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

SECOND SECTION

CASE OF A.D. v. MALTA

(*Application no. 12427/22*)

JUDGMENT

Art 3 (substantive) • Conditions of detention in various immigration centres of a vulnerable individual, due to presumed minority and health situation, amounting to inhuman or degrading treatment • Conditions not adapted to applicant's needs nor to the reasons given for his prolonged detention
Art 5 § 1 • Deprivation of liberty • Imposition of restriction of movement order (for health reasons) for two months amounting to a de facto detention • Detention neither in conformity with domestic law for Art 5 § 1 (e) purposes nor compatible with Art 5 § 1 (b) • Subsequent immigration detention on the basis of detention order, arbitrary under Art 5 § 1 (f) • Serious doubts as to authorities' good faith in case circumstances • Failure to ascertain whether placement in immigration detention a measure of last resort for which no alternative available • Prolonged detention in inadequate conditions
Art 13 (+ Art 3) • Effective remedy • Constitutional redress proceedings ineffective for complaints of ongoing detention conditions
Art 46 • Respondent State required to take general measures to ensure (1) legal basis in domestic law for detention on health grounds in conformity with legal certainty principle; (2) relevant domestic law effectively applied in practice, vulnerable individuals not detained, necessary detention periods limited so they remain connected to detention ground applicable in an immigration context and undertaken in appropriate places and conditions in view of that context

STRASBOURG

17 October 2023

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

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

In the case of A.D. v. Malta,

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

Arnfinn Bårdsen, *President*,
Jovan Ilievski,
Pauliine Koskelo,
Saadet Yüksel,
Lorraine Schembri Orland,
Frédéric Krenc,
Davor Derenčinović, *judges*,
and Hasan Bakırcı, *Section Registrar,*

Having regard to:

the application (no. 12427/22) 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 an Ivoirian national, Mr A. D. ("the applicant"), on 8 March 2022;

the decision to give notice to the Maltese Government ("the Government") of the complaints concerning Article 3 alone and in conjunction with Article 13, and those under Article 5 §§ 1 and 4, and to declare inadmissible the remainder of the application;

the decision not to have the applicant's name disclosed;

the observations submitted by the respondent Government and the observations in reply submitted by the applicant;

the comments submitted jointly by the AIRE Centre (Advice on Individual Rights in Europe), the International Commission of Jurists (ICJ), The Global Campus of Human Rights (represented by Professor Manfred Nowak and Dr. Chiara Altafin who intervened as part of the Global Study component of the ACRiSL project) and the European Council on Refugees and Exiles (ECRE), who were granted leave to intervene by the President of the Section;

Having deliberated in private on 26 September 2023,

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

INTRODUCTION

1. The case concerns the holding of the applicant, a vulnerable individual due to his alleged minority and health situation, in different detention centres for different purposes over several months. It raises issues under, *inter alia*, Articles 3 and 5 of the Convention.

THE FACTS

2. The applicant was allegedly born in 2004 and was at the time of the introduction of the application detained in Safi. The applicant was

represented by Dr N. Falzon, a lawyer, from Aditus Foundation, practising in Ħamrun.

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

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

THE CIRCUMSTANCES OF THE CASE

5. The applicant arrived in Malta irregularly, by boat, on 24 November 2021 with a group of other persons (hereinafter 'the group'). A number of people perished during the ten days in which their boat was stranded at sea, before the rescue operation took place.

A. The initial stages

6. Upon arrival in Malta, all the male arrivals in the group, including the applicant, were detained in Ħal Far Initial Reception Centre, also known as China House (hereinafter 'HIRC') which the applicant explained was used mainly - according to observed practice - to detain newly arrived asylum seekers under quarantine until they are medically cleared by the Health Authorities. The applicant claimed to be a minor. According to the applicant, for sixteen days, the group was not provided with any document regarding their ongoing detention and they did not receive any explanation justifying the reasons for their detention in a language which they could understand.

7. The Government explained that, on arrival, the applicant did not present the authorities with a COVID-19 vaccination certificate, nor a negative Polymerase Chain Reaction (PCR) or rapid antigen negative test result, nor proof of recovery from COVID-19. Thus, the Superintendent of Public Health (hereinafter 'Superintendent') issued an order for him to be placed in quarantine for a period of two weeks, in pursuance of the Period of Quarantine Order (see paragraph 59 below). Since the applicant claimed to be an Ivorian national at the time of his arrival, the quarantine order was issued to him in the French language - the official language of the Ivory Coast. The Government claimed to have submitted this order to the Court however the order submitted to the Court is neither dated nor named or referenced in any way, and appears to be a standard form (in both French and English versions) which has not been filled in. The applicant stated that he did not recognise the document submitted by the Government.

8. The order submitted reads as follows (English version):

> "This written order is being issued in terms of Subsidiary Legislation 465.13, period of Quarantine Order, pursuant to which you are here being ordered to quarantine for fourteen (14) days, during which period you will be tested as required.
>
> Pursuant to Subsidiary Legislation 465.23, Period of Quarantine (Contact with other persons) Order, your quarantine period may be extended for another fourteen (14) days

if persons residing with you are found to be suffering from the notifiable disease, COVID-19. This period may be extended.

If you are diagnosed as suffering from COVID-19, you will be required to self-isolate for a period of fourteen (14) days in accordance with Subsidiary Legislation 465.30, Self-isolation of Diagnosed Persons Order.

You may be ordered to undergo a PCR test prior to the end of a mandatory period of quarantine."

9. During this period of two weeks, the applicant had been accommodated at the HIRC with the group. He was tested for COVID-19 on three occasions, namely on 24 November 2021 (date of arrival), 30 November 2021 (after seven days) and on 9 December 2021 (after fourteen days). The applicant tested negative for COVID-19.

10. As to the conditions in HIRC, according to the applicant he had been detained in the same block with twenty-three other people, including adult men. There were three toilets and two showers. Upon arrival the group had been provided with one t-shirt and one tracksuit each and liquid soap. They had to wash their clothes in the same bucket that was provided to clean the floor. Since they had only one outfit, they had to change clothes between them when washing and NGOs had been refused the opportunity to donate warm winter clothes to the detainees on the basis that they had already been given tracksuits. The Block where they had been detained was composed of a hallway serving several small rooms, measuring approximately 3 sq. m. with three bunk beds. The applicant had been sharing the room with three other people. The Block did not have any common room, chairs, tables or praying room and the mattresses were visually old and used. The bedroom had one window which could not be opened, there was no natural light and was very dark. Upon arrival each individual had been given one sheet per person. The room was very humid and cold. There was no heating system nor any ventilation despite the high humidity encountered in Malta during the Winter. The applicant further reported that detainees had to clean the premises themselves and had no access to drinkable water, thus being obliged to drink from the tap despite the low quality of this water. There had been no regime of activities nor any outside area, no phone to make calls and thus he could have no contact with the outside world.

11. The Government disagreed with this description (see paragraph 94 below).

B. The subsequent stages

12. On 10 December 2021, the Superintendent issued a Restriction of Movement on Public Health Reasons Order (hereinafter 'RMPO'). The RMPO showing the date and the Police immigration number of the applicant, which was submitted by the applicant, reads as follows (English translation):

> "This restriction of movement is being issued in terms of Article 13 of the Prevention of Disease Ordinance (Chap. 36) on the following ground:
>
> There are reasonable grounds to believe that you may be at risk of infectious diseases and hence required to be screened."

13. The applicant reported that no interpreter was present to explain the content of this document written in French. The Government submitted that being from the Ivory Coast there was no reason to believe that the applicant did not understand that country's official language, and that his interviews had shown that he had a certain level of education.

14. Between 7 and 20 December 2021 the group went through various medical tests and check-ups. On 14 December 2021 the test results showed that the applicant was suffering from Pulmonary Tuberculosis (hereinafter 'TB'). As a result, on 17 December 2021, he was admitted to the Infectious Diseases Unit of Mater Dei Hospital for treatment. During this time, the applicant was treated for TB, with further tests being carried out, until he was eventually discharged on 22 December 2021 with a plan for further tests and visits to be carried out at the hospital and a prescription for medicine to treat the illness.

15. None of the parties specified where the applicant was accommodated between 10 December 2021 and his transfer to the Hospital.

16. In the meantime, since the applicant had claimed to be a minor, a provisional order had been issued by the Juvenile Court on 6 December 2021, ordering *inter alia* that the applicant be given accommodation adapted for minors and not with adults.

17. According to the Government, although according to the applicant's alleged date of birth he was sixteen years old, the authorities decided to accommodate him separately from adult asylum seekers. Thus, the applicant's place of residence was changed (no date was specified), and he was moved to Zone 4 of the Safi Detention Centre with six other alleged minors, of the same group, who were also covered by provisional orders issued by the Juvenile Court. The applicant disputed this allegation. According to him, his move to Safi Detention Centre was unrelated to his age (and the decision of the Juvenile Court of 6 December 2021), so much so that after his discharge from hospital on 22 December 2021 he spent another week in HIRC, before being moved to Safi Detention Centre Block [B, Zone 4] on an unknown date, around 30 December 2021. Moreover, in Safi Detention Centre, he had not been placed separately but together with the adults in his group, until at least mid-January 2022.

18. According to the applicant, the Block [B, Zone 4] in Safi Detention Centre was composed of three bedrooms, slightly bigger than the ones in China House. He shared his bedroom with seven other people. The Block did not have any common room, chairs, tables or praying room. The bedroom was composed of one window that could not be opened and the room was very dark. He had not been provided with any new outfit or sheets and had to

take the ones he had from HIRC. The detainees had to wash their clothes in the same bucket that was provided to clean the floor. There had been no regime of activities nor any outside area. The phone could not place outgoing calls, so the applicant had to rely on people to call him. Detainees had to clean the premises themselves and had no access to drinkable water other than the tap. Again, NGOs were refused the opportunity to donate warm winter clothes on the basis that they had already been issued with tracksuits.

19. In the meantime, on 13 January 2022, the applicant's psycho-social age assessment was carried out, according to which he was an adult (see for details paragraph 53 below).

C. The last stages

20. According to the applicant, on 30 January 2022 he was moved to a container with a Nigerian male from his group. The container only had one window and one door which was closed at all times. The applicant and his co-detainee had no access to any outdoor area and were kept inside the container all day, until mid-April, with limited light and ventilation. After mid-April his access to the outside was still limited as he would only be allowed half an hour alone in a fenced area. Most of the space in the container was occupied by the beds, the toilets and the shower and there was limited space to move around. The applicant indicated that he was suffocating inside and could not breathe properly, when it got too hot the guards refused to switch on the air-conditioner. While suffering the heat, he had to drink water from a rusty tap. He could not place calls freely and had to rely on people to call him in order to provide him with any information regarding his situation. The applicant claimed that he could not communicate with the guards or his co-detainee who only spoke French and there was no interpreter available. The Government disputed this description (see paragraph 101 below).

21. According to the Government, it was on 2 February 2022 that the applicant was moved to a two-bedded unit with another alleged minor, who had been transferred to the Safi Detention Centre from the YOURS (Young Persons Offenders Unit) facility, since the other alleged minors who had been residing with the applicant had been confirmed as minors and moved out of the Safi Detention Centre. Eventually, the person that the applicant was sharing the unit with was also moved and, since the applicant remained the only alleged minor, he was accommodated on his own, separately from the adult asylum seekers.

22. In the meantime, on an unspecified date the applicant had applied for asylum and on 10 February 2022, the Principal Immigration Officer (hereinafter 'PIO') issued a detention order in that connection (see paragraph 40 below).

23. According to the applicant he had been moved out of the container in around June 2022. It is unclear where he was moved to, the applicant

submitting that the conditions were similar to those in Block B. The Government made no mention of a further change.

24. On 6/7 July 2022, the applicant was released from Safi Detention Centre and was offered accommodation at the Ħal Far Open Centre. According to the applicant his release had been ordered on 28 June 2022.

D. Medical treatment at the Safi Detention Centre

1. Physical health

25. The applicant submitted that two days after he was moved to Safi Detention Centre, he no longer received his treatment (until 21 January 2022).

26. According to the Detention Service Treatment Chart (submitted by the Government), for the period January to June 2022 the applicant continued to receive four medicines a day which had been prescribed at the start of his TB diagnosis, throughout the entire period.

27. The applicant was seen by Dr M. of the Migrant Health Service (hereinafter 'MHS') on 26 January 2022, who found him asymptomatic and not feeling any side effects from the treatment that he was receiving. On that day, he was also provided with moisturizer to deal with dry skin over the legs and feet. He was seen again by Dr. M., on 26 February 2022, when the applicant was found in the container crying, the doctor noting a language barrier and the use of google translate, and that the applicant had asked to return home. On 14 March and 30 March 2022 the applicant refused his medical check-up. The applicant was examined again by Dr. M. on 22 April 2022, where (according to an unsigned report submitted to the Court) it was noted that his lodging remained an issue - since he was the only one contesting his age-assessment he effectively remained in isolation. When this was explained to him, he confirmed understanding the situation albeit this affected his mood. It was concluded that he was doing well from the 'TB point of view' and that there was 'No evidence of psychosis or other mental health issue apart from a reactive low mood due to solitude'. The doctor recommended that the applicant start attending football sessions and that he be provided with reading materials in French. The applicant noted that on this occasion the doctor spoke to him using Google translate and did not ask him any questions related to his mental health. The applicant was examined again on 23 May 2022 by Dr R. and was found to be "withdrawn and depressed" but had no complaints.

28. The applicant was also monitored by the TB experts at Mater Dei Hospital. According to the documents provided, on 4 February 2022 the applicant was seen at the Chest Clinic and the doctor ordered that the applicant be seen again after two weeks with a copy of chest x-rays and blood test results. Two weeks later, on 18 February 2022, the applicant's chest x-rays had been carried out and the doctors found the applicant in a good, stable condition and not exhibiting symptoms. On that day, the doctor ordered

that the applicant be seen again on 22 April 2022, once again having his chest x-ray and blood tests taken before the appointment. On 22 April 2022, the applicant was found well, however, having lost weight. The doctor ordered that the TB treatment be continued, and that his blood test and chest x-ray be repeated before the next appointment to be scheduled after two months.

2. Mental health

29. On 3 February 2022, the applicant was seen for the first time by the Assistant Psychological Officer (hereinafter 'APO') of the Therapeutic Services Unit (hereinafter 'TSU'). During that assessment, the applicant explained his history and background (his parents had passed away and he had not had the opportunity to go to school) and how he reached Malta (being detained and tortured in Libya). He looked tired, upset and had difficulty concentrating. In the report of 4 February 2022, the applicant was deemed to be suffering from Post-Traumatic Stress Disorder (hereinafter 'PTSD') and depression. According to the report, the applicant needed medical support as well as an improvement of his living conditions.

30. According to the Government, on an unspecified date a social worker from the Agency for the Welfare of Asylum Seekers (hereinafter 'AWAS') was appointed to observe the applicant on a regular basis with the intent of ensuring his general wellbeing. On 30 March 2022, the social worker deemed it necessary to refer the applicant to the APO of the TSU. Thus, his case was re-opened, and the applicant was observed regularly until July 2022.

31. According to the applicant (and the documents provided), on 16 March 2022 the applicant's representatives contacted his legal guardian and raised concerns about his mental health as this had drastically deteriorated. AWAS answered on 22 March 2022 that the applicant would be referred accordingly for his needs to be addressed. On 18 April 2022, the applicant's representatives requested an update since the applicant complained that he had not seen anybody since mid-March 2022. On 22 May 2022 the applicant's legal guardian replied that the applicant had seen the doctor from the MHS on 22 April 2022, who declared that there were no concerns on the applicant's mental wellbeing (see paragraph 27 above); the applicant had nonetheless been referred to TSU to receive any counselling he may require. He was seen by the TSU in the week of 13 May 2022.

32. On 18 May 2022 the applicant's legal representative requested the report from the TSU to no avail. The request was reiterated on 8 June, 14 June and 28 June 2022. On 30 June 2022 AWAS forwarded a report dated 28 June from the TSU, which included details of the report of 4 February 2022 (see paragraph 29 above).

33. The report of 28 June 2022 referred to the previous diagnoses noting that the applicant was suffering from depression and hallucinations. According to the report, the applicant had stated that he had been alone in the container for about a month, without the opportunity of going out even for a

short walk or to talk to someone. He thought a lot, even of suicide. In the reporter's view, being detained in isolation worsened the applicant's mental health, but he had improved when visited in June 2022 after he had moved out of isolation. Nevertheless, he still had symptoms which could be a sign of mental illness, he thus required medical attention and to be monitored by a psychiatrist.

E. Proceedings before the Court of Magistrates (*habeas corpus*)

34. According to the applicant, while in detention, in view of the rules at the time regarding access by lawyers and organisations to the detention centre, he did not meet any person or organisation to provide him with support or information on his situation or any information as to organisations offering legal information and services. On 4 January 2022 Aditus foundation's lawyers called the detention services and it was mentioned by one of the detainees that the applicant was a minor. On 6 January 2022 Aditus foundation' lawyers requested to visit the applicant who they then met on 19 January 2022. During the visit, the applicant and other minors indicated that they still did not know why they were being detained and that they were not given any document on the matter. According to the applicant they were still being detained with adults except for one of them.

35. The applicant (via his representatives), all present in court, filed a writ of *habeas corpus* before the Court of Magistrates on 21 January 2022 against the PIO, which was rejected as the applicant had not been held under the authority of the PIO.

36. On the same day (always via his representatives), all present in court, he filed another writ of *habeas corpus* before the Court of Magistrates, this time against the Superintendent, AWAS and the State Advocate. The applicant claimed that he was being detained unlawfully and thus asked for his immediate release.

37. The application was rejected by the Court of Magistrates on the same day, as it held that the applicant's situation at the time did not amount to a deprivation of liberty, thus, the *habeas corpus* application under Article 409A of the Criminal Code was inapplicable to the applicant's situation. It referred to Article 13 of Chapter 36 of the Laws of Malta (see paragraph 56 below), which did not empower the Superintendent to order a person's detention. As to the applicant's argument that the extension of restriction of movement from four weeks to ten weeks required authorisation and notification anew, the Court of Magistrates found that this was not so. While microbiological tests had already been carried out on the applicant and shown that he had TB, further tests were required to determine whether or not his already-determined illness had been brought under control. For those reasons the Superintendent's decision, based on her discretion, to extend the relevant period had been justified.

38. The Court of Magistrates noted that the applicant was being allowed to live in the detention centre where he could be in touch with others of the group, and benefit from the necessary medical treatment. At the hearing, AWAS had explained that residing in an open centre would not have been an adequate solution to respect the Superintendent's decision, thus the restriction of movement had to be undertaken in a detention centre. The Court of Magistrates considered the provisions of Article 29 of Chapter 465 of the Laws of Malta (see paragraph 58 below), as well as the Superintendent's argument that if the measures in question were not taken for the applicant's own benefit, there was a real risk of death and that the illness would be spread in the community. Thus, even assuming that Article 409A of the Criminal Code applied, the restriction on his movement was justified and the relevant time limit of ten weeks would only expire on 18 February 2022.

F. Asylum procedure

39. In the meantime, on an unspecified date the applicant applied for asylum. At one point the applicant had voluntarily requested to return to the Ivory Coast (see paragraph 27 above) however, the declaration signed by him was put aside once it was confirmed that the applicant wished to continue to pursue his application for international protection in Malta. The applicant's claims for international protection were rejected and he was notified of this on 27 June 2022. An appeal before the International Protection Appeals Tribunal (hereinafter 'IPAT') is still pending.

G. Proceedings before the Immigration Appeals Board (IAB)

40. Once the applicant applied for asylum, on 10 February 2022, the PIO issued a detention order against him (as noted in paragraph 22 above) on the grounds that detention was necessary for the determination of the applicant's identity/nationality and on the basis that the applicant's claims for international protection could not be determined in the absence of detention, since the risk of absconding was high (see the Reception of Asylum Seekers Regulations, S.L. 420.06 of the Laws of Malta, at paragraph 62 below, hereinafter 'S.L. 420.06'). The detention order, notified to the applicant's representative on the same day, was appealed against on 14 February 2022.

41. At the hearing of 17 February 2022, the PIO representative explained that the applicant was being treated as an asylum seeker, but that his application for international protection was pending the determination of his age assessment. He confirmed that the applicant was being kept separate from adults, since he claimed to be a minor and, at the time, was being accommodated with another minor. According to the Government, both parties made their submissions, and the detention was deemed lawful. According to the applicant, the IAB had only listened shortly to his

complaints, namely, that his detention was unlawful from the outset, since he was a minor, and that it was arbitrary as it had been solely based on his nationality (since only asylum seekers coming from countries where removals were carried out were detained), without any individual assessment. Moreover, the conditions of his detention were problematic. After ten minutes, the IAB stopped the pleas and decided to deliberate. The Chairperson left the room after requesting the applicant to show his face (as he was wearing a mask due to COVID-19 measures). After a few minutes of deliberation, the IAB delivered its decision that the detention was legal without providing any reasoning whatsoever and issued a stereotypical decision similar to most cases.

42. Alternatives to detention were also requested at the hearing, however, the IAB left full discretion to the PIO to implement these or not. The PIO later refused such alternatives stating that there would be a review of the detention in the future where the request would be considered. On 21 March 2022, the request for alternatives to detention was reiterated to the PIO. However, the PIO did not reply.

43. Another hearing was held before the IAB two months later, and then again two months after that (April and June 2022) in terms of Regulation 6(4) of S.L. 420.06 (see paragraph 62 below).

44. At the hearing of 21 April 2022, the applicant insisted that being kept alone in a container was detrimental to his mental health and that the PIO had not replied to his request for alternatives to detention. Given the controversy about his age, the PIO explained that he wished to await the outcome of the age assessment appeal. The IAB thus adjourned the case to 23 June (four months after he initially made his request).

45. At the hearing of 23 June 2022, the applicant presented written submissions whereby he considered detention to have ceased to be lawful since he had provided all elements necessary to determine his application for international protection (an interview related to his asylum application had also taken place on 9 June 2022). The PIO was not present, so the decision was postponed until the PIO had the occasion to reply to the written submissions. The following day the PIO informed the IAB that he had requested an update from the International Protection Agency, and that if there was no decision issued as of Monday 27 June, the applicant would be released under alternatives to detention.

46. On 27 June 2022 the applicant was notified of the rejection of his asylum claim by the International Protection Agency and informed that he had fifteen days to appeal. The applicant's representative was not informed of the decision and the applicant had no means to communicate with him.

47. On the morning of 28 June 2022, the PIO issued the applicant with a Removal Order and a Return Decision (hereinafter 'RODO'), despite the deadline for his asylum appeal still running. According to the Government the applicant had informed the PIO that he would not appeal. After learning

of the decision via the applicant, the applicant's representative immediately appealed the removal decision. As a result, the applicant's representative was informed that the RODO was to be suspended and replaced with a detention order, and that the PIO was in process of releasing the applicant under alternatives to detention.

48. On 6/7 July 2022, the applicant was released from the detention centre under alternatives to detention, some eleven days after he was officially released by the PIO on 28 June 2022. According to the applicant this delay was allegedly justified as necessary to ensure the applicant was medically cleared, and it is understood that the applicant was falling under the responsibility of the Superintendent during this eleven-day period.

H. Age Assessment

49. The applicant claimed that he arrived in Malta as a minor, born on 4 September 2004, meaning that he would turn eighteen on 4 September 2022.

50. As mentioned at paragraph 16 above, on 6 December 2021, on the request of the Director of the Child Protection Department, a provisional order had been issued by the Juvenile Court in favour of the applicant. It ordered, *inter alia*, that his temporary care and custody be vested in the CEO of AWAS; that he be placed in accommodation adapted for minors and not with adults; and that Ms LBB be appointed as his representative (guardian). The applicant did not participate in this process and was not informed of such decision, nor was he aware of the name of his legal guardian.

51. Subsequently, the age assessment process took place on 13 January 2022, including an interview and an examination, as a result of which the applicant was considered to be an adult. The applicant underwent his age assessment procedure without any legal assistance and in the absence of his legal guardian, but in the presence of an interpreter. The three social workers found the applicant's narrative to be consistent, they all noted that the applicant was very careful in the way he answered questions concerning his age and was seen counting on his fingers. That, together with the applicant's physical appearance (including build, facial hair and demeanour) clearly indicated that he was, in fact, an adult.

52. By a decision of 20 January 2022, he was deemed to be nineteen years of age, born on 1 January 2003.

53. The applicant was informed of this decision on the same day and although no age assessment appeal was ever successful, for the years 2021 and 2022, the applicant nonetheless appealed his decision on 21 January 2022. On 3 March 2022, a hearing was held before the IAB, as composed at the hearings held on 17 February 2022 (see paragraph 41 above). The applicant's lawyers requested to interview the social worker in charge of the initial assessment and the IAB decided to set this for 30 March 2022. On

2 June 2022 the appeal was rejected in two sentences, the IAB confirming the AWAS decision. No reasons were given in reply to the applicant's arguments set out in his ten-page appeal.

RELEVANT LEGAL FRAMEWORK

I. RELEVANT DOMESTIC LAW

A. The Criminal Code

54. The relevant provisions of the Criminal Code, Chapter 9 of the Laws of Malta, and its subsidiary legislation, read as follows:

Section 409A

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

(2) On the day appointed for the hearing of the application the court shall summarily hear the applicant and the respondents and any relevant evidence produced by them in support of their submissions and on the reasons and circumstances militating in favour or against the lawfulness of the continued detention of the applicant.

(3) If, having heard the evidence produced and the submissions made by the applicant and respondents, the court finds that the continued detention of the applicant is not founded on any provision of this Code or of any other law which authorises the arrest and detention of the applicant it shall allow the application. Otherwise the court shall refuse the application.

(4) Where the court decides to allow the application, access by electronic means to the scanned record of the proceedings, including a scanned copy of the court's decision, shall be transmitted to the Attorney General by not later than the next working day and the Attorney General may, within two (2) working days from receipt of the access by electronic means of the scanned record and if he is of the opinion that the arrest and continued detention of the person released from custody was founded on any provision of this Code or of any other law, apply to the Criminal Court to obtain the re-arrest and continued detention of the person so released from custody."

Section 244A

"(1) Any person who, knowing that he suffers from, or is afflicted by, any disease or condition as may be specified in accordance with sub-article (3), in any manner knowingly transmits, communicates or passes on such disease or condition to any other person not otherwise suffering from it or afflicted by it, shall, on conviction, be liable to imprisonment for a term from four year to nine years:

Provided that where the other person dies as a result of such disease or condition, the offender shall be liable to the punishment established in article 211(1).

(2) Where any such disease or condition as is referred to in sub-article (1) is transmitted, communicated or passed on through imprudence, carelessness or through non-observance of any regulation by the person who knew or should have known that he suffers there from or is afflicted thereby that person shall on conviction be liable to imprisonment for a term not exceeding six months or to a fine (multa) not exceeding two thousand and three hundred and twenty-nine euro and thirty-seven cents (€2,329.37):

Provided that where the other person dies as a result of such disease or condition, the offender shall be liable to the punishments established in article 225.

(3) The Minister responsible for justice shall, by notice in the Gazette, specify diseases or conditions to which this article applies."

55. Regulation 2 of the Communicable Disease and Conditions Regulations, Subsidiary Legislation (S.L.) 9.10 of the Laws of Malta, reads as follows.

"The following diseases or conditions are specified as diseases or conditions to which article 244A of the Criminal Code applies:

...

(e) Tuberculosis."

B. The Prevention of Disease Ordinance

56. In so far as relevant the provisions of the Prevention of Disease Ordinance, Chapter 36 of the Laws of Malta (hereinafter 'the Ordinance'), and its subsidiary legislation read as follows:

Article 7

"Every medical practitioner attending on or called in to visit the patient shall forthwith, on becoming aware that the patient is suffering from a disease to which this Part of the Ordinance applies, send to the Superintendent a certificate stating the name, age and address of the patient, and the disease from which, in the opinion of such medical practitioner, the patient is suffering."

Article 13

"(1) Where the Superintendent has reason to suspect that a person may spread disease he may, by order, restrict the movements of such person or suspend him from attending to his work for a period not exceeding four weeks, which period may be extended up to ten weeks for the purpose of finalising such microbiological tests as may be necessary.

(2) Any person who acts in contravention of the provisions of this article shall be guilty of an offence against this Ordinance."

Article 25

"(1) Any person suffering from a disease who is without proper lodging or accommodation or is in or upon any house or premises where proper precautions cannot

be taken so as to prevent the spread of disease, or is lodged in any tent or van or in a room or house occupied by other persons besides those whose presence is necessary for attending on the patient, or is on board any ship, may on a certificate signed by two of the medical officers mentioned in article 16, be removed, by order of a magistrate, on the application of the Superintendent and at the cost of the Government, to any hospital for infectious diseases in Malta where the patient is and detained therein at the expense of the Government, so long as infected.

(2) No such order shall be necessary where the removal is effected with the consent of the patient or his parents or tutor.

(3) The order referred to in subarticle (1) shall be addressed, in Malta, to the Commissioner of Police and, in Gozo, to the senior Police officer.

(4) Any person who shall obstruct the execution of any order made by any magistrate as aforesaid, shall be guilty of an offence under this Ordinance."

Article 26

"(1) Where, upon the application of any of the medical officers mentioned in article 16, any magistrate is satisfied that a person suffering from a disease, who is in a hospital, would not on leaving such hospital be provided with lodging or accommodation in which proper precautions could be taken to prevent the spreading of the disease by such person, such magistrate may make an order directing the said person to be detained in such hospital, at the cost of the Government, for a time to be fixed in such order, but with full power to such magistrate to enlarge such time as often as may appear to him to be necessary for preventing the spread of the disease.

(2) The execution of the said order may be enforced by any officer of the department of health, any Police officer or any officer of the hospital."

57. Regulation 2 of the Notification of Tuberculosis by Medical Practitioner Order, Subsidiary Legislation (S.L.) 36.15 of the Laws of Malta, reads as follows:

"The provisions of article 7 of the Prevention of Disease Ordinance, relating to the duty of medical practitioners to notify disease, shall apply to all forms of tuberculosis as they apply to tubercular phthisis under article 10(2) of the said Ordinance."

C. The Public Health Act

58. The pertinent provisions of the Public Health Act, Chapter 465 of the Laws of Malta, and its subsidiary legislation, in so far as relevant, read as follows:

Article 27

"The Superintendent may make, vary or revoke orders:

[...]

(c) prescribing measures to guard against or to control dangerous epidemics or infectious disease and in particular:

[...]

(iii) regulating the provision of medical aid, the distribution of medicine, the establishment of hospitals, the promotion of cleansing, ventilation and disinfection and otherwise for guarding against the spread of disease and for the treatment of persons suffering therefrom;

[...]

(v) prescribing such other matter as the Superintendent may deem expedient for the prevention or mitigation of such disease:

Provided that the power of the Superintendent to prescribe such other matter as the Superintendent may deem expedient for the prevention or mitigation of such disease shall include and shall be deemed to have always included the power to provide for any matter which is ancillary or consequential to an order issued under this paragraph [...]"

Article 29

"(1) The Superintendent may order that a person suffering from a notifiable disease:

(a) be isolated in such a place as the Superintendent determines;

(b) be placed under the supervision of a specified person;

(c) submits to further medical examination, medical testing, immunisation, medical treatment or counselling;

(d) discloses to an authorised officer the name and address of any other person with whom contact by that person may result or may have resulted in the transmission of the disease;

(e) refrains from doing anything which may cause the spread of disease.

[...]

(3) The Superintendent may apply to a magistrate for a warrant to apprehend and detain or quarantine any person who fails to comply with a direction under sub article (1) and for that purpose, to enter any area, premises, body of water or vehicle."

59. Article 2 of the Period of Quarantine Order, Subsidiary Legislation (S.L.) 465.13 of the Laws of Malta, in so far as relevant, reads as follows:

"[...] (3) Any person arriving to Malta from any of the following countries shall not be required to submit himself to any period of quarantine upon his arrival so long as that person is in possession of, either a vaccination certificate, or a negative Polymerase Chain Reaction (PCR) COVID-19 test performed not more than seventy-two (72) hours prior to arrival in Malta, or a negative COVID-19 rapid antigen test (RAT) performed not more than twenty-four (24) hours prior to arrival in Malta, or a certificate of recovery from COVID-19 valid for not more than one hundred and eighty (180) days after the date of the first positive Polymerase Chain Reaction (PCR) COVID-19 test result:

[...]

(be) Libya

[...]"

D. The Immigration Act

60. In so far as relevant the provisions of the Immigration Act, Chapter 217 of the Laws of Malta, particularly Article 17 and 25A are set out in *S.H. v. Malta* (no. 37241/21, § 33, 20 December 2022).

E. The International Protection Act

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

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

62. The relevant provisions of the Reception of Asylum Seekers Regulations, Subsidiary Legislation (S.L.) 420.06 of the Laws of Malta, in so far as relevant, read as follows:

Regulation 2

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

Regulation 4

> "(1) The Principal Immigration Officer shall take the necessary steps in order that, within a reasonable time and not exceeding fifteen days from the day an asylum seeker has lodged his application, the asylum seeker shall be informed of any established benefits and of the obligations with which he must comply relating to reception conditions; in this respect the Principal Immigration Officer shall ensure that an applicant is provided with information on organisations or groups of persons that provide specific legal assistance and organisations that might be able to help or inform him concerning the available reception conditions, including health care.
>
> (2) The Principal Immigration Officer shall ensure that the information referred to in sub-regulation (1) is in writing and, as far as possible, in a language that the applicant may reasonably be supposed to understand; where appropriate, this information may also be supplied orally."

Regulation 6

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

(b) in order to determine those elements on which the application is based which could not be obtained in the absence of detention, in particular when there is a risk of absconding on the part of the applicant; [...]

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

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

(3) The Immigration Appeals Board shall, with due regard to article 25A(10) of the Immigration Act, review the lawfulness of detention after a period of seven (7) working days, which may be extended by another seven (7) working days by the Board for duly justified reasons.

(4) If the applicant is still detained, a review of the lawfulness of detention shall be held after periods of two months thereafter. Wherever the Immigration Appeals Board rules that detention is unlawful, the applicant shall be released immediately.

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

[...]

(7) Any person detained in accordance with these regulations shall, on the lapse of nine months, be released from detention if he is still an applicant.

[...]

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

Regulation 6A

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

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

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

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

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

(5) Legal advisers, counsellors, representatives of relevant non-governmental organisations and family members of detainees shall be given the possibility to

communicate with and visit applicants in detention in conditions that respect privacy, in accordance with rules and conditions that may be laid down in legislation regulating detention facilities:

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

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

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

Regulation 11

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

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

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

Regulation 12

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

(a) premises used for the purpose of accommodating applicants during the examination of an application for asylum lodged at the moment of entry into Malta;

(b) accommodation centres which guarantee an adequate standard of living;

(c) other premises adapted for accommodating applicants:

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

Regulation 14

"(1) (a) In the implementation of the provisions relating to material reception conditions and health care, including mental health, account shall be taken of the specific situation of vulnerable persons who shall include minors, unaccompanied minors, disabled people, elderly people, pregnant women, single parents with minor children, victims of human trafficking, persons with serious illnesses, persons with mental disorders and persons who have been subjected to torture, rape or other serious

forms or psychological, physical or sexual violence, such as victims of female genital mutilation, found to have special needs after an individual evaluation of their situation:

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

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

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

Provided that applicants identified as minors shall not be detained, except as a measure of last resort:

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

(3) Whenever the vulnerability of an applicant is ascertained, no detention order shall be issued or, if such an order has already been issued, it shall be revoked with immediate effect.

(4) In the implementation of the provisions of these regulations, where these refer to minors, the best interests of the child shall constitute a primary consideration. When considering the best interest of the child due regard shall be taken to the possibilities of family reunification, the minor's general well-being and social development, safety and security considerations, and the views of the minor in accordance with his age and maturity.

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

Regulation 15

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

Regulation 16

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

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

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

63. The relevant provisions of the Procedural Standards for Granting and Withdrawing International Protection Regulations, Subsidiary Legislation (S.L.) 420.07 of the Laws of Malta, read as follows:

Regulation 9

"[..] (3) The applicant shall submit as soon as possible all elements needed to substantiate the application for international protection. Such elements shall consist of the applicant's statements and all the documentation at the applicant's disposal regarding the applicant's age, background, including that of relevant relatives, identity, nationality, country and place of previous residence, previous applications for international protection, travel routes, travel documents and the reasons for applying for international protection."

Regulation 17

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

(a) conducted in a language which he understands or is reasonably supposed to understand;

(b) performed with full respect for the individual's dignity;

(c) the least invasive possible; and

(d) carried out by qualified medical professionals allowing to the extent possible, for a reliable result.

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

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

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

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

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

II. RELEVANT MATERIAL

A. Conditions in detention centers

64. The Report to the Maltese Government on the visit to Malta carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 17 to 22 September 2020, published in March 2021[1], in so far as relevant, reads as follows:

> "**A. Foreign nationals deprived of their liberty**
>
> [...] 17. As regards a restriction of movement on grounds of public health, the authorities have been relying on the 1982 Prevention of Disease Ordinance containing a provision which enables the Superintendent of Public Health to restrict personal movements if there are reasonable grounds to believe that the person may have been exposed to infectious diseases and for the purposes of screening for such infectious diseases and to prevent their spread; it is ordered without an individual assessment.
>
> In practice, since mid-2018 this restriction has formed the basis by which more than 90% of Malta's detained migrants have been held in reception and detention facilities; it lasts for many months without review, and the migrants concerned are confined for 23 to 24 hours per day in their accommodation units (see section 4a detention procedures & legality).
>
> Indeed, immigration detention under these health provisions has been recently found to be illegal by Maltese Courts in six cases brought by detained asylum-seekers in 2019. The cases were habeas corpus applications brought under Article 409A of the Criminal Code. Multiple concerns were raised about the legality of detention, including that the relevant provision does not authorise deprivation of liberty, only the restriction of movement. There is a maximum period of four weeks permissible in national law and only extendable to 10 weeks in exceptional cases; it applies even in the case of vulnerable applicants and children. The health restriction order is a single sentence – without specifying the type of infectious disease concerned and with no effective remedy provided against this form of detention. Apparently, there are no procedural guarantees in relation to this form of detention, save for the habeas corpus process under the Criminal Code, Article 409A. [...]
>
> **3. Conditions of detention & regimes that may amount to inhuman and degrading treatment contrary to Article 3 of the European Convention on Human Rights**
>
> [...] 34. Safi Detention Centre and Hermes Block (Lyster Barracks) are detention facilities run by the Detention Service, located on an operational bases of the Armed Forces of Malta (AFM). China House is an additional detention facility run by the Detention Service, with assistance from Malta Red Cross. [...]
>
> **Safi Detention Centre, Safi AFM Barracks**
>
> 35. Safi Detention Centre consisted of two Warehouses, nos. 1 and 2 (each housing some 350 migrants); Safi B-Block Upper and Lower Zones holding some 200 migrants; Safi C-Block, a new building partially still under construction, was holding the 77 migrants transferred from Hermes Block following the riot in September; and an Isolation / "Museum" Block, holding 18 migrants at the time of the visit.

[1] https://rm.coe.int/1680a1b877 (last accessed September 2023)

36. The material conditions of each of Safi Detention Centre's Blocks were poor, apart from those in the Isolation block/ "Museum Block".

The large dormitories in both Warehouses 1 and 2 were crammed with rows of bunk beds and a similar situation pertained in B-Block where the dormitories, measuring some 30m², were accommodating 22 persons and the 11 sets of bunk beds took up most of the floor space. Every dormitory was equipped with one television set.

The shower facilities in both Warehouses and B-Block were filthy and the showers not always functioning, showerheads were missing and the sanitary area constantly flooding. Mould was present on the walls and ceilings. In Warehouse One, many migrants underlined that only one of the 10 toilets was working at the time of the delegation's visit and that they often used their lunchboxes to wash themselves from the wash basin's tap due to the dysfunctional showers. Further, as nearly all migrants only possessed one set of clothes (generally the ones that they had arrived in), when they washed these, they had to borrow clothes from other migrants where possible until their clothes dried.

Safi C-Block comprised one large dormitory, with adequate access to natural light and sufficient artificial lighting and ventilation, but as with the other blocks it was crammed with rows of bunk beds (for 80 migrants) only, there being no other furniture therein. It had a shower facility, in which there were 6 working showers (but no hot water) and 6 toilets and a large wash basin for migrants to launder their clothes.

The Isolation Block / "Museum" Block was a separate unit situated adjacent to B-Block, with a capacity of 14 beds but which was accommodating 18 persons at the time of the visit. The Block consisted of three rooms that each measured only 6m² and yet were furnished with two beds, and one dormitory of 20m² with eight beds. The facilities in this Block, were reasonably well maintained and clean, and the rooms and dormitory had adequate access to natural light and sufficient artificial lighting and ventilation. There was a television in the dormitory and the migrants had ready access to a small outside exercise yard (although lacking in shade and a means of rest). The CPT wishes to be informed where the four extra persons in the Isolator Block slept at night.

37. The regime of activities afforded to migrants was non-existent. Access to the outside exercise yards was sporadic for the 700 migrants detained in both Warehouses 1 and 2, and following the riot on 18 September 2020, access to the yard for the 350 migrants in Warehouse 1 was suspended. Equally, many migrants from B-Block, with whom the delegation spoke, alleged that they too had had no access to the outside exercise yards for several weeks, and in some cases, months. Exercise yards, when the migrants had access to them, provided no shade or means of rest. In Block C the exercise yard was still under construction, which meant that the 77 migrants held there were confined to their dormitory for 24 hours a day. [...]

Hal Far Reception Centre, "China House"

42. Due to the large number of migrant arrivals and the Covid-19 pandemic, an additional establishment was added to the Detention Services' facilities in March 2020, namely Hal Far Reception Centre (known as "China House"). The purpose of this establishment was to take many non-vulnerable migrants from Marsa IRC and to create additional capacity to ensure migrants arriving in Malta could be quarantined while being medically screened and assessed. According to staff, the average stay at China House was four months before they were transferred either to a closed detention centre, Marsa IRC or an open centre.

43. The Facility comprises three zones (A, B and C) in a two-storey building. At the time of the delegation's visit, Zone A had a capacity of 75 and was accommodating 50 persons, and Zone C had a capacity of 130 and was accommodating 100 persons (all of whom had been transferred from Hermes Block, Lyster, after the riot from 14-16 September 2020). Zone B was designated as a Covid-19 quarantine zone and held 38 persons, who had recently tested positive for the coronavirus.

The dormitories in Zones A and C measured 21m² each and were equipped with six sets of bunk beds (i.e. 12 beds); dormitories of such a size should not accommodate more than five persons. Not all of the rooms had access to adequate natural light and sufficient artificial lighting and ventilation. Some of the bathrooms had no doors and, at the time of the delegation's visit, some of the showers and wash basins were blocked in Zones C and B and flooded the bathroom floors when used, which had allegedly caused some migrants to slip and injure themselves.

44. There was no regime of activities in China House. Many of the detained migrants underlined that they had no access [to] any purposeful activities, no television, no access to the telephone, and were not offered access to the single exercise yard. Migrants spent 24 hours per day locked on their units with nothing to structure their days for months on end.

Such living conditions may well amount to inhuman and degrading treatment contrary to Article 3 of the European Convention on Human Rights.

45. By communication of 2 November 2020, the Maltese authorities stated that urgent maintenance works are being carried out on the existing toilets and showers at Safi Warehouses and B-Block. A detailed survey of both buildings was being conducted with the aim to improve the overall living and sanitary conditions of both blocks. Works on the plant room and the upper floors of Hermes Block have started in October 2020 and refurbishment of lowers floors will commence thereafter.

46. The CPT notes positively that some refurbishment works are now being undertaken. Nevertheless, in the light of the above findings, the CPT calls on the Maltese authorities to take broader action to: - transfer vulnerable persons (including families with children, pregnant women, etc.) to suitable open reception facilities, where they can receive appropriate care for their specific needs; - not to detain women and children; if exceptionally, they are detained for very short periods (hours) they should not be held in the same room as unrelated men. Further, the CPT calls upon the Maltese authorities to renovate Safi Detention Centre's Warehouses and B-Block, Hermes Block (Lyster Barracks) and China House to ensure that: - they provide an appropriate environment which is not carceral; - the official occupancy rates are revised so as to offer a minimum of 4 m² of living space per detained person in the multiple-occupancy accommodation; preferably the rooms should be divided up into smaller living units; - the building infrastructure is regularly maintained and litter and debris cleared (notably at Hermes Block, Lyster Barracks and Warehouse One, Safi detention Centre); - all dormitories have adequate access to natural light and sufficient artificial lighting, ventilation and heating/cooling; - all detained persons are offered a clean bed, mattress, blanket and bedding; - all dormitories are equipped with tables and chairs and all detained persons provided with personal lockable space; - all dormitories and sanitary annexes are regularly maintained and disinfected and have properly functioning toilets and showers designed to afford a degree of privacy, and properly maintained wash-basins; - all detained persons have access to hot water to wash and are provided with a towel; and - at least one additional set of clothing is provided to detained migrants, and especially for the winter months, warmer clothing and adequate footwear. In addition, the CPT calls upon the Maltese authorities to ensure that: - unrestricted

access to outdoor exercise is granted throughout the day; - outdoor exercise areas are appropriately equipped (benches, shelters, etc.); - a programme of activities (educational, recreational and vocational) is developed; - at least one common association room, equipped with books, television and games, and one multi-faith room are set up in each detention block; and - the facilities are adequately staffed by a range of professionals who are equipped with the necessary range of skills to work with migrants.

4. Safeguards against ill-treatment

a. detention procedures and legality

47. As mentioned above, 1,188 persons were being detained on public health grounds at the time of the delegation's visit. Some of these migrants appeared to possess no formal written order on their detention while others had in their possession a single piece of paper given to them by public health officials soon after their arrival in Malta, comprising a single paragraph written in English that he/she was being restricted in his/her movement to ensure screening for, and prevention of the spread of, an (unspecified) infectious disease. The papers seen by the CPT's delegation were often not fully annotated.

Understandably, migrants expressed increasing frustration at the lack of information, both as to how long the detention would last and as regards their immigration status. The frustration was compounded by the fact that a large number of the migrants had tested negative for tuberculosis and Covid-19.

48. There were no registers of the detention orders or copies of the detention orders kept at the Detention Services or IRC establishments, and management did not appear to know who was being held on which grounds. This incredible state of affairs meant that the management could not ensure any oversight of the safeguards related to detention. Indeed, the management took it on trust from the Immigration Police and Ministry of Health that all migrants were being detained lawfully. The Detention Service told the delegation that they were informed on an *ad hoc* basis when individual migrants were to arrive, be transferred, deported or released.

49. The CPT underlines that deprivation of liberty for immigration purposes should be a measure of last resort, after a careful and individual examination of each case, and that its continued need should be subject to periodic review. Every instance of deprivation of liberty should be covered by a proper individual detention order, readily available in the establishment where the person concerned is being held; and the detention order should be drawn up at the outset of the deprivation of liberty.

Equally, in line with the European Court of Human Rights' jurisprudence, the CPT has long held that detained migrants in an irregular situation should benefit from an effective legal remedy enabling them to have the lawfulness of their deprivation of liberty decided speedily by a judicial body. This judicial review should entail an oral hearing with legal assistance, provided free of charge for persons without sufficient means, and interpretation services being provided as required. Moreover, detained migrants in an irregular situation should be expressly informed of this legal remedy. Lastly, the need for continued detention should also be reviewed periodically by an independent authority.

In Malta, the CPT found that this was not the case for many of the migrants being deprived of their liberty, especially those held under public health grounds. Equally, there was a clear lack of systematic and effective periodic review for migrants held for long durations (over 12 to 18 months) under RD [SL 217.12] detention orders.

50. The CPT recommends that the Maltese authorities urgently review the legal basis for detention on public health grounds as its current application may well amount to hundreds of migrants being *de facto* deprived of their liberty on unlawful grounds.

The CPT recommends that the Maltese authorities ensure that any detention on public health grounds is exceptional, individualised, specific, time-limited and regulated by the same safeguards as detention under immigration detention orders (i.e. RCD [SL 420.06] **and RD orders).**

Further, registers and copies of every detention order should be kept in the establishments where persons are being deprived of their liberty, and periodic reviews of all types of detention should be systematically undertaken in a timely fashion, in accordance with Maltese law, along with adequate oversight that this operates on time, and in practice."

65. In so far as relevant in relation to detention conditions, the report of 15 February 2022 by the Council of Europe Commissioner for Human Rights following her visit to Malta from 11 to 16 October 2021 (CommDH(2022)1) reads as follows:

"47. In recent years, Malta has made positive changes to its immigration and asylum legislation and policy, notably by eliminating mandatory detention provisions and introducing vulnerability screenings, although mostly upon referrals, and not on a systematic basis. The Commissioner was informed, however, that in practice, since the increase in boat arrivals in 2018, most of the newly arrived refugees and migrants have been placed in detention centres on public health grounds, often for prolonged periods of time and in poor conditions which deteriorated further following the outbreak of the COVID-19 pandemic. In a report published in November 2020, the Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO) also found that contrary to Maltese legislation, vulnerable individuals have been kept in detention centres, owing to lack of space in open centres or other alternatives to detention.

48. Information received by the Commissioner during her visit indicates that the majority of those arriving by sea are still automatically placed in closed facilities managed by the Detention Services for COVID-19 quarantine and medical clearance purposes. Families, women, children, and vulnerable individuals are usually transferred to the Initial Reception Centre at Marsa managed by the Agency for the Welfare of Asylum Seekers (AWAS), where they are accommodated under an open regime. However, NGOs shared with the Commissioner their concerns that some children continue to be detained pending age assessment, although the authorities have started releasing them during the relevant appeal proceedings. [...]

52. Since September 2020, some positive changes have been reported in the management of detention centres, as well as improvements in detention conditions, including refurbishing, a medical clinic, increased human resources including welfare officers, better oversight of detained persons and a complaints mechanism. The Commissioner witnessed some of these improvements during her visit to the Safi Detention Centre. However, she noted that several problems persisted with respect to the prevailing material conditions and detention regimes.

53. The Commissioner was struck by the deplorable conditions at Block A in the Safi Detention Centre, including the carceral design and the blatantly poor sanitary and hygiene conditions and overcrowding. Her dismay was shared by the staff of the

Ombudsman's Office, who had made similar observations in the past. The Commissioner received assurances from the authorities that Block A would be modernised very soon. She invites the authorities to provide her with updates about the improvements made to living conditions there.

54. Several migrants with whom the Commissioner talked at the Safi Detention Centre complained about poor health care, in particular as regards the availability of adequate medication. The majority had been vaccinated against COVID-19 but were not wearing masks. They also reported being handcuffed while taking walks (a migrant woman) or while being escorted to medical checks. Many voiced their anguish at not knowing the reasons for their detention and their despair in the face of an uncertain future. They deplored their lengthy detention and expressed their wish to live as free people, in dignity and to have jobs that would allow them to support themselves and their families. They also complained about not being able to obtain information about their situation and to access legal assistance and other support. The authorities confirmed that at the time of the Commissioner's visit detained migrants could only use a landline to make external calls. The mobile telephone service previously available to them had been discontinued.

55. The Commissioner understood that access by organisations providing assistance and independent monitoring had been restricted in the context of the COVID-19 pandemic. NGO access was restored in September 2020, but authorisation had to be sought prior to each visit. The Commissioner was informed that NGOs only had access to reception rooms and were required to nominate in advance those with whom they wished to talk. This made it difficult to identify any new persons in vulnerable situations or otherwise in need of assistance as regards access to protection or legal assistance."

B. Minority and Age assessment

66. Article 11(2) of Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast), the 'Reception Conditions Directive', reads as follows:

"Minors shall be detained only as a measure of last resort and after it having been established that other less coercive alternative measures cannot be applied effectively. Such detention shall be for the shortest period of time and all efforts shall be made to release the detained minors and place them in accommodation suitable for minors."

67. The relevant provisions of the Convention on the Rights of the Child, which was adopted on 20 November 1989 and came into force on 2 September 1990 (1577 UNTS 3) read as follows:

Article 1

"For the purposes of the present Convention, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier."

Article 3

"1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration. ..."

Article 22

"1. States Parties shall take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures shall, whether unaccompanied or accompanied by his or her parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present Convention and in other international human rights or humanitarian instruments ..."

Article 37

"States Parties shall ensure that:

(a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. [...]

(b) No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time;

(c) Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances;

(d) Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action."

68. The Committee for the Rights of the Child (hereinafter 'CRC-Committee'), in the General Comment No. 6 of 2005, concerning the treatment of unaccompanied and separated children outside their country of origin observed that:

"61. In application of article 37 of the Convention [on the Rights of the Child] and the principle of the best interests of the child, unaccompanied or separated children should not, as a general rule, be detained. Detention cannot be justified solely on the basis of the child being unaccompanied or separated, or on their migratory or residence status, or lack thereof. Where detention is exceptionally justified for other reasons, it shall be conducted in accordance with article 37(b) of the Convention [on the Rights of the Child] that requires detention to conform to the law of the relevant country and only to be used as a measure of last resort and for the shortest appropriate period of time. In consequence, all efforts, including acceleration of relevant processes, should be made to allow for the immediate release of unaccompanied or separated children from detention and their placement in other forms of appropriate accommodation."

69. The UN Human Rights Council, Report of the Working Group on Arbitrary Detention, A/HRC/13/30, 18 January 2010 in so far as relevant reads as follows:

"60. The detention of minors, particularly of unaccompanied minors, requires even further justification. Given the availability of alternatives to detention, it is difficult to conceive of a situation in which the detention of an unaccompanied minor would

comply with the requirements stipulated in Article 37(b), clause 2, of the CRC of the [Convention on the Rights of the Child], according to which detention can be used only as a measure of last resort."

70. The European Parliament resolution of 4 February 2014 on undocumented women migrants in the European Union, Resolution 2013/2115(INI), 2014 called upon European Union Member States to

"cease, completely and expeditiously the detention of children on the basis of their immigration status, to protect children from violations as part of migration policies and procedures and to adopt alternatives to detention that allow children to remain with family members and/or guardians."

71. The Parliamentary Assembly of the Council of Europe, Resolution 2195 (2017), 'Child-friendly age assessment for unaccompanied migrant children', 24 November 2017, in so far as relevant reads as follows:

"3. The Parliamentary Assembly has raised the issue of age assessment of unaccompanied children in several resolutions, in particular Resolution 2136 (2016) on harmonising the protection of unaccompanied minors in Europe, Resolution 1810 (2011) "Unaccompanied children in Europe: issues of arrival, stay and return", Resolution 1996 (2014) "Migrant children: what rights at 18?" and Resolution 2020 (2014) on the alternatives to immigration detention of children, in which it establishes a number of safeguards pertaining to age assessment, emphasising that these procedures should only be carried out if there are reasonable doubts about a person's age and should always be conducted in the best interests of the child.

4. The Assembly welcomes and supports the Parliamentary Campaign to End Immigration Detention of Children and in particular its action to promote child-sensitive age assessment of migrant children.

5. The Assembly is particularly concerned that certain age-assessment methods can be frightening and traumatising for children and may involve inhuman and degrading treatment. In addition, the age-determination process can be negatively life-changing: if a child's age is disputed or if he or she is pronounced an adult, immigration detention and removal are likely to become a reality. In cases of detention, the negative physical and psychological effects on children's health and development are far-reaching and lasting.

6. The many methods of age assessment used in Europe reflect the lack of a harmonised approach and agreed method. The Assembly believes that the development of a child-sensitive, holistic model of age assessment would enable European States to meet the needs of unaccompanied or separated children. It therefore calls on member States to:

6.1. conduct case-by-case, reliable age assessment of unaccompanied migrant children only in cases of serious doubt about the child's age and as a last resort, in the best interests of the child;

6.2. provide unaccompanied migrant children with reliable information about age-assessment procedures in a language that they understand, so that they can fully understand the different stages of the process they are undergoing and its consequences;

6.3. appoint a guardian to support each unaccompanied migrant child individually during the age-assessment procedure;

6.4. ensure that an unaccompanied migrant child or his or her representative can challenge the age-assessment decision through appropriate administrative or judicial appeal channels;

6.5. use only as a last resort dental or wrist x-ray examinations and all other invasive medical procedures for the purpose of determining the age of unaccompanied or separated migrant children;

6.6. ensure that all medical examinations are sensitive to the child's gender, culture and vulnerabilities and that the interpretation of results takes into account the child's national and social background as well as previous experiences;

6.7. prohibit, in all situations, the use of physical sexual maturity examinations for the purpose of determining the age of unaccompanied and separated migrant children;

6.8. prohibit the detention of unaccompanied or separated children who are awaiting or undergoing age assessment, and always apply the margin of error in favour of the person so that the lowest age in the margin determined by the assessment is recorded as the person's age;

6.9. identify and provide alternative accommodation options for children awaiting or undergoing age assessment, with a view to avoiding the detention of children during disputes about age, including by temporary placement in centres for children where appropriate safeguards should be in place to protect them and other children in the centres;

6.10. support and promote the development of a single, holistic model of age assessment in Europe, based on the presumption that the person is a minor;

6.11. whenever possible, ensure that the procedure of age assessment is carried out by professionals acquainted with the children's ethnic, cultural and developmental characteristics."

THE LAW

I. PRELIMINARY REMARKS

72. The Government contested the applicant's allegation that he was a minor on his arrival, as confirmed by the age assessment procedures, and the relevant appeal. They further challenged various statements of the applicant.

73. The applicant noted that he had consistently claimed to be a minor from his arrival up until his 18th birthday, on 4 September 2022. The PIO had obtained this information from him upon disembarkation and referred the matter to AWAS which eventually interviewed him. However, the numerous shortcomings in his age assessment procedure cast doubt on its conclusions.

74. The Court considers that it is not its task to speculate on whether or not the applicant was a minor at the time of his arrival (see *Darboe and Camara v. Italy*, no. 5797/17, § 131, 21 July 2022). It is however satisfied that he did declare his minor age at some point after his arrival prior to 6 December 2021 when the order of the Juvenile Court was issued. It should also be noted that there is no indication, nor has it been argued at the domestic level, that the applicant's claims that he was a minor were unfounded or

unreasonable (see, *mutatis mutandis*, *Darboe and Camara*, § 131, cited above, and Regulation 14 of S.L. 420.06). He was therefore a presumed minor.

75. The Court further observes that the instant case presents an intricate set of facts, with overlapping procedures, different legal grounds, if any, for restricting the applicant's liberties, and different detention centres - the use of which was sometimes unrelated to the reason behind the accommodation in such a centre. Moreover, the parties are in disagreement about some of the facts (including dates) and the Government were unable to supply records to determine any uncertain circumstances or clarify any incoherences in the two versions of the facts supplied.

76. The Court reiterates that having assumed control over an individual, the authorities have a duty to account for his or her whereabouts and that the absence of holding data recording such matters as the date, time and location of detention, the name of the detainee as well as the reasons for the detention and the name of the person effecting it must be seen as incompatible with the very purpose of Article 5 of the Convention (see, *mutatis mutandis*, *Kurt v. Turkey*, 25 May 1998, §§ 123-24, *Reports* 1998-III, and *Belozorov v. Russia and Ukraine*, no. 43611/02, § 113, 15 October 2015). The Court further notes the comments of the CPT, an independent body, concerning the lack of records of each person's detention as being an "incredible state of affairs" (see paragraph 64 above). In the light of the above, in the absence of any submissions or documentation by the Government, the Court will give credence to the applicant's coherent submissions.

77. Without prejudice to the determinations to be reached on the admissibility and merits of the applicant's complaints, the Court finds it opportune to recapitulate in brief the facts outlining the case, as it understands them, on the basis of its assessment of the conflicting versions of the parties, and, where available, the documents supplied:

- The applicant was accommodated in HIRC from the date of his arrival on 24 November 2021 until 30 December 2021 (with the interruption of a few days spent in hospital between 17 and 22 December 2021). The grounds for the measures applied were the (COVID-19) Quarantine Order (until an unspecified date), followed by the RMPO as of 10 December 2021. It is disputed whether during this period the applicant was accommodated with minors or adults, but it appears that during this period no change to his accommodation was made after the order of the Juvenile Court of 6 December 2021 ordering that the applicant should not be accommodated with adults.

- The applicant was accommodated in Zone 4, Block B, of the Safi Detention Centre from 30 December 2021 to 2 February 2022 according to the Government, or 30 January 2022 according to the applicant, during which time he was under the RMPO (until an unspecified date). It is disputed whether during this period the applicant was accommodated with minors or adults at least until mid-January 2022. On 13 January 2022 the applicant's

age assessment decision, at first instance, determined that he was an adult, but that decision was appealed against.

- The applicant was accommodated in Zone 8 of the Safi Detention Centre (aka the container) from possibly 2 February 2022 until an unspecified date, around June 2022. At the start of this period the applicant was still under the RMPO (until an unspecified date) but as of 10 February 2022 he was being detained on the basis of the detention order related to his asylum claim.

- It is unclear where the applicant was detained from the end of June until the date of his release in July 2022.

II. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

78. The applicant complained that his conditions of detention were inadequate and constituted inhuman treatment, contrary to that provided in Article 3 of the Convention, which reads as follows:

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

A. Admissibility

1. The parties' submissions

79. The Government submitted that the applicant had failed to exhaust domestic remedies as he had failed to raise these complaints before the constitutional jurisdictions. While the Court had previously found that such proceedings were too lengthy for the purposes of complaints under Article 3 of the Convention, those considerations were no longer valid. The Government relied on the cases of *Alfred Degiorgio v. the Attorney General* (no. 29/2019), instituted on 26 February 2019, decided at first instance on 28 February 2019 and, on appeal, by the Constitutional Court on 12 July 2019; *Victor Buttigieg (Joseph Victor) v. the Attorney General* (no. 97/2018) instituted on 28 September 2018, decided at first instance on 11 March 2019 and, on appeal, by the Constitutional Court on 12 July 2019; *Onor. Simon Busuttil v. the Attorney General* (no. 86/2017) instituted on 19 October 2017, decided at first instance on 12 July 2018 and, on appeal, by the Constitutional Court on 29 October 2019, which concerned other Convention complaints. The Government explained that cases concerning ongoing ill-treatment, in detention, were extremely rare and it was therefore difficult to provide examples of cases under Article 3, with similar circumstances as those in the instant case, to show the speed with which they were decided.

80. The Government submitted that upon request, the constitutional jurisdictions were empowered to issue an interim measure at any stage of proceedings. They relied on some examples unrelated to the situation in the present case.

81. The applicant submitted that constitutional redress proceedings had already been found to be ineffective for the purpose of such complaints due to the length of proceedings before such jurisdictions.

2. The Court's assessment

82. The Court reiterates that the rule on exhaustion of domestic remedies referred to in Article 35 of the Convention obliges those seeking to bring their case against the State before the Court to use first the remedies provided by the national legal system. Consequently, States are dispensed from answering for their acts before an international body until they have had an opportunity to put matters right through their own legal system. The rule is based on the assumption – reflected in Article 13 of the Convention, with which it has close affinity – that there is an effective remedy available to deal with the substance of an "arguable complaint" under the Convention and to grant appropriate relief (see *Kudła v. Poland* [GC], no. 30210/96, § 152, ECHR 2000-XI).

83. It is incumbent on the Government claiming non-exhaustion to satisfy the Court that the remedy was an effective one available both in theory and in practice at the relevant time, that is to say, that it was accessible, was capable of providing redress in respect of the applicants' complaints and offered reasonable prospects of success. However, once this burden of proof has been satisfied, it falls to the applicant to establish that the remedy advanced by the Government had in fact been used or was for some reason inadequate and ineffective in the particular circumstances of the case or that there existed special circumstances absolving him or her from the requirement (see *Vučković and Others v. Serbia* (preliminary objection) [GC], nos. 17153/11 and 29 others, § 77, 25 March 2014, and *Ananyev and Others v. Russia*, nos. 42525/07 and 60800/08, § 94, 10 January 2012).

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

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

B. Merits

1. The parties' submissions

(a) General submissions

(i) The applicant

86. The applicant complained that he was detained for 225 days in inhuman and degrading conditions with, *inter alia*, no access to an outdoor area; no access to a common area; no access to any prayer room or private space; limited or no access to a phone to make any calls, including to his lawyers; no access to any leisure activities; inadequate living conditions; limited or no access to drinkable water; no information provided in a language which he understands regarding his detention or his medical situation; lack of adequate medical and psychosocial support. Furthermore, the Government had put his physical and mental health at risk by exposing him to inadequate living conditions and failing to provide adequate medical support. Thus, having regard to his minor status (if not all throughout, at least until his age assessment was finally concluded – although the applicant contested those conclusions), his medical conditions and mental health situation, the conditions in which he was held from 24 November 2021 until his release, including 120 days of isolation in a container, he was subjected to inhuman and degrading treatment.

87. The applicant highlighted that the Government had failed to provide any evidence of their claim that the detainees were allowed outside, nor any list of detainees indicating that minors were not detained with adults, or when the detainees were transferred to other blocks. In this regard the applicant noted that the CPT had already commented on the lack of due diligence of the Government in relation to the keeping of records of detainees (see point 48 of the 2021 report at paragraph 64 above). This institutionalised lack of due diligence was further reflected in the manner with which the detainees were addressed, namely, by their immigration police numbers instead of their names and surnames.

(ii) The Government

88. The Government was of the view that the material conditions of the applicant's various residences between 24 November 2021 and 6 July 2022 were not such as to amount to inhuman or degrading treatment. In respect of records concerning outdoor time, the Government admitted that they only kept records of the exception, when persons refused to benefit of the regular 1.5 hours outdoor exercise, which was the norm. Furthermore, the authorities took great care to tend to the applicant's physical as well as psychological wellbeing. The applicant had always been treated as a minor until such time as the age assessment determination processes were concluded by the IAB.

(b) Ħal Far Initial Reception Centre (HIRC) (aka China House)

(i) The applicant

89. The applicant relied on his description of the conditions of detention as set out in paragraph 10 above. In reply to the Government's submissions, he confirmed that he had been provided with clothes and other hygiene items upon arrival, however he had not been provided with a towel as there had been none left when it was his turn to pick up the items. He also confirmed that the pictures submitted by the Government corresponded to the overall damaged state of the building where the group was detained, noting that the Government had failed to provide pictures of the toilets and bathrooms, which were in a severe state of disrepair, without doors and insufficient in number for the twenty-four detainees.

90. The applicant confirmed that the bedrooms had several bunk beds, sleeping two to three people, and that personal space differed depending on the number of people in the room. There was no glass on the windows and the rooms were extremely cold - detainees would put a mattress or pillows on the window in order to stop the cold air. The applicant disputed the Government's allegation that detainees were provided with blankets when necessary and indicated that they would sleep in all their clothes due to the cold temperatures of winter and the impossibility to close the windows, noting further that there was no heating system despite the high humidity. The applicant complained of the quality and amount of the food provided and confirmed that detainees had to drink tap water.

91. There was no common room and detainees would stand in the hallway to watch TV or stay in their room all day. Additionally, the group was not allowed any time outside during their whole stay – indeed the Government had provided no records concerning their outside time. While there was a telephone landline in the block, it was impossible to place calls outside, to contact their families or a lawyer. In this respect, they were never offered assistance by the guards, and they were not given any information (including contact details) regarding organisations or individuals providing services to asylum-seekers.

92. The applicant noted that in their 2021 report (point 44), the CPT had already made the same observations with regard to the HIRC, warning that such living conditions may well amount to inhuman and degrading treatment contrary to Article 3 of the Convention (see paragraph 64 above).

(ii) The Government

93. The Government admitted that the applicant had spent the first few days with the group since it had not been immediately evident that he was a minor and it was necessary for the group as a whole to quarantine until such time as it was confirmed that they were not positive for COVID-19. They also

confirmed that the applicant had been accommodated in a zone with a hallway which serves several rooms (photo submitted).

94. However, the Government contested the applicant's description of the conditions in which he was accommodated. They claimed that the rooms in question measured, on average, 14 sq.m. in size (a photo of a room was submitted). The sanitary facilities were outside of the bedrooms, and there was a set of six toilets and seven showers in the applicant's block. Since the sanitary facilities were in a separate room, and on the basis of the applicant's statement that he slept in the same room with three other people, this meant that the applicant had been afforded at least 3.5 sq.m. of personal space in the bedroom alone. Each bedroom had direct and ample sunlight and ventilation via a large traditional two-leaf window with perspex in a steel frame which could be opened and closed at the resident's discretion (photos provided).

95. As soon as the applicant was admitted to HIRC, he had been given all the necessary basic items[2], in order to make his stay more comfortable.

96. The Government disputed that the applicant had been required to wash his clothing in a bucket, as HIRC had a designated sink to wash clothing, which the applicant could have made use of freely. The bucket and other cleaning products and equipment were provided to the detainees to keep the premises clean in line with a policy of shared responsibility. However, the zone in question had been cleaned before the applicant was accommodated there. While bed mattresses are not replaced with every new resident, the authorities ensure that any torn or old mattresses are replaced promptly. If the residents feel cold, they may at any time request further blankets. Furthermore, a television is available with an open package including movies and sports. The residents have regulated, direct access to a yard, with each resident being afforded at least 1.5 hours of outdoor access every day. The zone in question also had a phone where residents could receive an unlimited number of phone calls, and they could at any time make a request to officers to make external phone calls. In the same block, the applicant had access to a multipurpose room, which could be used for praying. The same room had a tap for cold water and a tap for hot potable water to make tea or coffee.

(c) Zone 4, Block B, of Safi Detention Centre

(i) The applicant

97. The applicant referred to his description of the conditions of detention at paragraph 18 above.

---

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

(ii) The Government

98. According to the Government, in Zone 4, the applicant had been accommodated together with a number of other asylum seekers who were allegedly minors. They disputed the applicant's description of the conditions of his accommodation in Zone 4 (which was currently being refurbished). In relation to the common/playing room, the applicant's ability to open the window and the size of the window, the availability of facilities to wash clothing, the availability of potable water, the applicant's responsibility to maintain his bedroom in a clean state, access to the outdoors and the ability to make phone calls, they referred to their submissions in relation to the HIRC. They also noted that in Zone 4 the bedrooms were larger and had four windows, as they hosted more individuals. Zone 4 was composed of three large bedrooms and three smaller bedrooms, and the eight residents decided for themselves where to sleep among the available bedrooms. NGOs were not allowed to donate clothes, because their distribution often led to altercations between the residents and was viewed as a security risk since the clothing could be used to smuggle hidden, illicit items. However, the authorities provided the residents with sufficient clothing adequate for the season and for each person's individual needs.

(d) Zone 8, Safi Detention Centre (the container)

(i) The applicant

99. The applicant referred to his description of the conditions of detention at paragraph 20 above.

(ii) The Government

100. The Government considered that the applicant's description was misleading and partly untrue. The applicant had not been moved from Zone 4 to Zone 8 with an adult male, but with a minor who had been transferred to the Safi Detention Centre from the YOURS facility (a Unit for Young offenders) for a number of days until he could join the community. Thus, the applicant had not been accommodated with an adult until such time as the age determination process was completed. The applicant had eventually spent the majority of the time in Zone 8 residing alone.

101. The unit measured 9 sq.m. with a window, which could be opened at will, and a door. It had also contained sanitary facilities; a TV set with an open television package; and an air-conditioning unit (photos submitted). The Government denied the allegation that the door had been closed at all times and that the applicant had been prevented from accessing the outdoors. Residents of Zone 8 were afforded a minimum of 1.5 hours of outdoor access every single day. In fact, according to the authorities' logbook, on a at least four days the applicant had refused to go outside, including to partake in the football activities which had been organised for the residents.

(e) Treatment of the applicant's Ailments

(i) The applicant

102. The applicant submitted that his health had greatly deteriorated while in detention and that adequate medical assistance had not been provided to him. In particular the applicant, already a victim of torture in Libya and traumatised by his crossing to Europe, developed suicidal thoughts and signs of mental illness as early as February 2022. Despite the medical report of February 2022, a copy of which had been repeatedly refused to the applicant's representatives, nothing had been done to ameliorate his situation.

103. The applicant also questioned how the doctor of the Detention Centre could come to the conclusion that there was "no evidence of psychosis or other mental health issue apart from a reactive low mood" using only Google translate and without ever questioning him on his general mental health state.

104. During the whole duration of his detention, the applicant had never been assisted by any interpreter when meeting with doctors and nurses, thus his understanding of his conditions and his ability to share his distress were severely impaired.

(ii) The Government

105. The Government submitted that upon arrival, the applicant had been subjected to a number of routine medical tests for his safety and that of others, and later underwent relevant testing concerning TB. He then left the hospital with the relevant prescription. He regularly received his treatment and continued to be observed by both doctors of the MHS, based at the Detention Service, as well as the healthcare professionals at Mater Dei Hospital Chest Clinic (see paragraph 25 and 28 above).

106. As to the applicant's mental health, he had been seen by the APO of the TSU (see paragraph 29 above) but the applicant refused psychological support at the time thus, the APO did not follow up with the applicant for a number of weeks. When the applicant was found crying on 26 February 2022, saying that he wanted to return home, the doctor at the MHS was immediately informed of this, and the doctor examined the applicant later on that same day. Between March 2022 and July 2022, the applicant's case with the APO was re-opened and thereafter was observed regularly. According to the report of 28 June 2022, the applicant was doing better although he had symptoms of mental illness (see 33 above) thus, at that point, the report was inconclusive, a conclusion which 'had been substantiated' by the assessment of the doctor at the MHS, carried out on 22 April 2022, finding him in a low mood (see paragraph 25 above).

(f) Age assessment

(i) The applicant

107. The applicant highlighted the shortcomings of the age assessment procedure during the proceedings before the IAB and complained, *inter alia*, of the inadequate procedure carried out without the necessary safeguards. He noted, in particular, that the assessment's conclusions focused mainly on his physical appearance. However, the IAB failed to address his arguments and rejected his appeal in an automatic and standard-style manner, without giving proper reasons in fact or in law. To the day of filing observations, he was not aware of any successful age assessment appeal in Malta, thereby questioning the effectiveness of Malta's age assessment appeal procedure.

108. The applicant wholly disagreed with the Government that he had been treated as a minor during the 190 days he spent in detention as an "alleged minor" and considered that the Government failed to apply the appropriate international standards on the matter. Accordingly, the applicant should have been detained as a measure of last resort, only if it had been established that less coercive measures could not be applied and for the shortest time possible as highlighted by Article 37(b) of the CRC, Article 11(2) of the Reception Conditions Directive and Regulation 14(1)(c) of S.L. 420.06 (see paragraphs 67, 66, and 62 above). Moreover, the applicant noted the growing international consensus advocating against the detention of minors in the context of migration, underlining that the detention of children can never be in their best interests (see paragraphs 68-71 above). He noted, *inter alia*, that the United Nations Global Study on Children Deprived of Liberty, November 2019 (pp. 146-147 and p. 467) found that children in immigration detention are vulnerable to experiencing serious mental health disorders with high levels of serious development delays, depression, anxiety, PTSD, self-harm and suicide. He further referred to the Inter-American Court of Human Rights (IACHR), Advisory Opinion OC-21/14, Rights and Guarantees of Children in The Context of Migration and/or in Need of International Protection, 19 August 2014, which in sum found that the deprivation of liberty of a child migrant, ordered on this basis alone is arbitrary and, contrary to both the Convention and the American Declaration.

(ii) The Government

109. The Government submitted that the applicant was, indeed, detained from 10 February 2022 onwards, only as a measure of last resort, prior to that he had not been detained. He had been detained first with another minor and then on his own since there were no other alleged minors in residence at the time. Even assuming the applicant was really born on 4 September 2022, this would have made him seventeen years old upon arrival in Malta and, according to Regulation 15 of S.L. 420.06 (see paragraph 62 above), the authorities were permitted to accommodate minors aged sixteen with adults.

2. The Court's assessment

110. The Court need not determine for the purposes of the present complaint under Article 3 whether the situation amounted to a deprivation of liberty for the purposes of Article 5 all throughout the relevant period given that it is not disputed that all throughout the period the applicant had been dependent on the Maltese authorities for his most basic needs and subject to their control and therefore that it was the responsibility of the Maltese authorities not to subject him to such conditions as would constitute inhuman and degrading treatment contrary to Article 3 of the Convention (see *Ilias and Ahmed v. Hungary* [GC], no. 47287/15, §§ 186-87, 21 November 2019).

(a) General Principles

111. The Court reiterates that, according to its case-law, ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3 of the Convention. The assessment of this minimum level of severity is relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and state of health of the victim (see *Khlaifia and Others v. Italy* [GC], no. 16483/12, § 159, 15 December 2016). Furthermore, in considering whether treatment is "degrading" within the meaning of Article 3, the Court will have regard to whether its object is to humiliate and debase the person concerned and whether, as far as the consequences are concerned, it adversely affected his or her personality in a manner incompatible with Article 3. However, the absence of such a purpose cannot conclusively rule out a finding of a violation of Article 3 (see *Riad and Idiab v. Belgium*, nos. 29787/03 and 29810/03, §§ 95-96, 24 January 2008).

112. Under Article 3, the State must ensure that a person is detained in conditions which are compatible with respect for human dignity and that the manner and method of the execution of the measure do not subject the individual to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention (see *Riad and Idiab*, cited above, § 99; *S.D. v. Greece*, no. 53541/07, § 47, 11 June 2009; and *A.A. v. Greece*, no. 12186/08, § 55, 22 July 2010). When assessing conditions of detention, account has to be taken of the cumulative effects of these conditions, as well as of specific allegations made by the applicant (see *Dougoz v. Greece*, no. 40907/98, § 46, ECHR 2001-II). The length of the period during which a person is detained in specific conditions also has to be considered (see, among other authorities, *Muršić v. Croatia* [GC], no. 7334/13, § 101, 20 October 2016, and *Aden Ahmed v. Malta*, no. 55352/12, §§ 86, 23 July 2013).

113. The extreme lack of personal space in the detention area weighs heavily as an aspect to be taken into account for the purpose of establishing whether the impugned detention conditions were "degrading" from the point of view of Article 3 (see *Karalevičius v. Lithuania*, no. 53254/99, § 36,

7 April 2005, and *Yarashonen v. Turkey*, no. 72710/11, § 72, 24 June 2014, and, for a detailed analysis of the principles concerning the overcrowding issue, see *Muršić*, cited above, §§ 136-41).

114. The Court further reiterates that, quite apart from the necessity of having sufficient personal space, other aspects of physical conditions of detention are relevant for the assessment of compliance with Article 3 (ibid., and *Story and Others v. Malta*, nos. 56854/13 and 2 others, §§ 112-13, 29 October 2015). Such elements include access to outdoor exercise, natural light or air, availability of ventilation, and compliance with basic sanitary and hygiene requirements (see *Ananyev and Others*, cited above, § 149 *et seq.* for further details, and *M.S.S. v. Belgium and Greece* [GC], no. 30696/09, § 222, ECHR 2011). The Court notes in particular that the Prison Standards developed by the Committee for the Prevention of Torture make specific mention of outdoor exercise and consider it a basic safeguard of prisoners' well-being that all of them, without exception, be allowed at least one hour of exercise in the open air every day and preferably as part of a broader programme of out-of-cell activities (see, *inter alia*, *Abdullahi Elmi and Aweys Abubakar v. Malta*, nos. 25794/13 and 28151/13, § 102, 22 November 2016).

115. It should be noted that the confinement of minors raises particular issues, since children, whether accompanied or not, are considered extremely vulnerable and have specific needs related in particular to their age and lack of independence, but also to their asylum-seeker status (see *Popov v. France*, nos. 39472/07 and 39474/07, § 91, 19 January 2012; *A.B. and Others v. France*, no. 11593/12, § 110, 12 July 2016; and *R.R. and Others v. Hungary*, no. 36037/17, § 49, 2 March 2021). Article 22 § 1 of the United Nations Convention on the Rights of the Child encourages States to take appropriate measures to ensure that children seeking refugee status, whether or not accompanied by their parents or others, receive appropriate protection and humanitarian assistance (see paragraph 67 above; see also *S.F. and Others v. Bulgaria*, no. 8138/16, § 79, 7 December 2017). Likewise, the European Union directives regulating the detention of migrants adopt the position that minors, whether or not they are accompanied, constitute a vulnerable category requiring the special attention of the authorities (see paragraph 66 above). Moreover, the Court has already held that the extreme vulnerability of children – whether or not they were accompanied by their parents – was a decisive factor that took precedence over considerations relating to the child's status as an illegal immigrant (see *G.B. and Others v. Turkey*, no. 4633/15, § 101, 17 October 2019, and *M.H. and Others v. Croatia*, nos. 15670/18 and 43115/18, § 184, 18 November 2021).

116. Accordingly, the reception conditions for children seeking asylum must be adapted to their age, to ensure that those conditions do not create for them "a situation of stress and anxiety, with particularly traumatic consequences" (see *Tarakhel v. Switzerland* [GC], no. 29217/12, § 119, ECHR 2014). Otherwise, the conditions in question would attain the

threshold of severity required to come within the scope of the prohibition under Article 3 of the Convention (ibid. and *Darboe and Camara,* cited above, § 167).

117. In recent years the Court has in several cases examined the conditions in which accompanied minors were held in immigration detention. In finding a violation of Article 3 of the Convention in those cases, the Court had regard to several elements such as the age of the children involved, the length of their detention, the material conditions in the detention facilities and their appropriateness for accommodating children, the particular vulnerability of children caused by previous stressful events and the effects of detention on the children's psychological condition (see *S.F. and Others v. Bulgaria*, cited above, §§ 79-83, and the cases cited therein; see also *G.B. and Others v. Turkey*, cited above, §§ 102-17; and *R.R. and Others v. Hungary*, cited above, §§ 58-65). Similar considerations were also made in cases concerning unaccompanied minors (see *Rahimi v. Greece*, no. 8687/08, § 86, 5 April 2011, concerning a child aged fifteen, where the brevity of the period of detention of two days was irrelevant, *Abdullahi Elmi and Aweys Abubakar*, cited above, concerning children of sixteen and seventeen years of age, §§ 113-14; and *M.H. and Others v. Croatia*, cited above, § 190, where the Court explicitly held that the same considerations applied to a person who was seventeen years of age and close to adulthood; see also *Moustahi v. France*, no. 9347/14, § 66, 25 June 2020, and *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, no. 13178/03, § 55, ECHR 2006-XI, concerning younger children).

118. A lack of appropriate medical care for persons in custody is capable of engaging a State's responsibility under Article 3. It is not enough for such detainees to be examined and a diagnosis made; instead, it is essential that proper treatment for the problem diagnosed should also be provided (see *Rooman v. Belgium* [GC], no. 18052/11, § 146, 31 January 2019). Thus, the lack of appropriate medical care and, more generally, the detention of a sick person in inadequate conditions, may in principle constitute treatment contrary to Article 3 (see *Ghavtadze v. Georgia*, no. 23204/07, § 76, 3 March 2009).

119. On the whole, the Court takes a flexible approach in defining the required standard of health care, deciding it on a case-by-case basis (see *Blokhin v. Russia* [GC], no. 47152/06, § 138, 23 March 2016, and *Fenech*, cited above, § 128). The Court reiterates that the mere fact that a detainee is seen by a doctor and prescribed a certain form of treatment cannot automatically lead to the conclusion that the medical assistance was adequate. The authorities must also ensure that a comprehensive record is kept concerning the detainee's state of health and his or her treatment while in detention, that diagnosis and care are prompt and accurate and that, where necessitated by the nature of a medical condition, supervision is regular and systematic and involves a comprehensive therapeutic strategy aimed at

adequately treating the detainee's health problems or preventing their aggravation, rather than addressing them on a symptomatic basis. The authorities must also show that the necessary conditions were created for the prescribed treatment to be actually followed through (see *Blokhin*, cited above, § 137, with further references).

120. In line with established international law, the health of juveniles deprived of their liberty shall be safeguarded according to recognised medical standards applicable to juveniles in the wider community. The authorities should always be guided by the child's best interests, and the child should be guaranteed proper care and protection. Moreover, if the authorities are considering depriving a child of his or her liberty, a medical assessment should be made of the child's state of health to determine whether or not he or she can be placed in a juvenile detention centre (ibid., § 138).

(b) Application to the present case

121. The Court notes that the measures of confinement taken in the present case did not solely concern the applicant's immigration status but were rather based on health grounds for the first periods (see the Government's observations in connection with Article 5 below, at for example paragraph 138 below). Nevertheless, it is not disputed that the applicant was an asylum seeker and was accommodated with other asylum seekers, in immigrant detention centres all throughout. It follows that the above-mentioned general principles concerning the detention of unaccompanied minor migrants are equally relevant in the present case.

122. The Court notes that, for more than six months out of the seven months complained of, the applicant had been held in Safi Detention Centre. Furthermore, the accommodation conditions all throughout the different periods (except the Hospital which was not complained of) were sufficiently similar for the Court to make only one set of considerations, distinguishing only when, and if, relevant or necessary.

123. Bearing in mind that vulnerability factors, such as age and health status are particularly relevant to the assessment of conditions of detention, the Court will first make its considerations in that respect.

(i) Age-related considerations

124. It would appear that, although with some delay, the principle of presumption of minor age was applied to the applicant (see, *a contrario*, *Darboe and Camara*, cited above, §§ 153 *et seq*.,) given that on 6 December 2021 the Juvenile Court made an order in his favour, attributing his temporary custody to the CEO of AWAS; appointing a representative (guardian), and ordering that he be placed in accommodation adapted for minors and not with adults (see paragraph 16 above). Whether this order had been followed in practice is, however, questionable.

125. The Court observes, firstly, that the Juvenile Court's decision had not been communicated to the applicant, he had not known that he had a guardian, nor had she been present during his age assessment (see paragraph 51 above).

126. Secondly, while the order also referred to accommodation adapted for minors and not with adults, the Government admitted that the applicant had initially been hosted with the group, and therefore with adults, since they had to be subjected to quarantine for COVID-19 (see paragraph 93 above). Without specifying any date, the Government claimed that the applicant had been moved to Zone 4 of the Safi Detention Centre with six other alleged minors, of the same group, who had also been covered by provisional orders issued by the Juvenile Court (see paragraph 17 above). The applicant submitted that after his release from hospital on 22 December 2021 he had been sent back to HIRC, and that he had moved to Safi Detention Centre on around 30 December 2021. There, he had not been placed separately but together with the adults in his group, until at least mid-January 2022 (see paragraph 17 above). Even accepting the Government's version of events in so far as it related to the applicant being hosted with other alleged minors in Zone 4, in the absence of any detail or records about the date of transfer, the Court accepts the applicant's version of events that it was only on around 30 December 2021 that he was moved to Zone 4 (see paragraph 77 above). It follows that for around a month following his arrival the applicant, who at the time had been a presumed minor, had been hosted with adults. The mere fact that this was allowed under domestic law (see paragraph 178 below) has no bearing on the assessment for the purposes of Article 3.

127. The situation once he had been moved to the container in Zone 8, in February 2022, is again subject to dispute in relation to the person with whom the applicant shared the premises for an indefinite time (ending before late April 2022). The applicant claimed to have been held with a Nigerian male from his group (see paragraph 20) while the Government claimed that he had been held with a minor coming from the YOURS facility (see paragraph 98 above). Given all the documents in its possession, including the medical recitals of the applicant, and the testimony before the IAB (see paragraph 41 above) the Court is ready to accept that the applicant had been lodged in the container with another minor, it however has serious concerns as to the placement of the applicant, a presumed minor, at the time under an RMPO because of his tuberculosis, in shared lodging with a young offender before his release.

128. Thereafter, the applicant had been hosted alone until sometime in June 2022 when, according to the applicant he had been moved to an unidentified location, which the Government failed to mention. The Court has serious doubts as to the compatibility with Article 3 of a situation where a presumed minor, even if close to adulthood, was left to spend more than a month alone (in total isolation since neither the guards nor the doctors could

speak French) in such premises within the confines of a detention centre. Indeed, the Court has already taken issue with a nearly identical situation of isolation, in respect of an adult male (see *Feilazoo*, cited above, § 91). Those concerns are exacerbated in the situation of the applicant where no measures appear to have been taken by the authorities to ensure that the applicant's physical and psychological condition allowed him to remain in isolation – quite the contrary (see paragraph 130 below) – nor does it appear that in the specific circumstances of this case, any other alternatives to this isolation had been envisaged (compare, *Feilazoo*, cited above, § 91).

(ii) Health status

129. As to the applicant's physical medical condition:- The Court observes firstly the discrepancy in the Government's arguments, namely, for the purposes of the complaint under Article 3, that the applicant had been prescribed four medicines a day, which were administered to him all throughout, and those under Article 5 referring to fourteen pills a day, which the applicant would not have been able to follow assiduously on his own (see paragraph 158 below). However, based on the applicant's medical chart, submitted to the Court, it appears that the four medicines a day had been administered to the applicant in the month complained of (January). He had also been examined by both doctors of the MHS, regularly on a monthly basis (with one exception when he had refused the medical visit in the month of March), as well as the healthcare professionals at Mater Dei Hospital Chest Clinic who focused particularly on his tuberculosis (see paragraph 27 and 28 above). While an element of vulnerability can be said to exist due to his physical health, no concerns transpire in relation to the attention given to the applicant's physical health.

130. The same cannot be said of the applicant's mental health. The Court notes that, from the report of the Therapeutic Services Unit (TSU) of 4 February 2022, it had been clear that the applicant was suffering from PTSD and depression and that he needed medical support as well as an improvement of his living conditions (see paragraph 29 above). The subsequent findings of the general practitioner of the MHS of 22 April 2022 to the effect that there was "no evidence of psychosis or other mental health issue apart from a reactive low mood" (see paragraph 27 above), relied on by the Government, do not dispel those conclusions, so much so that thereafter the applicant had nonetheless been referred to the TSU to receive any counselling he may require (see paragraph 31 above). He was seen by the team in the week of 13 May 2022. Therefore, it was only three months after his diagnosis that he had been offered some specialised support. While the Government claimed that the applicant had refused the assistance of the TSU, no evidence in that respect has been submitted. Moreover, when the applicant was examined again on 23 May 2022 by the MHS doctors he had been "withdrawn and depressed". The subsequent TSU report of 28 June 2022 referred to the

previous diagnoses (of 4 February) noting that being detained in isolation worsened the applicant's mental health, until it improved in June 2022 after he had moved out of isolation. Nevertheless, he still had symptoms which could be a sign of mental illness and required medical attention and monitoring by a psychiatrist (see paragraph 33 above). There is therefore little doubt that the applicant was particularly vulnerable not only because he had mental health problems but also because these had not been seen to, despite the recommendations to that effect. Furthermore, the Court notes that, one week after the first assessment of 4 February 2022, instead of taking relevant action, the authorities considered that the applicant – a presumed minor, suffering from tuberculosis, PSTD and depression, who was in need of medical support and of an improvement of living conditions – was to move from a regime of "restriction of movement" to detention (albeit the accommodation conditions remaining the same) (see paragraph 109 above). The Court finds it hard to consider that such a decision could have been taken with the best interests of the child constituting a primary consideration, and bearing in mind the minor's general well-being and social development, as required by Regulation 14 of S.L. 420.06 (see paragraph 62 above).

(iii) The material conditions of detention of the applicant

131. Turning to the conditions in which the applicant had been accommodated. The Court notes that it has already had occasion to express its concern about the appropriateness of the place and the conditions of detention in Safi Barracks (see *Suso Musa v. Malta*, no. 42337/12, § 101, 23 July 2013, in the context of an Article 5 complaint, *Abdullahi Elmi and Aweys Abubakar*, cited above, §§ 114-15, concerning a sixteen and seventeen year old detained for eight months where the Court found a violation of Article 3, and *Feilazoo*, cited above, §§ 88-91, where the Court also found a violation of Article 3). The Court further notes that most recent CPT findings support the applicant's arguments, at least in respect of HIRC where the applicant spent around a month, and Block B (where Zone 4 is situated) where he spent around another month (and which was being refurbished). While the present case concerns a period subsequent to the most recent CPT visit in September 2020, it is noted that similar concerns were echoed by the Council of Europe Commissioner for Human Rights (hereinafter 'the Commissioner') in her visit a year later (see paragraph 65 above), just a couple of months prior to the period at issue in the present case.

132. As to the container, where the applicant was accommodated for most of the time, no reference appears to have been made of such structure, within the Safi Detention centre, by the CPT, nor is there any indication that Zone 8 forms part of Block B (some documents referring to Zone 8 Block A, and the yard of Zone C). The CPT however did note that the material conditions of each of Safi Detention Centre's Blocks were poor, apart from those in the Isolation block/ "Museum Block" (see paragraph 64 above). Further, should

it be located in Block A, the Court cannot but note that the Commissioner was struck by the deplorable conditions therein, and the staff of the Ombudsman's Office had made similar observations in the past (see paragraph 65 above). In any event, the Court will not assume its location, and will assess the situation on the basis of the material before it.

133. While of itself accommodation in a container may not amount to inhuman and degrading treatment, limited light and ventilation may be of concern and would be exacerbated by the limited, if any, exercise time (see, *mutatis mutandis*, *Feilazoo*, cited above, § 90). In that regard, the Court reiterates that no access to open air and exercise is a factor carrying considerable weight when coupled with the other conditions (see *Aden Ahmed*, cited above, § 96, and the examples cited therein) and that suffering from cold and heat cannot be underestimated, as such conditions may affect well-being and may in extreme circumstances affect health (ibid., § 94).

134. The Court observes that from the material submitted by the Government, there is not a sufficient indication that there had been a serious problem of light and ventilation for the purposes of a one or two persons lodging, despite the metal grids and barriers over the window (see, *mutatis mutandis*, *Story and Others*, cited above, § 115). The Court, however, accepts that being held in a metal mobile container with only one window (which could be opened) in the warm temperatures applicable to Malta in the months of, for example May and June, would cause particular discomfort. Indeed, the applicant's claim that he had difficulty breathing can also be accepted given his history of tuberculosis infection. The Government did not dispute the applicant's statement that the guards refused to switch on the air-conditioner available. This discomfort is even more of concern if the applicant had to spend most of his day inside. While the Government provided documents showing that the applicant refused to go out on four occasions between 20 April and 30 May 2022, the parts of the logbook submitted refer solely to those days. No substantiation has been brought forward to the Government's general claim that all detainees were allowed a regular 1.5 hours outdoor exercise each day, which contrast with the findings of the CPT, at point 37 of their report that "The regime of activities afforded to migrants was non-existent"; "Access to the outside exercise yards was sporadic for the 700 migrants detained in both Warehouses 1 and 2"; "[...] access to the yard for the 350 migrants in Warehouse 1 was suspended"; "many migrants from B-Block, with whom the delegation spoke, alleged that they too had had no access to the outside exercise yards for several weeks, and in some cases, months". In the light of the foregoing, the Court has no reason to question the applicant's claim that he had not been allowed out at all until mid-April, and that later allowances were limited to half an hour. This limited access to open air and exercise, is a factor carrying considerable weight when coupled with the other conditions (see, *inter alia*, *Aden Ahmed*, cited above, § 96).

(iv) Conclusion

135. The above considerations are more than sufficient to enable the Court to conclude that, in the light of the applicant's vulnerabilities (presumed minor age and health situation), the conditions in which he had been accommodated were not adapted to his needs, nor to the reasons behind such holding, which persisted for over seven months, and, bearing in mind all the relevant circumstances, constituted inhuman and degrading treatment.

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

III. ALLEGED VIOLATION OF ARTICLE 5 § 1 OF THE CONVENTION IN RELATION TO THE SECOND PERIOD (10 DECEMBER 2021 – 10 FEBRUARY 2022)

137. The applicant complained that the period from 10 December 2021 to 10 February 2022 amounted to a detention which had not been lawful and therefore contrary to Article 5 § 1 which reads as follows:

> "1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
>
> (a) the lawful detention of a person after conviction by a competent court;
>
> (b) the lawful arrest or detention of a person for non- compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
>
> (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
>
> (d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;
>
> (e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;
>
> (f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition."

A. Admissibility

1. The parties' submissions

138. The Government submitted that during this period the applicant had not been deprived of his liberty, therefore the provision did not apply. In particular, they relied on the findings of the Court of Magistrates to this effect (see paragraph 37 above), noting that the applicant had only been restricted

in his movement as a result of testing positive for TB, to avoid him infecting other persons. It being a very serious disease, the Government considered that the CPT's statements of a year earlier were inconsequential. Other less severe measures had resulted futile in the past, and his accommodation had to be seen in the light of the fact that, at the time, the applicant had been entirely dependent on the national authorities for his basic needs. As to the applicant's reliance on the Superintendent's statement, they noted that she was a medical professional and not a lawyer qualified to determine what constituted "detention" under the Convention.

139. The Government raised no further objections in respect of this complaint.

140. The applicant submitted that in the light of the Court's case-law the situation clearly amounted to a deprivation of liberty. He further relied on the CPT's call to the Maltese authorities to urgently review the legal basis for detention on public health grounds which in the CPT's view "may well amount to hundreds of migrants being *de facto* deprived of their liberty on unlawful grounds" (see paragraph 64 *in fine* above), as well as the Superintendent's reply to a request for information which read "All migrants on arrival by boat are detained until they do their medical clearance. That is according to the detention order." Indeed, there had been no change in his factual living situation when this period came to an end and became a detention under a proper detention order (the subsequent period). The applicant further submitted that the Court of Magistrates' conclusions in the present case had been in contrast with other decisions in previous cases delivered by the same court, differently composed (see the findings of the CPT in this respect at paragraph 64 *in primis* above – point 17 of the Report).

2. *The Court's assessment*

(a) General principles

141. The Court reiterates that in proclaiming the "right to liberty", paragraph 1 of Article 5 contemplates the physical liberty of the person. Accordingly, it is not concerned with mere restrictions on liberty of movement, which are governed by Article 2 of Protocol No. 4. In order to determine whether someone has been "deprived of his liberty" within the meaning of Article 5, the starting point must be his or her specific situation and account must be taken of a whole range of factors such as the type, duration, effects and manner of implementation of the measure in question. The difference between deprivation and restriction of liberty is one of degree or intensity, and not one of nature or substance (see *Medvedyev and Others v. France* [GC], no. 3394/03, § 73, ECHR 2010; *Nada v. Switzerland* [GC], no. 10593/08, § 225, ECHR 2012; *Austin and Others v. the United Kingdom* [GC], nos. 39692/09 and 2 others, § 57, ECHR 2012; and *Stanev v. Bulgaria* [GC], no. 36760/06, § 115, ECHR 2012).

142. The requirement to take account of the "type" and "manner of implementation" of the measure in question enables it to have regard to the specific context and circumstances surrounding types of restriction other than the paradigm of confinement in a cell. Indeed, the context in which the measure is taken is an important factor, since situations commonly occur in modern society where the public may be called on to endure restrictions on freedom of movement or liberty in the interests of the common good (see *De Tommaso v. Italy* [GC], no. 43395/09, § 81, 23 February 2017).

143. The characterisation or lack of characterisation given by a State to a factual situation cannot decisively affect the Court's conclusion as to the existence of a deprivation of liberty (see *Creangă v. Romania* [GC], no. 29226/03, § 92, 23 February 2012, and *Khlaifia and Others*, cited above, § 71). Further, the applicability of Article 5 of the Convention cannot be excluded by the fact that the authorities' aim had been to assist the applicants and ensure their safety. Even measures intended for protection or taken in the interest of the person concerned may be regarded as a deprivation of liberty (ibid.).

144. In determining the distinction between a restriction on liberty of movement and deprivation of liberty in the context of confinement of foreigners in airport transit zones and reception centres for the identification and registration of migrants the Court set out specific factors to be taken into account (see *Z.A. and Others v. Russia* [GC], nos. 61411/15 and 3 others, § 138, 21 November 2019 ; *Ilias and Ahmed*, cited above, § 217; and *R.R. and Others v. Hungary*, cited above, § 75).

(b) Application to the present case

145. In respect of this period (10 December 2021 to 10 February 2022), the Court observes that the restriction of movement order was issued on 10 December 2021, but the applicant was diagnosed with TB only a few days later, on 14 December 2021. On 17 December 2021, the applicant was admitted to the Infectious Diseases Unit of Mater Dei Hospital for treatment. None of the parties specified where the applicant had been accommodated in the week prior to his hospitalisation, but presumably he was still in HIRC. He was discharged on 22 December 2021 with a plan for further tests and visits to be carried out at the hospital and a prescription for medicine to treat the illness. According to the applicant, following his discharge from hospital, he spent another week in HIRC, before being moved to Safi Detention Centre Block B [Zone 4] on an unknown date, around 30 December 2021, where he had been placed with the adults in his group, until at least mid-January 2021. According to the applicant, on 30 January 2022 he had been moved to a container [Zone 8] with a Nigerian male from his group. The Government did not specify when the applicant was moved to Block B [Zone 4] of the Safi Detention Centre, nor did they submit any relevant record, and claimed that he had been lodged there initially in a separate block with six other alleged

minors of the same group. Later, on 2 February 2022, the applicant was moved to a "two-bedded unit" with another minor from the YOURS facility. Again, no record was provided. The restriction of movement order presumably came to an end on the issuance of a detention order, for immigration purposes, on 10 February 2022.

146. The Court observes from the above that, while he was under the restriction of movement order (for health reasons) for two months the applicant was hosted in four facilities. However, quite apart from the days he spent in hospital, the regime he was subjected to in each facility was similar and thus will be examined globally.

147. Since the Government claimed that the restrictive measure applied was based on health concerns, the Court considers that the circumstances relating to the present period do not concern transit zones or hotspots (contrast for example, *Ilias and Ahmed*, cited above). The mere fact that he was at the time dependent on the authorities, does not alter that conclusion – indeed at no point in their submissions on the merits (see below) did the Government rely on the fact that during this period the applicant was being held in connection with his migrant status (under Article 5 § 1 (f)). It follows that, to determine whether this period amounted to detention for the purposes of Article 5 it suffices to consider the type, duration, effects and manner of implementation of the measure in question.

148. The Court considers that it is of relevance that the applicable regime and the accommodation conditions during most of this period had been identical to those of the subsequent period (i.e. from 10 February onwards) which – it is not disputed – amounted to *de jure* detention. There is therefore no doubt that the degree and intensity of this type of measure and the way in which it was implemented were the same. The applicant suffered this restriction for 62 days of which only 5 days were spent in Hospital – the applicant was placed for most of the remaining time in a detention centre, not a hospital or similar facility adapted to his medical situation. The Court also cannot ignore the independent findings of the CPT, as well as those of the domestic courts in other similar cases, relied on by the applicant, to the effect that the situation amounted to a *de facto* detention (compare *Khlaifia*, cited above, § 69), as well as the findings in this respect of the Commissioner (see paragraph 65 above). The Court considers that nothing has been brought to its attention which could justify a different conclusion. In the light of the foregoing, the Court finds that the classification of the applicant's confinement in domestic law cannot alter the nature of the constraining measures imposed on him (ibid. § 71), amounting to a *de facto* detention.

149. Thus, the Court considers that the applicant was deprived of his liberty, and therefore that Article 5 applies. The Government's objection is thus dismissed.

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

B. Merits

1. The parties' submissions

(a) The applicant

151. The applicant submitted that his detention during this period was unlawful as it was not provided for by national or EU law. Indeed, the Superintendent, being a public officer, she was not authorised to detain a person, but merely to restrict his movement. It was only the courts, under Articles 25 and 26 of the Ordinance, or upon request under Article 29 (3) of the Public Health Act, which could order such detention (see paragraph 56 above). In the context of "institutional neglect" referred to by the CPT, the applicant also questioned how this measure could be seen as lawful and executed with due diligence when the responsible authorities failed to maintain even the most basic of records of all the individuals detained on the basis of the Ordinance, with information such as biodata, detention start date, delivery of Order, medical or other conditions, transfers/movements, and the like.

152. The applicant further submitted that the place of detention did not conform to the intended purpose of a public health regime, nor had the authorities provided proof that any less severe measures had been explored, such as being accommodated in an open centre under the care and supervision of AWAS. As to the protection of others, the applicant noted that he had been taken before the Court of Magistrates without his lawyers or officers being alerted to any potential risks.

153. Moreover, the applicant submitted that this measure had been exclusively applied only to asylum seekers reaching Malta by sea and was therefore being used as a tool of migration management, rather than an instrument to protect public health. It was thus discriminatory, and indicated bad faith and arbitrariness, because if the intention was migration management than it was migration and asylum norms which ought to have applied.

154. The same considerations above, applied also to the Government's reliance on Article 5 § 1 (b).

(b) The Government

155. The Government submitted that the measure was lawful and pursued the objective of preventing the spreading of infectious disease (Article 5 § 1 (e) of the Convention), namely TB, an airborne disease which was the second leading infectious killer after COVID-19. The measure had been in

accordance with the law namely Article 13 (1) of the Ordinance (see paragraph 56 above), which allowed the Superintendent to restrict movement for a period of four weeks extendable by a maximum ten weeks. They also referred to the powers of the Superintendent under Article 29 (1) of the Public Health Act (see paragraph 58 above), given that TB was a notifiable disease[3].

156. The Government further argued that the wilful transmission of TB to another person was a criminal offence punishable by life imprisonment. Thus, the measure had also been justified under Article 5 § 1 (b) of the Convention, as a consequence of the applicant having failed to fulfil an obligation at law, namely, not to commit a criminal offence. The Government was of the view that had the measure not been applied the applicant would have "most certainly infected other persons" as without alternative accommodation it would have been impossible for him to avoid contact with others. Thus, allowing him out of the detention centre would have amounted to a clear and positive step that the applicant would not adhere to his obligation at law. Nevertheless, the obligation had not been punitive in character but rather to safeguard his own health and that of others.

157. The Government considered that "the law" applied to any person on the territory of Malta, not only to asylum seekers. Referring to "all the provisions mentioned taken together", they submitted that the collective purpose had been to protect the applicant (and others "with whom he may be in contact") from serious illness; to provide for his treatment and care; to prevent the further spreading of disease when the person does test positive; and in order for all necessary tests to be carried out on time. They further noted that the applicant having arrived from Libya, and having declared to be from the Ivory Coast, he had presented a certain risk profile from the medical point of view, since statistics showed that persons from the African region had a significantly higher chance of contracting diseases such as TB. They referred to the Global Tuberculosis report 2021 issued by the World Health Organisation (WHO)[4].

158. In so far as the applicant argued that he had been taken to court without relevant precautions, the Government noted that TB was treatable. Provided that medication was taken regularly and that the patient responded well to it, then the risk of infection was eliminated. However, experience had shown "that when asylum seekers (in particular) were allowed to live outside closed reception centres during such treatment", it was difficult to ensure that the patient continued with the treatment, thus once again becoming infectious. This was even more relevant in the case of the applicant who asserted to be a minor and was required to take fourteen (sic.) pills a day and be subject to further testing, thus no less severe measure would have achieved the intended

[3] Key Facts on Tuberculosis by the WHO: https://www.who.int/news-room/fact-sheets/detail/tuberculosis (last accessed in September 2023)

[4] https://www.who.int/publications/digital/global-tuberculosis-report-2021 (last accessed in September 2023)

purpose. They further noted that the applicant had not been held in a cell but accommodated with other minors.

2. *The Court's assessment*

(a) General principles

159. Any deprivation of liberty must, in addition to falling within one of the exceptions set out in sub-paragraphs (a) to (f) of Article 5 § 1, be "lawful". Where the "lawfulness" of detention is in issue, including the question whether "a procedure prescribed by law" has been followed, the Convention refers essentially to national law and lays down the obligation to conform to the substantive and procedural rules of that law (see *Denis and Irvine v. Belgium* [GC], nos. 62819/17 and 63921/17, § 125, 1 June 2021).

160. In laying down that any deprivation of liberty must be carried out "in accordance with a procedure prescribed by law", Article 5 § 1 primarily requires any arrest or detention to have a legal basis in domestic law. However, these words do not merely refer back to domestic law. They also relate to the quality of the law, requiring it to be compatible with the rule of law, a concept inherent in all Articles of the Convention. On this last point, the Court stresses that, where deprivation of liberty is concerned, it is particularly important that the general principle of legal certainty be satisfied. It is therefore essential that the conditions for deprivation of liberty under domestic law be clearly defined and that the law itself be foreseeable in its application, so that it meets the standard of "lawfulness" set by the Convention, a standard which requires that all law be sufficiently precise to allow the person – if need be, with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail (see *Khlaifia and Others*, cited above, §§ 91-92; *Del Río Prada v. Spain* [GC], no. 42750/09, § 125, ECHR 2013; and *Denis and Irvine*, cited above, § 128).

161. Although it is in the first place for the national authorities, notably the courts, to interpret and apply domestic law, under Article 5 § 1, failure to comply with domestic law entails a breach of the Convention, and the Court can and should therefore review whether this law has been complied with (*Mooren v. Germany* [GC], no. 11364/03, § 73, 9 July 2009). In particular, it is essential, in matters of deprivation of liberty, that the domestic law define clearly the conditions for detention and that the law be foreseeable in its application (see *Creangă*, cited above, § 101).

162. The essential criteria when assessing the "lawfulness" of the detention of a person "for the prevention of the spreading of infectious diseases" are whether the spreading of the infectious disease is dangerous to public health or safety, and whether detention of the person infected is the last resort in order to prevent the spreading of the disease because less severe measures have been considered and found to be insufficient to safeguard the

public interest. When these criteria are no longer fulfilled, the basis for the deprivation of liberty ceases to exist (see *Enhorn v. Sweden*, no. 56529/00, § 44, ECHR 2005-I).

163. Detention may be authorised under the second limb of Article 5 § 1 (b) in order to "secure the fulfilment of any obligation prescribed by law". This concerns cases where the law permits the detention of a person to compel him or her to fulfil a specific and concrete obligation already incumbent on him or her, and which he or she has, until then, failed to satisfy (*S., V. and A. v. Denmark* [GC], nos. 35553/12 and 2 others, §§ 79-80, 22 October 2018, and *Ostendorf v. Germany*, no. 15598/08, § 69, 7 March 2013, with further references).

164. In order to be covered by Article 5 § 1 (b), an arrest and detention must also be aimed at or directly contribute to securing the fulfilment of that obligation and not be punitive in character. A further requirement is that the nature of the obligation within the meaning of Article 5 § 1 (b) whose fulfilment is sought must itself be compatible with the Convention. As soon as the relevant obligation has been fulfilled, the basis for detention under Article 5 § 1 (b) ceases to exist. Finally, a balance must be struck between the importance in a democratic society of securing the immediate fulfilment of the obligation in question and the importance of the right to liberty. The nature of the obligation arising from the relevant legislation, including its underlying object and purpose, the person being detained and the particular circumstances leading to the detention, as well as its duration, are relevant factors in striking such a balance (*S., V. and A. v. Denmark*, cited above, §§ 80-82, with further references).

(b) Application to the present case

165. The Court has already held above that the measure applied between 10 December 2021 and 10 February 2022 amounted to detention for the purposes of Article 5 § 1. While the Government argued that it was intended to prevent the spreading of infectious disease under sub-article (e), and the Court has no doubt that tuberculosis is a serious infectious disease and may require measures to be taken to protect the public interest, the Court notes that no judicial order to that effect had been issued by a court empowered to do so (under Articles 25 and 26 of the Ordinance, or upon request under Article 29 (3) of the Public Health Act, see paragraphs 56 and 58 above), nor was the applicant (for most of the time) detained in a hospital accordingly.

166. While the Government relied on Article 29 (1) of the Public Health Act (see paragraph 58 above) allowing the Superintendent to take certain measures in respect of a person suffering from a notifiable disease, none of those measures concerned detention, nor was the applicant, at the date of issuance of the RMPO, "a person found to be suffering from such disease" - him having tested positive only later. Indeed, nothing indicates that the measure had been based on an individual assessment (see in this regard the

findings of the CPT and the Commissioner at paragraphs 64 and 65 above). Moreover, the RMPO had referred solely to Article 13 of the Ordinance as a basis for the measure. Under the latter provision the Superintendent solely had the power to order a restriction of movement, and it has not been argued that under domestic law the term restriction of movement included a restriction of such an intensity to amount to detention (compare and contrast *H.L. v. the United Kingdom*, no. 45508/99, §§ 116 -18, ECHR 2004-IX). This is enough to find that the applicant's detention was not in conformity with national law for the purposes of Article 5 § 1 (e).

167. In so far as the Government argued that the applicant had been detained for the purposes of Article 5 § 1 (b), to avoid the commission of an offence (namely, contaminating other persons), the Court reiterates that a wide interpretation of sub-paragraph (b) of Article 5 § 1 would entail consequences incompatible with the notion of the rule of law, from which the whole Convention draws its inspiration, and entail the risk of arbitrary deprivation of liberty. The Court has already held that Article 5 § 1 (b) does not justify, for example, administrative internment meant to compel a citizen to discharge his or her general duty of obedience to the law (*S., V. and A. v. Denmark*, cited above, § 83, with further references).

168. The obligation not to commit a criminal offence may only be considered sufficiently "specific and concrete" for the purposes of sub-paragraph (b) if the place and time of the imminent commission of the offence and its potential victim(s) have been sufficiently specified, if the person concerned was made aware of the specific act which he or she was to refrain from committing, and if that person showed him or herself not to be willing to refrain from committing that act (ibid., § 83, with further references). The duty not to commit a criminal offence in the imminent future cannot be considered sufficiently concrete and specific to fall under Article 5 § 1 (b), at least as long as no specific measures have been ordered which have not been complied with (ibid., § 83, and *Ostendorf*, cited above, § 70).

169. The Court observes that the applicant opposed no resistance to the restriction of movement order, so much so that the authorities did not feel the need to refer to the domestic court for a detention order. There is thus nothing suggesting that the applicant would have knowingly, or through imprudence, carelessness or non-observance of any regulation, contaminated another person, in breach of Section 244A of the Criminal Code, nor can such an offence be considered sufficiently "specific and concrete" for the purposes of sub-paragraph (b) as explained in the preceding paragraph. Moreover, the Court cannot but note that the State authorities have themselves changed his place of residence a number of times, accommodating him with other persons, irrespective of any risk of contamination for others. It follows that the applicant's detention between 10 December 2021 and 20 February 2021 cannot be said to have been compatible with Article 5 § 1 (b).

170. The Government did not rely on any other sub-article.
171. There has therefore been a violation of Article 5 § 1.

IV. ALLEGED VIOLATION OF ARTICLE 5 § 1 OF THE CONVENTION IN RELATION TO THE LAST PERIOD (10 FEBRUARY ONWARDS)

172. The applicant submitted that his detention following the issuance of the detention order of 10 February 2022, was arbitrary, and therefore contrary to Article 5 § 1.

A. Admissibility

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

B. Merits

1. The parties' submissions

(a) The applicant

174. The applicant submitted that the sole consideration for this period of detention was his nationality. In practice Malta had reverted back to a blanket detention policy, similar to the one existing pre-2015, whereby the vast majority of asylum seekers coming from countries deemed 'safe' and to where removals could be feasible, would be systemically detained, and this without any individual assessment as to the existence of a legal ground or the possibility of imposing alternatives to detention. They relied on official statistics showing that Ivorian nationals started being detained only after June 2021, when Malta started implementing such returns. Moreover, had the applicant's detention really been meant to determine his identity (under Article 5 § 1 (b) of the Convention) one would question why so many other persons arriving without identification documents were not equally detained. In any event no request to fulfil this obligation had been made to him.

175. The lack of individualised assessment was also evident from the applicant's case where he had been detained, in the absence of an assessment as to whether there existed any less coercive measures, despite him being a minor, and in a vulnerable position due to his mental and physical health. In the applicant's view, this, together with the PIO's approach of ignoring the time-limit to appeal, and AWAS's persistent denial to provide the relevant medical reports to the applicant's representative, thus, hindering the proceedings before the IAB, indicated the authorities' bad faith.

(b) The Government

176. The Government submitted that the applicant's detention during this period was for the purposes of preventing his unauthorised entry into the country and therefore fell squarely into the remit of Article 5 § 1 (f) of the Convention, as well as that of Article 5 § 1 (b) of the Convention in so far as he was required to fulfil an obligation imposed at law by Regulation 9 (3) of S.L. 420.07 (see paragraph 63 above).

177. The detention had been lawful, imposed via a detention order in line with Regulation 6 (1) of S.L. 420.06 (see paragraph 62 above). It was subsequently reviewed by the IAB on three occasions. The Government denied that the decision in the applicant's case was taken pursuant to a blanket policy, noting that the IAB had clearly stated that his detention was necessary to determine elements regarding his claim for international protection, particularly, his age.

178. The Government further submitted that the applicant had been accommodated with minors pursuant to the provisional order by the Juvenile Court, which is why he was for some time on his own. However, the applicant was eventually found not to be a minor and, in any event, according to the date of birth submitted by him, he was at least sixteen years of age. Therefore, according to Regulation 15(3) of S.L. 420.06, he could be accommodated in centres for adult asylum seekers (see also the proviso to Article 6A of S.L. 420.06) (both at paragraph 62 above).

(c) The third-party interveners

179. In light of the obligations of Contracting Parties under European Union (EU) law and international law (see the materials at paragraph 66 *et seq.* above) detention of non-national children or those individuals undergoing an age assessment will result in a breach of the Convention obligations. This is especially so where it is not used as a measure of last resort, but rather is imposed without a thorough consideration of less onerous alternative measures and where the child's best interest assessment has not been carried out and reflected in this decision.

2. The Court's assessment

(a) General principles

180. One of the exceptions, contained in sub-paragraph (f) of Article 5 § 1, permits the State to control the liberty of aliens in an immigration context (see *Khlaifia and Others*, cited above, §§ 88-89, with further references).

181. While the first limb of Article 5 § 1 (f) permits the detention of an asylum-seeker or other immigrant prior to the State's grant of authorisation to enter (see *Z.A. and Others*, cited above, § 162, and *Saadi v. the United Kingdom* [GC], no. 13229/03, § 66, ECHR 2008), the Court emphasises that

such detention must be compatible with the overall purpose of Article 5, which is to safeguard the right to liberty and ensure that no one should be dispossessed of his or her liberty in an arbitrary fashion (ibid.).

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

183. As already mentioned at paragraph 163 above, detention is authorised under sub-paragraph (b) of Article 5 § 1 only to "secure the fulfilment" of the obligation prescribed by law. It follows that, at the very least, there must be an unfulfilled obligation incumbent on the person concerned, and the arrest and detention must be for the purpose of securing its fulfilment and must not be punitive in character. As soon as the relevant obligation has been fulfilled, the basis for detention under Article 5 § 1 (b) ceases to exist (see *Vasileva v. Denmark*, no. 52792/99, § 36, 25 September 2003; *Göthlin v. Sweden*, no. 8307/11, § 57, 16 October 2014). Moreover, this obligation should not be given a wide interpretation. It has to be specific and concrete, and the arrest and detention must be truly necessary for the purpose of ensuring its fulfilment (see *Iliya Stefanov v. Bulgaria*, no. 65755/01, § 72, 22 May 2008).

184. An arrest will only be acceptable under the Convention if the "obligation prescribed by law" cannot be fulfilled by milder means (see *Khodorkovskiy v. Russia*, no. 5829/04, § 136, 31 May 2011, and *O.M. v. Hungary*, no. 9912/15, § 43, 5 July 2016). The principle of proportionality further dictates that a balance must be struck between the importance in a democratic society of securing the immediate fulfilment of the obligation in question and the importance of the right to liberty (ibid., and *Saadi*, cited above, § 70). In this assessment the Court considers the following points relevant: the nature of the obligation arising from the relevant legislation, including its underlying object and purpose; the person being detained and the particular circumstances leading to the detention; and the length of the detention (see *Vasileva*, cited above, § 38, and *Epple v. Germany*, no. 77909/01, § 37, 24 March 2005).

(b) Application of the principles to the present case

185. It has not been disputed that this period of detention had a legal basis in domestic law, Regulation 6(1) (b) of S.L. 420.06, read in the light of Regulation 9(3) of the Procedural Standards for Granting and Withdrawing International Protection Regulations (see also *Aboya Boa Jean v. Malta*,

no. 62676/16, §§ 58-60, 2 April 2019) and that it fell primarily under Article 5 § 1 (f) of the Convention (ibid. § 61), although the Government also relied on Article 5 § 1 (b). The Court considers Article 5 § 1 (f) to be a *lex specialis* in the context of immigration detention, it would therefore be more appropriate to rely on sub paragraph (b) only where Article 5 § 1 (f) would be inapplicable. In any event, for the purposes of the present case, reliance on Article 5 § 1 (b) brings nothing more to the Government's argumentation, which remained the same under both provisions, namely that the applicant's detention was necessary to determine elements regarding his claim for international protection, particularly, his age.

186. In this connection the Court observes that the applicant's age assessment examination took place on 13 January 2022 and a first-instance decision was issued on 20 January 2022, at a time when he had been detained under an RMPO for health purposes. The applicant appealed the conclusions of his age assessment on the same day and the appeal was dismissed on 2 June 2022. Bearing in mind that a first-instance decision on the applicant's age had already been delivered three weeks before his detention order for immigration purposes was issued, it is unclear what elements in respect of his age he was still expected to provide during his appeal, requiring his detention for immigration purposes as of 10 February 2022 and the subsequent months. This is even more so given that the applicant had not been subjected to any further medical tests or awaiting any further results.

187. Secondly, the Government did not indicate what outstanding information in relation to possibly his identity or nationality remained outstanding, more than four months after he had arrived in Malta, that is on 10 February 2022 when his detention order was issued and in the subsequent period of more than another four months, and therefore which obligation remained unfulfilled. Indeed, the Government did not shed a doubt about the applicant's Ivorian nationality at an early stage, so much so that documents were provided to him in French accordingly. In these circumstances it is therefore not necessary to determine whether detention of a vulnerable individual would have been truly necessary, and unachievable by less coercive means, for the purpose of ensuring the fulfilment of such unspecified obligation. As a consequence, in the absence of a specific and concrete legal obligation which the applicant failed to satisfy, Article 5 § 1 (b) of the Convention cannot convincingly serve as a legal basis for the applicant's asylum detention (see, *mutatis mutandis*, *O.M. v. Hungary*, cited above, § 54).

188. Turning to the analysis of detention under Article 5 § 1 (f), it remains to be determined whether such detention was arbitrary, namely whether it was carried out in good faith; whether it was closely connected to the ground of detention relied on by the Government; whether the place and conditions of detention were appropriate and whether the length of the detention exceeded that reasonably required for the purpose pursued.

189. The Court notes that age determination is a prerequisite for the assessment of an asylum claim (see paragraph 41 *in primis* above, and *Abdullahi Elmi and Aweys Abubakar*, cited above, § 146) and that the applicant's appeal against his age assessment decision was still pending four and a half months after his detention was ordered. The Court, however, reiterates that the necessity of detaining children in an immigration context must be very carefully considered by the national authorities. An issue may arise, *inter alia,* in respect of a State's good faith, in so far as the determination of age may take an unreasonable length of time – indeed, a lapse of various months may also result in an individual reaching his or her majority pending an official determination (see *Mahamed Jama v. Malta*, no. 10290/13, § 147, 26 November 2015).

190. The Court considers that even accepting that the detention was closely connected to the ground of detention relied on, namely to prevent an unauthorised entry, and in practice to allow for the applicant's asylum claim to be processed with the required prior age assessment, both the time lines and the delays in the present case, raise serious doubts as to the authorities' good faith (see, *mutatis mutandis*, *Abdullahi Elmi and Aweys Abubakar* § 146). A situation rendered even more serious by the fact that at no stage did the authorities ascertain whether the placement in immigration detention of the applicant, who in the absence of a final decision was a presumed minor, suffering from physical and mental health conditions, was a measure of last resort for which no alternative was available (see, *mutatis mutandis*, *Abdullahi Elmi and Aweys Abubakar*, cited above, § 146, and *Popov*, cited above, § 119). In this connection, the Court notes that Regulation 14 of S.L. 420.06 (see paragraph 62 above) provides that applicants who claim to be minors shall not be detained, except as a measure of last resort, unless the claim is evidently and manifestly unfounded. It has not been claimed that this was the applicant's situation (see paragraph 74 above). Despite the law, there is no indication of any such assessment having been made before the detention order was issued, nor was any proper assessment made during the subsequent reviews by the IAB, who refused to take any decision on the matter, or the PIO who simply rejected a request without any assessment, ignored a later request and delayed taking a decision upon further repeated requests, until late June (see 41 to 47 paragraphs above) - after the applicant was deemed to be an adult by a final decision on appeal on 2 June 2022. This finding is compounded by the fact that, during such time (nearly five months), the applicant had been detained in conditions, which the Court has already found (at paragraph 135 above) to be in breach of Article 3 and therefore inappropriate for the purposes of the lack of arbitrariness requirement under Article 5 § 1 (f).

191. In conclusion, bearing in mind all the above, the Court considers that in the present case the applicant's detention during the entirety of this period

was not in compliance with Article 5 § 1. Accordingly, there has been a violation of that provision.

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

192. The applicant complained that he did not have an effective remedy to complain under Article 3 about his conditions of detention, contrary to that provided by Article 13 of the Convention, which reads as follows:

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

A. Admissibility

193. In view of the conclusions reached above under Article 3 of the Convention, it is clear that the applicant had an arguable complaint for the purposes of Article 3 and therefore that Article 13 applies in the present case.

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

B. Merits

1. The parties' submissions

(a) The applicant

195. The applicant submitted that the Court had already considered that constitutional redress proceedings were not an effective remedy due to the length of the proceedings before such jurisdictions and the Government had not submitted any relevant domestic case-law that would call into doubt the Court's previous conclusions. In particular, the cases relied on by the Government which were nonetheless lengthy, were also incomparable to the present case.

(b) The Government

196. The Government reiterated the same arguments set out in their objection concerning non-exhaustion of domestic remedies at paragraphs 79-80 above.

(c) The third-party interveners

197. The interveners submitted that applicants must have access to an effective remedy in accordance with Article 13, which meets the

requirements of effectiveness in law and in practice. Where vulnerable applicants are concerned, remedies must be exercised with special diligence and speediness in light of *inter alia* international and EU standards providing for effective remedies.

2. The Court's assessment

198. The scope of a Contracting Party's obligations under Article 13 varies depending on the nature of the complaint. However, the remedy required by Article 13 must be "effective" in practice as well as in law. The term "effective" means that the remedy must be adequate and accessible (see *McFarlane v. Ireland* [GC], no. 31333/06, § 108, 10 September 2010). Particular attention should be paid to the speediness of the remedial action itself, it not being excluded that an otherwise adequate remedy could be undermined by its excessive duration (ibid., § 123).

199. With respect to complaints under Article 3 of inhuman or degrading conditions of detention, two types of relief are possible: improvement in these conditions and compensation for any damage sustained as a result of them. Therefore, for a person held in such conditions, a remedy capable of rapidly bringing the ongoing violation to an end is of the greatest value and, indeed, indispensable in view of the special importance attached to the right under Article 3. However, once the impugned situation has come to an end because this person has been released or placed in conditions that meet the requirements of Article 3, he or she should have an enforceable right to compensation for any breach that has already taken place. In other words, in this domain preventive and compensatory remedies have to be complementary to be considered effective (see *Ananyev and Others v. Russia*, nos. 42525/07 and 60800/08, §§ 96-98 and 214, 10 January 2012). The need, however, to have both of these remedies does not imply that they should be available in the same judicial proceedings (see *Story and Others*, cited above, § 73).

200. In *Story and Others*, (cited above, §§ 83-85), concerning conditions of detention the Court had found that the Government had been unable to prove that constitutional redress proceedings, a remedy effective in principle, were also effective in practice, due to their duration. In *Yanez Pinon and Others v. Malta* (nos. 71645/13 and 2 others, § 76, 19 December 2017) and *Peňaranda Soto v. Malta* (no. 16680/14, § 40, 19 December 2017), although the Government requested that the Court review its conclusion concerning constitutional redress proceedings – the only shortcoming of which was the length of the proceedings – the Court found that the Government had not submitted any relevant domestic case-law that would call into question the prior conclusions. To the contrary, in *Yanez Pinon and Others* (cited above, § 76) the Court noted that the proceedings instituted by the second applicant in that case which had lasted fourteen months at one instance, strengthened that finding. In *Abdilla v. Malta* (no. 36199/15, § 71, 17 July 2018) the Court

further noted that despite its suggestion made in *Story and Others* (cited above, § 85) that the Government should be able to introduce a proper administrative or judicial remedy capable of ensuring the timely determination of such complaints, and where necessary, to prevent the continuation of the situation, no new remedy had yet been put in place. In the most recent *Fenech* judgment (cited above, § 44) the Court noted that more than six years after the judgment in *Story and Others*, the situation remained unchanged.

201. As already noted at paragraph 84 above, the Government's submissions do not go further than those they already submitted in recent cases of the like. Moreover, in *Feilazoo* (cited above, § 59) the Court noted that the earlier proceedings instituted by the applicant in that case, whereby he had complained about his conditions of detention, which had lasted for more than three years, continued to reinforce that finding. The mere possibility of requesting interim measures during such proceedings does not alter that conclusion (see *Mahamed Jama*, cited above, §§ 62-64 and 120).

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

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

VI. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

204. The applicant also complained that the period of 24 November 2021 until 9 December 2021 during which he was held in quarantine for COVID-19 purposes amounted to a detention which had not been lawful and was therefore contrary to Article 5 § 1. He further complained that the remedies pursued in relation to his other periods of detention (the *habeas corpus* application in relation to the RMPO and the proceedings before the IAB in relation to his immigration related detention) had not been effective, therefore that he had suffered a breach of Article 5 § 4. The Government contested both the admissibility and merits of these complaints.

205. The Court observes that it has already found a violation of Article 3 concerning the applicant's accommodation conditions, and a violation of Article 5 § 1 in respect of the major period of his detention. Having regard to the facts of the case and the submissions of the parties, the Court considers that it has dealt with the main legal questions raised in the present application and that there is no need to give a separate ruling on the remaining complaints (see *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania* [GC], no. 47848/08, § 156, ECHR 2014).

VII. APPLICATION OF ARTICLE 46 OF THE CONVENTION

206. The applicant called on the Court to issue general measures to ensure that administrative detention in Malta is undertaken in compliance with the Convention.

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

> "1. The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.
>
> 2. The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution. ..."

208. The Court reiterates that by Article 46 of the Convention the Contracting Parties have undertaken to abide by the final judgments of the Court in any case to which they are parties, execution being supervised by the Committee of Ministers. It follows, *inter alia*, that a judgment in which the Court finds a breach of the Convention or the Protocols thereto imposes on the respondent State a legal obligation not just to pay those concerned the sums awarded by way of just satisfaction, but also to choose, subject to supervision by the Committee of Ministers, the general and/or, if appropriate, individual measures to be adopted in their domestic legal order to put an end to the violation found by the Court and to redress as far as possible the effects (see *Scozzari and Giunta*, [GC], nos. 39221/98 and 41963/98, § 249, ECHR 2000-VIII; *Maestri v. Italy* [GC], no. 39748/98, § 47, ECHR 2004-I; and *Grabowski v. Poland*, no. 57722/12, § 66, 30 June 2015). In principle it is not for the Court to determine what may be the appropriate measures of redress for a respondent State to perform in accordance with its obligations under Article 46 of the Convention (see *Scozzari and Giunta*, cited above; *Brumărescu v. Romania* (just satisfaction) [GC], no. 28342/95, § 20, ECHR 2001-I; and *Öcalan v. Turkey* [GC], no. 46221/99, § 210, ECHR 2005-IV). With a view, however, to helping the respondent State fulfil its obligations under Article 46, the Court may seek to indicate the type of individual and/or general measures that might be taken in order to put an end to the situation it has found to exist (see *Broniowski v. Poland* [GC], no. 31443/96, § 194, ECHR 2004-V; *Scoppola v. Italy (no. 2)* [GC], no. 10249/03, § 148, ECHR 2009; and *Stanev v. Bulgaria* [GC], no. 36760/06, § 255, 17 January 2012).

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

210. The Court notes that it has found a violation of Article 5 § 1 on account, *inter alia*, of the lack of legal basis surrounding detention for health considerations, with concerns having been raised already by the CPT and the Commissioner in 2021 (see paragraphs 64 and 65 above). It thus calls on the Government to ensure a legal basis in domestic law for any such detention, in conformity with the general principle of legal certainty.

211. In the present judgment the Court also found a violation of Article 3 in respect of the conditions of detention of the applicant (a vulnerable individual due to his presumed minority and health situation), as well as of Article 5 § 1, *inter alia*, in relation to his prolonged immigration detention in those conditions. Having regard to those findings, the Court recommends that the respondent State envisage taking the necessary general measures to ensure that the relevant law is effectively applied in practice and that vulnerable individuals are not detained, as well as to limit any necessary detention periods so that they remain connected to the ground of detention applicable in an immigration context, and that they are undertaken in places and conditions which are appropriate, bearing in mind that the measure is applicable not to those who have committed criminal offences but to aliens in an immigration context.

VIII. APPLICATION OF ARTICLE 41 OF THE CONVENTION

212. 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

213. The applicant claimed 25,000 euros (EUR) in respect of non-pecuniary damage given the severe nature of the violations as well as the psychological harm suffered.

214. The Government considered, without being more specific, that the sum claimed by the applicant was exorbitant and found no justification in the Court's case law.

215. Ruling on an equitable basis and in view of the violations concerning Articles 3, 5 § 1, and 13 in conjunction with Article 3 of the Convention, the Court awards the applicant EUR 25,000 in respect of non-pecuniary damage, plus any tax that may be chargeable (see, for example, *Feilazoo*, cited above, § 139).

B. Costs and expenses

216. The applicant also claimed EUR 4,062.50 for the costs and expenses incurred before the domestic courts and the Court according to an invoice issued by his lawyers dated 4 October 2022, on the basis of 225 hours worked in respect of every step of the domestic proceedings and the Court proceedings and on which date. The legal representatives (Aditus Foundation) also informed the Court that they had sought private funding to cover the costs and expenses, and obtained EUR 3,000, and were waiting for confirmation of a further EUR 3,200.

217. The Government submitted that the claim, which was based on an invoice, not a proof of payment was not sufficiently articulated. They considered that it was likely to be a bogus document to claim costs never incurred. Moreover, the legal representatives had also sought and obtained private funding.

218. According to the Court's case-law (see *L.B. v. Hungary* [GC], no. 36345/16, § 149, 9 March 2023) an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these were actually and necessarily incurred and are reasonable as to quantum. The Court notes that the applicant has signed a power of attorney mandating the legal representatives to bring proceedings before the Court, and thus has entered into a contractual relationship with the legal representatives who are entitled to recover relevant dues as per invoice issued (just before the filing of the last submissions), even assuming that these have not yet been paid (see, *mutatis mutandis*, *S. H. v. Malta*, cited above, § 113). Nevertheless, it does not appear that these costs, or at least part thereof, have not been paid given that the legal representatives themselves have informed the Court that they obtained private funding of at least EUR 3,000.

219. The Court reiterates that Article 41 does not impose on applicants or their representatives before the Court any procedural requirements (non-) compliance with which would, at the same time, circumscribe the Court's decision on the matter of just satisfaction (see *Nagmetov v. Russia* [GC], no. 35589/08, § 58, 30 March 2017). While certain requirements are contained in the Rules of Court and the Practice Direction to the Rules of Court concerning just satisfaction claims, in respect of costs it only provides that the Court can order the reimbursement to the applicant of costs and expenses which he or she has necessarily, thus unavoidably, incurred – first at the domestic level, and subsequently in the proceedings before the Court itself – in trying to prevent the violation from occurring, or in trying to obtain redress. Therefore, nothing therein obliged the applicant's legal representatives to inform the Court about the source of the funds used to cover the costs and expenses incurred and billed to the applicant in the present case (see, conversely, *Becker v. Norway*, no. 21272/12, § 91, 5 October 2017, and *Voskuil v. the Netherlands*, no. 64752/01, § 92, 22 November 2007, where

the costs were not billed to the applicants). Indeed, it is not for the Court to enter into the question of how or by whom those costs and expenses have been paid, as long as they have been "incurred".

220. In the present case, regard being had to the documents in its possession and the above criteria, the Court finds no reason to doubt the hours worked in relation to the proceedings at the domestic level and before this Court, and therefore those expenses have been incurred, it notes however that certain hours connected with the domestic proceedings are unrelated to the violations found in the present case, and would have been incurred irrespective of the violations. Bearing in mind all the above, the Court considers it reasonable to award the sum of EUR 3,000 covering costs under all heads, plus any tax that may be chargeable to the applicant.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the complaints concerning Article 3 alone and in conjunction with Article 13, and Article 5 § 1 in respect of the periods 10 December 2021 to 10 February 2022, and 10 February 2022 until July 2022, admissible;

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

3. *Holds* that there has been a violation of Article 5 § 1 of the Convention in relation to the period between 10 December 2021 until 10 February 2022;

4. *Holds* that there has been a violation of Article 5 § 1 of the Convention in relation to the period between 10 February 2022 until July 2022;

5. *Holds* that there has been a violation of Article 13 taken in conjunction with Article 3 of the Convention;

6. *Holds* that it is not necessary to make a separate ruling on the remainder of the application;

7. *Holds*
   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts:
      (i) EUR 25,000 (twenty-five thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
      (ii) EUR 3,000 (three thousand 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;

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

Done in English, and notified in writing on 17 October 2023, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Hasan Bakırcı Registrar	Arnfinn Bårdsen President