34. The Court of Justice of the European Union has also held that "[i]t must therefore be apparent, at the time of the national court's review of the lawfulness of detention, that a real prospect exists that the removal can be carried out successfully, having regard to the periods laid down in Article 15(5) and (6) of Directive 2008/115, for it to be possible to consider that there is a 'reasonable prospect of removal' within the meaning of Article 15(4) of that directive. Thus a reasonable prospect of removal does not exist where it appears unlikely that the person concerned will be admitted to a third country, having regard to those periods."<sup>54</sup>

#### **Detention in good faith**

35. This Court has consistently held that for detention not to be arbitrary, it must be imposed in good faith. For detention to be in good faith, it must be imposed genuinely for the purposes contemplated under Article 5.1.f. For example, in *Saadi v UK*, the brief period of detention imposed was considered by the Grand Chamber to be generally designed to benefit asylum seekers by speedy decision-making, in the context where the UK was faced with a large number of arrivals and was seeking to prevent delays, and had provided good access to legal advice for detainees as well as appropriate conditions of detention.<sup>55</sup>

36. Good faith in the imposition of detention implies a measure of openness and due process in the imposition of detention so that procedures under national law, which allow for alternatives to detention or for release from detention, such as a period of voluntary departure, are not circumvented or manipulated so as to deprive them of meaning. In *Conka v Belgium*, for example, this Court held that: "a conscious decision by the authorities to facilitate or improve the effectiveness of a planned operation for the expulsion of aliens by misleading them [...] so as to make it easier to deprive them of their liberty is not compatible with Article 5".<sup>56</sup> In *R.U. v. Greece*,<sup>57</sup> detention was found to be in bad faith where the tribunal reviewing detention ignored the fact that the detainee had submitted an

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<sup>50</sup> *A and others v. UK*, op cit para.167

<sup>51</sup> Articles 31 to 33, 1951 Convention, together with dicta of the Court in *R.U. v Greece* Application no.2237/08 para.94 and *S.D. v Greece*, Application No. 53541/07 para.62, affirming that it is prohibited in international law to expel an asylum seeker before determination of his or her claim; *Lokpo and Touré v Hungary*, Application No.10816/10, paras.20-24; *Alaa Al-Tayyar Abdelhakim v Hungary*, Application No.13058/11; *Said v Hungary*, Application No.13457/11. See Also Asylum Procedures Directive, Article 7.1 : "Applicants shall be allowed to remain in the Member State, for the sole purpose of the procedure, until the determining authority has made a decision in accordance with the procedures at first instance...". See also Article 6 Reception Conditions Directive (Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers.

<sup>52</sup> *Yoh-Ekale Mwanje v Belgium*, Application no. 10486/10, para. 124.

<sup>53</sup> Directive 2008/115/EC on common standards and procedures in Member States for returning illegally staying third country nationals)

<sup>54</sup> *Said Shamilovich Kadzoev (Huchbarov)*, C-357/09 PPU, 30 November 2009, paras 65-66.

<sup>55</sup> *Saadi v UK*, op cit, para.77

<sup>56</sup> *Conka v Belgium*, op cit para.42

<sup>57</sup> *R.U. v. Greece*, op cit, para.95

application for asylum, although this would have been grounds for his release under national law.

**37. Where the law or procedure is applied so as to deprive it of effect, and to prevent a migrant from availing of alternatives to detention, or release from detention, provided for in national law, it is submitted that detention will be in bad faith and will therefore be arbitrary.**

#### **Procedural protection against arbitrariness**

38. In *Louled Massoud v Malta*, this Court stressed the importance, in protecting against arbitrary detention under Article 5.1.f, of procedures for review of detention which can ensure an effective remedy to contest the lawfulness and length of detention, and protect against arbitrariness.<sup>58</sup> Such remedies will be particularly important where the detention is indeterminate or lengthy.

39. The newly revised UNHCR Guidelines on detention state that asylum seekers “are entitled to minimum procedural guarantees” (Guideline 7). These include the rights: to be informed of the reasons of detention in a language they understand; to legal counsel; to be brought promptly before and have the detention decision reviewed by a judicial or other independent authority; to regular periodic review of the necessity of detention by these bodies; to challenge the lawfulness of the detention (*habeas corpus*); to access asylum procedures; to contact or be contacted by UNHCR; to privacy and confidentiality; and to be assisted in making written submissions.

**40. Where proceedings for the review of detention are conducted by authorities that are insufficiently independent, or have insufficient scope of review or power to order release, or where the procedures are ineffective in practice in allowing for release in appropriate cases or are subject to significant delay, they will be insufficient to protect against arbitrary detention.**

#### **Vulnerability and Alternatives to Detention**

##### ***Asylum seekers as vulnerable persons***

41. This Court has held that in the application of Article 5.1.f ECHR, particular consideration must be given to alternatives to detention for vulnerable persons or groups, for the detention to be in good faith and free from arbitrariness. In *M.S.S. v. Belgium and Greece*, the Grand Chamber held that even short periods of detention of four days and one week could not be regarded as insignificant because the “applicant, being an asylum seeker, was particularly vulnerable because of everything he had been through during his migration and the traumatic experiences he was likely to have endured previously”.<sup>59</sup> While this consideration was expressed in the context of detention in light of Article 3 ECHR, it should equally apply to the assessment of whether the detention was arbitrary in light of Article 5.1.f. Indeed, the UNHCR Guidelines on detention of asylum seekers state in Guideline 9 that “[b]ecause of their experience of seeking asylum, and the often traumatic events precipitating flight, asylum seekers may present with psychological illness, trauma, depression, anxiety, aggression, and other physical, psychological and emotional consequences. Such factors need to be weighed in the assessment of the necessity to detain”.

##### ***Alternatives to Detention***

42. The Council of Europe’s *Twenty Guidelines on Forced Return* establish a general principle that alternatives to detention of migrants should be considered first, irrespective of vulnerability. Guideline 6 states that “[a] person may only be deprived of his/her liberty,

<sup>58</sup> *Louled Masood v Malta*, op cit para.71 (and paras.43-47 on Article 5.4)

<sup>59</sup> *M.S.S. v Belgium and Greece*, Application No.30696/09, GC, para 232

with a view to ensuring that a removal order will be executed, if this is in accordance with a procedure prescribed by law and if, after a careful examination of the necessity of deprivation of liberty in each individual case, the authorities of the host state have concluded that compliance with the removal order cannot be ensured as effectively by resorting to non-custodial measures such as supervision systems, the requirement to report regularly to the authorities, bail or other guarantee systems.” This Guideline has been held by the CJEU to be an authoritative instrument of interpretation of interpretation of EU asylum law, along side the ECHR and the European Court of Human Rights jurisprudence.<sup>60</sup> Similarly, the 2012 UNHCR Guidelines on detention of asylum seekers clearly spell out the pre-eminence of alternative measures over detention (Guideline 4.3).

43. In a series of cases of vulnerable persons, this Court has found the measure of detention not to have been carried out in good faith, as, despite the situation of vulnerability, the authorities had not considered less severe measures.<sup>61</sup> This has been held in cases of persons affected by serious illness,<sup>62</sup> children and families,<sup>63</sup> and unaccompanied minors.<sup>64</sup> The UN Human Rights Committee, in *C v Australia*, found a violation of the right to liberty under Article 9 ICCPR because the respondent State “has not demonstrated that, in the light of the author’s particular circumstances, there were not less invasive means of achieving the same ends, that is to say, compliance with the State party’s immigration policies, by, for example, the imposition of reporting obligations, sureties or other conditions which would take account of the author’s deteriorating condition”.<sup>65</sup>

**44. The ICJ submits that, in assessing whether detention of an asylum seeker is arbitrary under Article 5.1.f, it must be taken into account that a large proportion of asylum seekers belong a vulnerable group for which detention is contrary to Article 5.1.f if suitable alternatives have not been taken into consideration. Such vulnerability may be related to their reasons for fleeing their country, the precariousness of their situation, the uncertainty of their prospects in life and the peril of their journey. As such, there should be a rebuttable presumption against their detention.**

#### ***Place and Conditions of Detention***

45. This Court has consistently affirmed that the place and conditions of detention must be appropriate given the purpose of detention and the vulnerability of the individual.<sup>66</sup>

**46. The ICJ submits that, given the particular vulnerability of asylum seekers, their detention in inappropriate places of detention, or in inadequate conditions which are not in accordance with fair and effective determination of their asylum claim, is likely to render the detention arbitrary, particularly over prolonged periods.**<sup>67</sup>

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<sup>60</sup> The Court of Justice of the European Union in the El Dridi case, Case C-61/11 PPU, 28 April 2011, para 43, stated that “Directive 2008/115 is thus intended to take account both of the case-law of the European Court of Human Rights, according to which the principle of proportionality requires that the detention of a person against whom a deportation or extradition procedure is under way should not continue for an unreasonable length of time, that is, its length should not exceed that required for the purpose pursued ... and of the eighth of the ‘Twenty guidelines on forced return’ ... referred to in recital 3 in the preamble to the directive. According to that guideline, any detention pending removal is to be for as short a period as possible

<sup>61</sup> *Yoh-Ekale Mwanje v Belgium*, op cit para. 124

<sup>62</sup> *Yoh-Ekale Mwanje v Belgium*, op cit.

<sup>63</sup> *Mubilanzile Mayeke and Kaniki Mitunga v Belgium*, Application No. 13178/03

<sup>64</sup> *Rahimi v Geece*, Application No.8687/08.

<sup>65</sup> para 8.2

<sup>66</sup> *Mubilanzile Mayeke and Kaniki Mitunga v Belgium*, op cit, para.102; *Yoh-Ekale Mwanje v Belgium*, op cit, para.118; *Popov v France*, Application Nos.39472/07 and 39474/07, paras.119-120.

<sup>67</sup> *Saadi v UK*, op cit para.74.