



# Detention of Asylum Seekers in the Light of Article 5 (1) (f) of the ECHR

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“Where liberty is, there is my country.”

Benjamin Franklin

## I. INTRODUCTION

Albert Einstein<sup>1</sup>, Madeleine Korbelt Albright<sup>2</sup>, Hannah Arendt<sup>3</sup>, Frédéric Chopin<sup>4</sup>, Milan Kundera<sup>5</sup>, Victor Hugo<sup>6</sup>... Are we aware of what those people have in common and how they could succeed in life?

Physicist Albert Einstein, politician Madeleine Korbelt Albright, political theorist Hannah Arendt, composer Frédéric Chopin, writer Milan Kundera and Victor Hugo are globally known. While all of them could make a difference and leave a mark in the world, their common fate was to become a refugee<sup>7</sup>. They achieved special status within a community due to their determination to overcome hardships to build a new life.<sup>8</sup> These people are saluted for showing the potential of refugees and for their contributions to the society.

People have always moved, whether through desire or through violence. But now, more than perhaps ever before, millions of people are chronically mobile and routinely displaced. The realities of conflict, violence and persecution, force people to leave their countries. They have been the target of violent attacks and intimidation, largely because they were perceived as “different” from the communities in which they had settled. These persons are among the most vulnerable people in the world.

Even though States are responsible for protecting the rights of their own citizens, when they are unable or unwilling to do so, often for political or discriminatory grounds, individuals suffer from serious violations of their human rights and have to leave their countries. The main reason why refugees flee from their country of origin, by leaving their families, prosperities, memories and especially social self, to a safe third country is to ensure ‘the right to life’, which is defined in Article 2 of the ECHR, and ‘right to liberty and security’, in Article 5 of the ECHR.

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<sup>1</sup> Country of Origin: Germany; Country of Asylum: United States of America.

<sup>2</sup> Country of Origin: Czech Republic; Country of Asylum: United States of America.

<sup>3</sup> Country of Origin: Germany; Country of Asylum: Switzerland.

<sup>4</sup> Country of Origin: Poland; Country of Asylum: France.

<sup>5</sup> Country of Origin: Czech Republic; Country of Asylum: France.

<sup>6</sup> Country of Origin: France; Country of Asylum: United Kingdom of Great Britain and Northern Ireland.

<sup>7</sup> A refugee, according to 1951 Geneva Convention, is someone who is unable or unwilling to return to their country of origin owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion.

<sup>8</sup> (<http://www.unhcr.org/pages/49c3646c74-page14.html>)

Well, do the States give, in Arendt's influential words, 'the right to have rights' to these people to show their potential or just ignore them?

Generally speaking, countries around the world stay away from the issues of migration and asylum. They have become increasingly concerned about the economic and social costs of asylum so that the refugees are getting deprived of 'the right to have rights'. Despite the principle of non-refoulement<sup>9</sup>, most of the asylum-seekers<sup>10</sup> are sent back to the frontiers of territories where their life or freedom would be in danger because of their race, religion, nationality, membership of a particular social group or political opinion, as well as being exposed to ill-treatment irrespective of their specific situation. Arbitrary and unlawful detention of asylum seekers and unsafe conditions in the refugee camps are frequently encountered problems. For instance, asylum-seekers who are detained for illegal entry or illegal stay benefit from fewer safeguards than the persons suspected or convicted of criminal acts. Therefore, the safeguards set out by ECtHR against unlawful and arbitrary implementations are of great importance to asylum seekers who deprived of their liberty in Europe<sup>11</sup>.

## II. BRIEF HISTORY OF ASYLUM AND REFUGEES

Man's search for a place to refuge is an old issue. The primitive man needed a sanctuary to escape from the storms and avalanches of nature. He needed to escape from fierceness of wild animals as well. But it was not merely restricted to these grounds. He needed asylum to escape from passion of men as well.<sup>12</sup> Initially, the places of asylum were originally related to a religion. Later on, a state became the refuge for offenders and pariahs of another state.

The first modern 'refugees' the Huguenots, French Protestants, emerged shortly after the Peace of Westphalia of 1648. King Louis XIV. of France issued an edict in 1685, Edict of Fontainebleau, which dictated the destruction of Huguenot churches and schools. Despite the harsh punishments for those who attempted to escape, some 200,000 fled from France to the

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<sup>9</sup>Article 33 of the 1951 Geneva Convention: 'prohibition of expulsion or return ("refoulement")

1. No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.'

<sup>10</sup>An asylum-seeker is an individual who has sought international protection and whose claim for refugee status has not yet been determined. Those also benefite from provisions applied to refugees.

<sup>11</sup>Remarks by Antonio Guterres, United Nations High Commissioner for Refugees, at the opening of the judicial year of ECtHR, Strasbourg, 28 January 2011.<http://www.unhcr.org/4d4693259.html> 28.04.2012.

<sup>12</sup>S. Prakash Sinha, *Asylum and International Law*, (The Hague, Netherlands, Martinus Nijhoff, 1971), p.5.

Netherlands, Switzerland, England, Germany and the United States illegally. Then the aristocrats of the French Revolution persecuted but the modern refugee system has been developed during and after two vital phenomena in Europe: World War I-II and Cold War<sup>13</sup>.

In the aftermath of World War I (1914-1918) millions of people -estimated 9.5 million in Europe alone in the mid-1920s- fled their homelands in search of refuge. The numbers increased dramatically during and after World War II (1939-1945) as millions – estimated 30 million people- more were forcibly displaced, deported and/or resettled.<sup>14</sup> World War I and II had long since ended, hundreds of thousands of refugees still wandered aimlessly across the European continent. Thus, the international community took action to solve this confusion, established refugee organisations<sup>15</sup>and approved refugee conventions<sup>16</sup>, but legal protection was still rudimentary.<sup>17</sup>

The Geneva Convention Relating to the Status of Refugees ('Geneva Convention'), Magna Carta of international refugee law, was adopted in 1951. The Geneva Convention consolidates previous international instruments relating to refugees and provides the most comprehensive codification of the rights of refugees at the international level. In contrast to earlier international refugee instruments, which applied to specific groups of refugees, the 1951 Convention endorses a single definition of the term "refugee" in Article 1. There were geographic and temporal limits at first, but the 1967 Protocol expanded its scope abolishing these restrictions. The principle of "non-refoulement" which is one of the basic principles of international refugee law was adopted in the convention as well. Geneva Convention is the *lex specialis* of asylum and has pre-eminence as a key international instrument for protecting those who fall within its scope<sup>18</sup>.

In the second half of the 20<sup>th</sup> century, we witnessed some of the most intractable armed conflicts of history, creating displacement on a practically global scale, along with steadily diminishing space for humanitarian action. It has been reported that more than 300 armed

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<sup>13</sup> <http://www.unhcr.org/3c7529495.html>.

<sup>14</sup> <http://www.unhcr.org/4ec262df9.html>.

<sup>15</sup> Such as International Refugee Organisation (1947).

<sup>16</sup> 1928 Arrangement of Relating to the Legal Status of Russian and Armenian Refugees, 1938 Convention concerning the Status of Refugees coming from Germany.

<sup>17</sup> Refugees, Volume 2, Number 123, 2001, 50th Anniversary, p.2 (<http://www.unhcr.org/3b5e90ea0.html>).

<sup>18</sup> Nuala Mole and Catherine Meredith, *Asylum and European Convention on Human Rights*, (Council of Europe Publishing, 2010) p.10.

conflicts occurred in this period, causing around 100 million deaths and countless of refugees and displaced persons.<sup>19</sup>

The 1980s and 1990s saw a vital increase in the number of asylum applications in Europe, as a result of Russian invasion of Afghanistan, the Balkan Wars, Kosovo Crisis and so on. Nowadays, millions of people are still uprooted by conflicts and wars, especially in Africa and the Middle-East. It is an obvious fact that Europe is the primary destination of asylum-seekers with the increasing number of asylum applications per annum<sup>20</sup>.

The refugee issue will always be an important problem, unless wars, armed conflicts, political controversies are eradicated from the world.

### **III. LEGAL ASPECT**

There are five main contemporary international instruments providing international protection for asylum-seekers and refugees. These are:

The 1951 Geneva Convention (GC) and its 1967 protocol, The 1950 Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and its protocols, the 1966 International Covenant on Civil and Political Rights (ICCPR), The 1984 United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment(UNCAT) and European Union Law (EU Law)<sup>21</sup>.

The 1951 Convention and its 1967 Protocol remains to be the cornerstone of refugee protection. These documents clearly spell out who is a refugee and what kind of legal protection and rights a refugee is entitled to have. It also defines a refugee's obligations to host countries and specifies certain categories of people, such as war criminals, who do not qualify for refugee status.

Although the ECHR has no express provision relating to the asylum issue, this gap is filled by Article 1 of the ECHR which secures everyone's rights irrespective of his/her nationality.

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<sup>19</sup> Remarks by Antonio Guterres, United Nations High Commissioner for Refugees, at the opening of the judicial year of ECtHR, Strasbourg, 28 January 2011.<http://www.unhcr.org/4d4693259.html> 28.04.2012.

<sup>20</sup>According to EUROSTAT statistics; there were 301000 asylum applications in 2011. This number was 259000 previous year. [http://epp.eurostat.ec.europa.eu/cache/ITY\\_PUBLIC/3-23032012-AP/EN/3-23032012-AP-EN.PDF](http://epp.eurostat.ec.europa.eu/cache/ITY_PUBLIC/3-23032012-AP/EN/3-23032012-AP-EN.PDF) 28.04.2012.

<sup>21</sup>EU members agreed to work towards establishing a Common European Asylum System (CEAS) which grounds inclusive application of the Geneva Convention in Tampere meeting of the European Council in 1999. In this regard, a system created called as "Dublin" which aims to determine the state responsible for examining asylum applications. Many directives and some regulations adopted regarding CEAS. The second phase of this expected to end in 2012.

Refugee law contains lacunae and lacks an international competent court to provide a common interpretation of Geneva Convention, unlike the areas of human rights law<sup>22</sup>. In this regard, ECtHR's relevant case-law is of great importance to address a number of issues not explicitly covered by the conventions and to fill the refugee protection gaps.

Thus far we have discussed the refugee issue in a general manner, which is one of the most significant problems of today.

Now, we will tell you a fictional story in an effort to highlight the difficulties incurred by refugees. The story begins in our border state, Syria, where increasing human rights abuses, causing its citizens to flee from their homeland, are being witnessed by the whole world via media, and ends up in Malta, which receives the highest number of asylum-seekers in proportion to its population<sup>23</sup>. Though there are numerous human rights violations affecting asylum-seekers, this paper focuses on detention of asylum seekers in the light of Article 5 (1) (f) of the ECHR and ECtHR's relevant case-law.

#### **IV. FICTIONAL STORY**

##### ***THE SITUATION IN SYRIA / BACKGROUND***

Syria has a population of 22 million people of different ethnicities and religious groups. Among them, Sunni Muslims account for 70% while 12% are Alawis. Bashar al-Assad, who is from the minority Alawi community, succeeded his father, Hafez al-Assad, who had overthrown the government of Sunni-Arab majority in 1966. The martial law, which had been introduced in 1963 and also been in place during Bashar al-Assad's rule, was lifted in March 2011 as a result of the wave of demonstrations and protests, known as Arab Spring that began in Tunisia in December 2010 and then spread to other Arab countries. Following the action of Hasan Ali Akleh who set himself on fire as a protest against the Syrian government, the regime opponents used the Internet to spark a general uprising in Syria on January 28, 2011. The crackdowns in the southern town of Daraa on March 23, which saw the Syrian army killed around 100 people, lead to a sharp increase in protests. The unrest in Syria further deepened after the first three months with the number of casualties going up to over 1300 civilians and 500 security members, in addition to 120 policemen killed in the town of Jish ash-Shugur. In June 2011, the Syrian government and President Bashar al-Assad, in particular, were accused of ordering his own security forces to shoot the soldiers who are unwilling to open fire on peaceful civilians. A UN-backed ceasefire came into effect on April 12, 2012, but UN observers reported ceasefire violations from the government and opposition and demanded an immediate halt to all violence on May 1, 2012.

As the country was turning into a "bloodbath", a large number of Syrians sought asylum in the neighbouring countries such as Tunisia, Lebanon, Jordan and Turkey as a last resort. On May 4, 2012, the Cihan News Agency

<sup>22</sup> Guy S. Goodwin-Gill and Helene Lambert, *The Limits of Transnational Law: Refugee Law, Policy Harmonization and Judicial Dialogue in the European Union*, (Cambridge University Press, 2010), p.4.

<sup>23</sup> According to EUROSTAT statistics; Malta has the highest asylum application rate with 4500 application per million inhabitants. [http://epp.eurostat.ec.europa.eu/cache/ITY\\_PUBLIC/3-23032012-AP/EN/3-23032012-AP-EN.PDF.28.04.2012](http://epp.eurostat.ec.europa.eu/cache/ITY_PUBLIC/3-23032012-AP/EN/3-23032012-AP-EN.PDF.28.04.2012)

reported that more than 40.000 Syrian refugees had already fled to Turkey; however, this number is thought to increase at the rate of 1000 per day.

### ***THE COURSE OF EVENTS***

Acrab Hubey, a Syrian citizen and a colonel in the Syrian Army, was born in 1960, and his wife, Fatima Hubey, who is a housewife, in 1972. Their son Baham Hubey, also a Syrian citizen, was born in 1988. Mr. Hubey's opinion about the Assad regime had changed with the passing years and he started openly criticising the discriminatory and unlawful practices of the regime. Meanwhile, Mrs. Hubey was influenced by her husband and participated in oppositional activities. Baham Hubey was also known as the national vanguard of an international terrorist organization, calling for terrorist attacks against the government.

The ongoing violence and oppression on the regime's opponents sharpened the Hubey family's resentment towards the regime. On 1 April 2011, after the deterioration of the situation in Syria, Mr. And Mrs. Hubey, who were known as opponents, felt that their lives and freedom were at risk. Together with their son, they fled to Turkey and lived in a tented camp in Hatay for a while. Their main aim was to go to the United Kingdom and to start a new life. They paid a great amount of money to human smugglers for this purpose. They boarded the smugglers' ship at the port of Iskenderun and arrived at Malta on 29 April 2011, where they were arrested for their illegal entry into the country.

Initially, all three of them were brought to the Police Headquarters in Floriana. Mr. and Mrs Hubey were detained in a room used to accommodate irregular immigrants for two months, whereas Baham Hubey, whose name was on the list of intelligence services for being a member of an international terrorist group, was transferred to a detention centre on 1 May 2011, where other irregular immigrants were also held on suspicion of terrorism, facing deportation proceedings. On the next day, an investigation was initiated by Maltese authorities to examine his situation and the threat he posed to the national security and to decide whether he should be deported. He was also brought before the Local Court on the same day, which ruled that his administrative detention was justified and lawful. The Court also decided that his situation would be reviewed every thirty days to examine if the grounds for his detention were still valid.

On 1 June 2011 Baham Hubey was issued a deportation order. In an effort to avoid expulsion, he filed a preliminary questionnaire on 5 June 2011, claiming that his aim was to seek asylum in Malta. On 25 June 2011, the Refugee Commissioner conducted an interview with him and the official asylum application was then made.

On 30 January 2012, Maltese authorities declared that his asylum application was rejected. Baham Hubey thereon applied to the Court of Magistrates on 1 February 2012 and claimed that his expulsion to Syria would give rise to a violation of Article 3 of the Convention, because of the great risk of ill-treatment. On 15 March, the Court ruled in favour of the refusal, not explaining why Baham Hubey was not at the risk of persecution. On 15 August, the authorities made a deportation order again, maintaining that, even if there was such a risk, he would not be entitled to protection because of the threat he posed to the national security, according to Articles 32 and 33, especially Art.33/2, of the Geneva Convention. This time the Local Court, to which Baham Hubey appealed again after this decision, approved the refusal of the asylum claim on 30 September 2012 by justifying the deportation order. Baham Hubey applied on 1 October 2012 to the Superior Court, which gave a judgment in the same direction with the Court of Magistrates.

Meanwhile, Mr. and Mrs. Hubey filed their preliminary questionnaire on 30 May 2011 and were transferred to the detention centre called “Safi Barracks” on 29 June 2011. They were only able to make the interview with the Refugee Commissioner for asylum application on 30 October 2011, after six months in detention.

On 1 December 2011, Mr. and Mrs. Hubey applied to the Immigration Appeals Board to demand their release, and alleged that their detention for an indefinite time under inappropriate conditions was hence unlawful. On 1 March 2012, the IAB refused their request on the grounds that their release was not possible without providing identity documents from Syrian authorities, under Article 25A (11) of the Immigration Act. IAB also decided that they could pose a threat to public security.

On 1 April 2012, the Hubey family was also informed that their asylum claim had been rejected because of “national security reasons” and a deportation order was issued against them. Upon being notified of the deportation order, Mr. and Mrs. Hubey filed a petition with the Court of Magistrates on 2 April 2012. The case was assessed by the Court one month later and their petition was dismissed on 2 May 2012, declaring that both their detention and deportation order were legally justified. On 3 May 2012, they applied to the Superior Court, which also decided against Hubey family on 1 June 2012. Afterwards, they filed petitions with the Ministry several times, which were not replied.

On 1 August 2012, Mrs. Hubey, who was diagnosed pregnant, filed again a petition with the Ministry, demanding her release because of pregnancy. But it was not replied by the Ministry either.

All the members of Hubey family have still been in detention, for more than twenty months.

## **V. THE CASE OF MR. AND MRS. HUBEY**

### **A. PARTIES’ SUBMISSIONS**

#### **a. Applicants’ Submissions**

The applicants submitted that their detention lasting more than twenty months after their arrival in Republic of Malta had been arbitrary, unlawful, and not in compliance with the provisions of the ECHR. On 29 April 2011, the day they landed on Malta, they were arrested by the police and were put in a small and gloomy room in the Police Headquarters allocated to foreigners, where they could not contact anybody or have access to legal aid. Their detention was not ordered or approved by a judge, nor was their situation reviewed automatically after they had been detained. They had been forced to live in an overcrowded facility without any legal assistance in Safi Barracks. They learned how to challenge with this continuing detention from the other detainees and appealed it.

They further alleged that the Immigration Appeals Board took their application into consideration only after three months and rejected it. IAB was not able to give sufficient evidence for the threat posed by the applicants to the national security of Malta.



The applicants alleged that deportation order had been grounded only on “a threat to the national security” but the relevant details and possible risks had not been disclosed to them. Their claim that they had a well-founded fear of persecution by Syrian authorities and that, in this case, the decision to deport them was not in compliance with Article 3 of the Convention was disregarded by the Court of Magistrates. Once again they were not given any substantial evidence, this time by the Court, for the risks to be faced in case they are released. The Court also declared their detention to be lawful, just because “it had a legal basis in Maltese law”, which was not adequately comprehensive according to the ECtHR judgments. The particular circumstances of the actual case were not taken into account by the Court.

To avoid their expulsion, the applicants filed petitions with the administrative organs several times, which were never been replied. The applicants alleged that their detention proceedings were not conducted as delicately as required.

According to the applicants’ submissions, the Government policy setting out an eighteen-month-long time limit for the release of irregular immigrants was exceeded by the authorities. This situation did not change even when Mrs. Hubey realized that she was pregnant and filed another petition with the Ministry for her release to live in better conditions during pregnancy. Her request was not replied, too.

All these facts revealed, in applicants’ opinion, that their situation was not considered properly and that their detention was arbitrary.

#### **b. Government’s Submissions**

The Government submitted that the applicants, who entered Malta illegally, became “prohibited immigrants” automatically under Article 5 of the Immigration Act. The Article 5(1) (f) of the ECHR gives the States the right to “detain a person against whom action is being taken with a view to deportation”. The Government submitted that Article 14 (2) of the Immigration Act empowers the Maltese authorities to detain any prohibited immigrants until they are removed from Malta, in compliance with the Convention. Given these accessible and precise provisions, it is understood that there was a clear legal basis for the administrative detention of prohibited immigrants, which applied also to the case of Hubey family. As regards the room in the Police Headquarters where the applicants were held, it was used to accommodate people coming with boats from other countries to seek asylum. After two months, the family was transferred to Safi Barracks, as in the case of all other irregular immigrants, where their detention was reviewed by the IAB, which is an administrative body

fully authorized to grant release when any detention is deemed unreasonable, in accordance with Article 25A of the Immigration Act.

The Government further alleged that, the asylum applications were assessed within -and even shorter than- twelve months, in compliance with the Maltese government policy, and that the deportation order was duly reviewed and approved by the judicial bodies.

The duration of their detention, according to the Governments submissions, was not excessive either, because the applicants arrived in Malta without required documents, which caused their deportation process to be more difficult and to last longer than expected. Consequently, the Government alleged that the family's detention was neither unlawful, nor arbitrary.

## **B.GENERAL PRINCIPLES**

In *Amuur v. France*, ECtHR clearly established that the States have the indisputable right to control the entry and resettlement of foreigners. Nevertheless, it is essential for the Contracting States to exercise this right in compliance with the provisions of the Convention, including Article 5.

The overall purpose of Article 5 is to ensure that no one shall be dispossessed of his liberty in an arbitrary fashion<sup>24</sup>. This provision also makes it clear that it shall be applied to "everyone", including foreigners who have fled from their homelands to seek asylum<sup>25</sup>.

The six sub-paragraphs of Article 5(1) include, as *numerous clauses*, a list of exceptional grounds on which persons may be deprived of their liberty. In *Saadi v. UK*, the Court highlighted that every deprivation of liberty shall fall within one of those grounds<sup>26</sup>.

The last one of those exceptions, sub-paragraph (f), repeats the States' right to control the liberty of aliens by permitting them;

-to detain a person in order to prevent his/her unlawfully entrance to the country, and

-to detain a person whilst he/she is awaiting the completion of his/her deportation or extradition process.<sup>27</sup>

Before making any further explanation, there is an important point to highlight: it is essential to decide whether the situation in question is about a "restriction upon liberty" or a

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<sup>24</sup> Harris, O' Boyle & Warbrick, *Law of the European Convention on Human Rights*, (Oxford University Press, Second Edition, 2009), p. 122.

<sup>25</sup> *Aksoy v. Turkey*, application no. 21987/93, judgment of 12 December 1996.

<sup>26</sup> See also *Louled Massaud v. Malta*, application no. 24340/08, judgment of 27 July 2010.

<sup>27</sup> *Mole and Meredith* p.147.

"deprivation of liberty". This is important because Article 5(1) (f) is not in principle related with restrictions on the liberty of movement; such restrictions are ruled under Article 2 of Protocol No. 4<sup>28</sup>. The "deprivation of liberty" will depend on several aspects of each case. Deprivation should not be associated with just "being locked in a prison cell". The *Guzzardi v. Italy* was the first case where the Court clarified this distinction.<sup>29</sup> Mr. Guzzardi was not being kept in a prison cell, but in a small island under "special supervision", where he could not leave his residence between 10 p.m. and 7 a.m., shall report twice a day and was not able to contact with the outside world properly. The Court has decided that, when all these factors are considered in combination, this was also a "deprivation" and stated that 'for determining whether someone has been "deprived of his liberty" within the meaning of Article 5, the starting-point must be his concrete situation, and account must be taken of a whole range of criteria such as the type, duration, effects and manner of implementation of the measure in question. The difference between deprivation of and restriction upon liberty is merely one of degree or intensity, and not one of nature or substance'.

In *Amuur v. France*, the Court remarked that, being held at an airport for twenty days was principally a restriction on liberty, rather than a deprivation. But in the light of the facts that a group of asylum seekers were not provided any legal or social assistance and were not made subject to a judicial review and were forced to live for twenty days under strict police control, the degree of this restriction turned it into a deprivation. The argument that the group was free to leave France and therefore were not deprived remained only theoretical, because no other countries offered them protection comparable to which they expected in France, and did not decline the degree of their detention.

In *Chahal v. UK*, the Court stated the main stipulation for applying a deprivation of liberty to persons seeking asylum, as follows: "Deprivation of liberty under the second limb of Article 5 (1) (f) will be justified, however, only for as long as deportation or extradition proceedings are in progress. If such proceedings are not performed with due diligence, the detention will cease to be permissible under Article 5 (1) (f)."<sup>30</sup> Therefore, detention is only permitted as long as

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<sup>28</sup> *Amuur v. France*, application no.19776/92, judgment of 25 June 1996 .

<sup>29</sup> *Mole and Meredith*, p.138.

<sup>30</sup> *Chahal v. UK*, application no. 22414/93, judgment of 27 June 1995. *Louled Massaud v. Malta*, application no. 24340/08, judgment of 27 July 2010.

the proceedings are conducted delicately and there is a “realistic prospect” of deportation. If it is not feasible anymore, there will not be any “action taken with a view to removal”<sup>31</sup>.

In *Singh v. Czech Republic*, the authorities’ failure to conduct the proceedings with due diligence and to bring in the necessary documentation from India made the deportation process infeasible for, in this case, the detention could no longer be effected with a view to deportation.

The ECtHR expresses the other elements for exercising a detention as follows: “The deprivation of liberty must also be ‘lawful’. Where the ‘lawfulness’ of detention is in issue, including the question whether ‘a procedure prescribed by law’ has been followed, the Convention refers essentially to national law and lays down the obligation to conform to the substantive and procedural rules of national law. But the words ‘in accordance with a procedure prescribed by law’ do not merely refer back to domestic law; they also relate to the quality of law, requiring it to be compatible with the rule of law, a concept inherent in all Articles of the Convention. Quality in this sense implies that where a national law authorizes deprivation of liberty, it must be sufficiently accessible and precise in order to avoid all risk of arbitrariness”.<sup>32</sup> This means; in case of detaining a person with a view to deportation, it is required to comply with the national law. In *Abdolkhami Karimnia v. Turkey*, the ECtHR decided that there was no clear legal basis in the national law establishing the procedure and setting strict time limitations for detention<sup>33</sup>. However, this compliance is not adequate. In *Saadi v. UK*, the Court assessed that any deprivation of liberty should be targeting to protect the individuals from arbitrariness, that the notion of “arbitrariness” extends beyond a lack of conformity with national law, and that a deprivation of liberty may be lawful in terms of domestic law but still arbitrary and thus contrary to the Convention.

What kind of practices should be considered arbitrary?

The answer of this question is given in *A. and Others v UK* as follows: “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

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<sup>31</sup> *Mole and Meredith*, p.148, see also *Mikolenko v Estonia*, application no.10664/05, judgment of 8 October 2009.

<sup>32</sup> *Dougoz v. Greece*, application no 40907/98, judgment of 6 March 2001 . *Amuur v. France*, application no.19776/92, judgment of 25 June 1996.

<sup>33</sup> See also *Muminov v. Russia*, application no. 45502/06, judgment of 11 December 2008.

lives, have fled from their own country; and the length of the detention should not exceed that reasonably required for the purpose pursued”.<sup>34</sup>

In *Conka v. Belgium*, the detention had not been conducted in good faith, where there had been a deception. In *Riad and Idiab v. Belgium*, where there had been disregard for orders which would have made the applicants be released, the Court also pointed out to the absence of good faith. But in *Saadi v. UK*, the authorities had acted in good faith in detaining him in appropriate conditions and for seven days, for processing his claim quickly.<sup>35</sup>

So, arbitrariness depends on the specifics of each case: There might be a prolonged detention and, in some cases, it might be accompanied with poor detention conditions.<sup>36</sup> “Detention conditions” are very important, since they must be appropriate in order to prohibit arbitrariness. Like in *Dougoz v Greece*, *Peers v. Greece* or *Charahili v. Turkey*; the inappropriate circumstances like overcrowded and dirty rooms also leads to the violation of Article 3 of the Convention, which prohibits inhuman or degrading treatment.

In *Al-Algha v. Romania*, the applicant’s detention with an excessive duration on the basis of “national security” was not subject to any prosecution and the details why he was seen as a security risk were not disclosed. Such uncertainty is another reason for considering a detention arbitrary.

In order to prevent arbitrariness, it is essential that the detention order is given or approved by a judge, not only by administrative bodies. The importance of an automatic and regular judicial review is also emphasized in the Reports of the Working Group on Arbitrary Detention. The local Courts should also carry out not only a formal analysis of the fulfilment of the requirements of domestic law, but also assess the case in substance.

In cases where there is no automatic review, the existence of a speedy and effective remedy to challenge the detention order is very important, too, which is strictly related to the Article 5/4 of the Convention. In *Louled Massoud v. Malta*, the Court stressed that, the procedure under which persons are detained should provide effective remedies by which to contest the lawfulness and length of the detention, in order to avoid the risk of arbitrary detention.

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<sup>34</sup> See also *Saadi v. UK*, application no. 13229/03, judgment of 27 September 2005.

<sup>35</sup> Mole and Meredith, p.162.

<sup>36</sup> Mole and Meredith p.157-158, see also *Gebremedhin v. France*, application no. 25389/05, judgment of 26 April 2007.

Granting legal aid to detainees is also of great importance.<sup>37</sup> Without it, this remedy can neither be effective, nor accessible.

If there has to be administrative detention, the principle of proportionality requires it to be the last resort.<sup>38</sup> Article 31 of the Geneva Convention stipulates that any restriction on free movement of asylum seekers must be necessary, which is also agreed by the Committee of Ministers, Council of Europe Commissioner for Human Rights and UNHRC. In *Chahal v. UK*, it was stated that the test of necessity does not have to be applied to persons who detained after a deportation order has been issued. However, this detention should last as long as the proceedings are in progress and, of course, be conducted with due diligence.

Especially, the detention of vulnerable groups such as children and pregnant women, whose detention cannot be regarded as a last resort, should be avoided in accordance with the principle of proportionality. Vulnerability refers to a person's need for special protection and care to maintain their life, such as minors, pregnant women, elderly persons and people with mental and physical disabilities. In cases of pregnant women for example; when Article 10 of the International Covenant on Economic, Social and Cultural Right, The United Nations General Report of The Working Group on Arbitrary Detention both in 2009 and 2010, and "Guidelines on Detention" which was published by UNHRC in 1999 are taken into account, it is obvious that their situation should be assessed with great diligence. Article 10 of ICESCR pointed out to the importance of protecting mothers before and after childbirth. According to "Guidelines on Detention", the detention of pregnant women in their final months should be avoided. The Working Group on Arbitrary Detention also stated that the detention of pregnant women as a last resort is not acceptable.

One should bear in mind that those measures are not taken against criminals, but those foreigners who fled from their home country for fear of their own lives.

### **C. THE ASSESSMENT OF THE CASE**

The applicants submitted that their detention, which was not in accordance with the requirements of Article 5(1) (f) of the Convention, had been unlawful.

First of all, it is required to decide whether the proceedings were conducted by Maltese authorities with due diligence.

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<sup>37</sup> *Amuur v. France*, application no.19776/92, judgment of 25 June 1996.

<sup>38</sup> UN Human Rights Council, *Report of the Working Group on Arbitrary Detention*, 18 January 2010.

On 31 December 2012, when the applicants applied to the ECtHR, the deportation process had been under way for more than twenty months and not been terminated yet. Since 1 June 2012, not a single proceeding had been conducted. Although it was difficult to contact Syrian authorities for the collection of necessary documents to complete the deportation proceedings, the Maltese Government failed to prove that they attempted to obtain the documents. There were no indications that they pursued the matter vigorously or entered into negotiations with the Syrian Government for that purpose. In addition, that the applicants were only given the opportunity to be interviewed and to make asylum claim after six months of their arrival and that they had not been informed about the asylum process for seven months are also signs of negligence on the part of the Maltese Government.

Moreover, it is another issue that, if -due to the recent developments in Syria-, it is not possible to contact the Syrian Government, the deportation order will become infeasible. Hence, it is no longer possible to say that there is “an action taken with a view to deportation” and the detention should be deemed unlawful.

In these circumstances, it should be moved onto to examine, whether the detention was lawful with respect to being “prescribed by law” and whether there existed sufficient guarantees against arbitrariness.

The Government claimed that the automatic administrative detention of prohibited immigrants was based on Articles 5 and 14 of the Immigration Act. However, considering whether this provision guarantees a particular procedure offering safeguards against arbitrariness, it is seen that the maximum length of the detention is not defined there. Government’s argument that there are several Government policies to set time limits is not sufficiently convincing, for these policies have no legal force and are not possibly applicable to some situations as in this case. This is why the applicants were subject to a detention with an indefinite period.

The conditions, in which the applicants had to live for months, were very inappropriate. For two months, they had lived in a small and gloomy room in the Police Headquarters, which is not a convenient place considering that they are not criminals. Later, they were transferred to a detention centre, which has, according to the Report of Working Group on Arbitrary Detention on Malta in 2010, appalling conditions to live. The centre is very crowded and there is not enough space to accommodate all the people, especially in winters.

The detention of the applicants was prolonged due to the fact that they had the chance of applying for asylum only after a period of six months. It was also against the general rule that persons who fled from their homelands to another country should immediately be given the chance of making an asylum application.

All these detention conditions and prolongation were not in compliance with the requirement to conduct the proceedings in good faith.

The applicants' detention was automatic and mandatory. Their detention order was issued by an administrative body and there was no automatic and regular judicial review of their detention. They were not granted any legal aid, too, because in Malta persons seeking legal aid have to present their case at the office of Advocate for Legal Aid, situated in the Law Courts, which was impossible for the detainees in this case. There were also very few civil society lawyers available.<sup>39</sup> The lack of legal aid prevented the applicants from challenging their detention order for a period of almost seven months. All these facts fell short of protecting the applicants from arbitrariness.

The applicants lodged an application with the Immigration Appeals Board, which is not a judicial body and where judges are not involved. Even accepting that it could be regarded as a judicial authority because it has authorization to release, the relevant legal provisions are limited by the fact that a request for release has no possibility of success in many events such as the identity of the detainee is yet to be verified or he/she imposed a "public risk".<sup>40</sup> This remedy does not provide much opportunity to be released indeed. In our case, the applicants' identities could not be verified because Syrian government did not cooperate, which was not the fault of detainees. Why they posed a threat to public security was not clarified in IAB's decision, too. *Inter alia*, IAB examined the reasonableness of the detention, rather than the lawfulness of it, which was not sufficient. The protection of Article 409A of Criminal Code applied by the Courts of Magistrates also failed to provide a review of the lawfulness of their detention with respect to the requirements not only in domestic law but also in the Convention. This Court excluded the examination of other conditions by deeming the detention lawful, because they assumed that there was a sufficient legal basis. The Superior Court also acknowledged the limited competence of the Courts. This formal and ineffective remedy to challenge detention orders, which does not test the lawfulness of the detention in

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<sup>39</sup> UN Human Rights Council, *Report of the Working Group on Arbitrary Detention*, 18 January 2010.

<sup>40</sup> *Louled Massoud v. Malta*, application no. 24340/08, judgment of 27 July 2010.



accordance with the requirements of Convention, shows that the Maltese legal system fails to provide a procedure to avoid the risk of arbitrary detention.<sup>41</sup>

The details for the applicants' deportation order were not explained to them, since it was only said that their release would threaten the public security. The Court of Magistrates and the Superior Court also failed to give any evidence to support this decision, by making only a formal review. This also led to arbitrariness.

In a small island like Malta, where escape by sea is extremely dangerous and air transportation strictly controlled, detention should not be the first option, at least not mandatory and automatic, to secure an eventual removal.<sup>42</sup> This was against the principle of proportionality. *Inter alia*, Mrs. Hubey's continued detention, even after finding out that she was pregnant, was another violation of the principle of proportionality, thus leading to arbitrariness.

Living under such conditions for such a long time with no legal assistance -considering the type, duration, effects and manner of the detention- reveals that the applicants' situation was clearly a "deprivation of liberty". As a consequence, all these facts show that Maltese law do not have sufficient safeguards to protect the applicants against arbitrary detention, which fell short of the "quality of law" standards required under the Convention. So, this deprivation of liberty could not be considered "lawful", for the purposes of Article 5 of the Convention.

Therefore, this was a violation of Article 5/1 (f) of the Convention.

One may argue that Mr. Hubey, who is a soldier, cannot be granted refugee status, given the fact that only a civilian can be considered a refugee. If he would remain in service as a soldier for Syrian army and take part in military activities, this allegation would be true. But, having fled from Syria to seek asylum, he could no longer turn back to Syrian army and, thus, he should be considered a refugee.

## **VI. THE CASE OF BAHAM HUBEY**

### **A. PARTIES' SUBMISSIONS**

#### **a. Applicant's Submissions**

The applicant submitted that, his detention "with a view to deportation" for more than twenty months ceased to be lawful because of its excessive length and thus there was a breach of

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<sup>41</sup> Louled Massoud v. Malta, application no. 24340/08, judgment of 27 July 2010.

<sup>42</sup> Louled Massoud v. Malta, application no. 24340/08, judgment of 27 July 2010.

Article 5 (1) (f) of the Convention. The applicant also alleged that Article 3 of the Convention had been violated, which is a significant issue since the applicant is a member of an international terrorist group and there is a conflict between the provisions of international law on repatriation of persons who took part in terrorist activities. The applicant argued that he shall not be deported to his country of origin since Article 3 of the Convention provides a certain protection against ill treatment for everyone, especially the ones that have a well-founded fear of torture if returned as the applicant.

#### **b. Government's Submissions**

The Government argued that the whole process applied to the applicant was conducted with the highest level of diligence. Shortly after his entrance, he was transferred to a bigger place and his administrative detention was made subject to judicial review only after two days. Meanwhile, an investigation was started against him immediately to verify the allegation that he was a terrorist. They asked the intelligent services for detailed reports on the applicant. He was also granted legal aid during every step of his deportation process and had the opportunity to apply for asylum quickly. Regarding that the case had a extremely serious and weighty nature, the Government acted delicately throughout the proceedings and the Local Court once quashed the asylum refusal which lead to a re-examination of the case, made the process last longer than expected, which was by no means a defect of the authorities.

The Government further claimed that Article 33/2 of the Geneva Convention ruled that the Contracting States, including Malta, have the right to exclude the persons, about whom there are reasonable grounds for regarding him/her as a danger to the security of the country, from the protection shelter of the "Non-Refoulement" principle stated by the Geneva Convention. Because of his terrorist activities in recent years which were all detected by Maltese authorities, the Government submitted that he posed a danger to the public security and therefore should be deported.

#### **B.GENERAL PRINCIPLES**

The conditions which a detention should have in accordance with Article 5/1 (f) of the Convention are mentioned above. In addition, it is essential to accept that the prohibition provided by Article 3 of the European Convention on Human Rights against ill- treatment is "absolute" in expulsion cases.<sup>43</sup> There is no exception to this rule, even in the event that there

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<sup>43</sup> Soering v. UK, application no. 14038/88, judgment of 7 July 1989. Chahal v. UK, application no. 22414/93, judgment of 27 June 1995.

is a risk for public security.<sup>44</sup> The European Convention on the Suppression of Terrorism (27 January 1977), the European Convention on the Prevention of Terrorism (16 May 2005) , the European Convention on Laundering, Search, Seizure and Confiscation of the Proceeds of Crime and on the Financing of Terrorism (16 May 2005) and the Committee of Ministers of the Council of Europe's Guidelines Point IV, XII § 2 (11 July 2002) also rule not to extradite or expel any person who, in the receiving country, would run the "real risk" of being subjected to ill-treatment. This provides an indisputable protection for everyone, including asylum seekers.

### **C.THE ASSESMENT OF THE CASE**

It has first to be determined whether the detention was lawful and whether the authorities pursued the deportation proceedings with due diligence in terms of Article 5 para. 1 (f) of the Convention.

In Baham Hubey's case, in addition to the provisions ruling detention of irregular immigrants in Maltese legal system, the Government was far away from being arbitrary: the investigation to reveal the facts about the applicant commenced immediately, he was sent to a Court promptly in order to make his detention subject to judicial review, and was also granted legal aid. The reasons for the refusal of his asylum claim were disclosed in detail. During this period, the judicial review continued periodically every thirty days. All these factors indicated that; even Maltese law fell short of providing sufficient guarantees against arbitrariness (see above, page ..), there was no arbitrary behaviour of the authorities in Baham Hubey's case. Therefore, the detention can be considered "lawful".

The fact that the applicant was a member of an international terrorist group and participated in several terrorist activities gave this case an extremely serious nature. His situation had to be made subject to a more careful consideration. Therefore, the seven months and the later five months long duration of the examination of his asylum claim should not be considered "overlasted"<sup>45</sup>. From the beginning, the Maltese authorities acted quickly, gathered sufficient evidence about the applicant's activities, including detailed reports from intelligence services, and made careful and delicate assessments. So, having pursued the processes with due diligence, in addition with the fact that the detention was lawful, the Maltese authorities caused no breach of Article 5 (1) (f).

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<sup>44</sup> Tomasi v. France, application 12850/87, judgment of 27 August 1992.

<sup>45</sup> See also Chahal v. UK, application no. 22414/93, judgment of 27 June 1995; where seven months' duration did not cause a violation.

The other issue was whether the applicant could be deported back to Syria in accordance with Article 33/2 of the Geneva Convention, which can be considered an exception of non-refoulement principle, or not, relying upon the protection under Article 3 of the ECHR. As one can see, there is a contrast between the international conventions *prima facie*. But the protection provided by Article 3 of the ECHR is an absolute one. As ECtHR stated in *Saadi v. Italy*; “There can be no derogation from that rule. The conduct of the person concerned, however undesirable or dangerous, cannot be taken into account, with the consequence that the protection afforded by Article 3 of the ECHR is broader than provided for in Article 32 and 33 of the 1951 Convention”.<sup>46</sup> Therefore, the superiority of Article 3 of ECHR over the Geneva Convention suggests that the deportation order issued against Baham Hubey, who has a well-founded fear of persecution if deported back to Syria, is a breach of Article 3.

## **VII. ALTERNATIVES TO THE ADMINISTRATIVE DETENTION OF ASYLUM SEEKERS**

The administrative detention of asylum seekers is a particularly problematic issue in Europe. Many of those seeking asylum in Europe now routinely face detention, often for lengthy periods, sometimes in appalling conditions. This occurs both whilst their asylum claims are being processed and before their expulsion is carried out, even though they have not committed any crimes or not suspected of having done so.<sup>47</sup>

States indicate that they resort to detention in order to control the asylum procedure. In the light of article 31 of 1951 Geneva Convention, States shall not impose penalties to asylum seekers on account of their illegal entry or presence and shall apply this measure only when it is necessary. Despite this provision, asylum seekers are placed in detention facilities throughout Europe due to their illegal entry or presence. In operation, several different types of detention are enforced, including detention at border points, in airport transit areas, jails, detention centres. Such a practice will be likely to violate the human rights of those persons, especially “their right to liberty”, defined in Article 5 of ECHR.

Consequently, the detention of asylum seeker should be on extremely exceptional grounds, as a last resort, consistent with international standards and based on the personal history of each asylum-seeker. If detained, they should be held in conditions appropriate to their status and not kept with persons charged with or convicted of criminal offences, and their detention should be concluded in the shortest time possible. In majority of cases, alternative measures

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<sup>46</sup> See also *Chahal v. UK*, application no. 22414/93, judgment of 27 June 1995.

<sup>47</sup> *Mole and Meredith*, p.123.

should be taken into account before resorting to detention and this alternative should simply be liberty.<sup>48</sup> The various alternatives set out below are important in order to decrease human rights abuses in detention of asylum seekers:

1. Supervised release of vulnerable groups to local services

Social services should be responsible for providing accommodation for vulnerable persons. (e.g: U.K)

2. Supervised release to an NGO

Some of the asylum seekers may be released into the hands of an NGO, which will supervise such individuals if provided with financial support from the State. (e.g: U.S)

3. Supervised release to an individual citizen

Citizens could offer to guarantee that the asylum seeker will not flee until end of the deportation process. He will act as the guardian of the asylum seeker. (e.g: Canada)

4. Reporting requirements

States may require asylum seekers to deposit their passports and to report to the authorities at regular intervals. (e.g: France, Denmark)

5. Open centres.

Open centres can be considered an alternative in cases where asylum seekers might otherwise be held in detention, as such centres can control the whereabouts of the residents. However, this should be used as a last resort.<sup>49</sup> ( e.g: Turkey)

We want to sum up with Urkhan Alakbarov's famous quote "Should not the existence of even one single refugee be a cause for alarm throughout the world?" Our answer is "Yes". Refugees and asylum seekers are our less fortunate brothers and sisters and it is time for all the States around the world to revise their policies to give them more liberty.

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<sup>49</sup> 1997 ECRE Research Paper on Alternatives to Detention- Practical Alternatives to the Administrative Detention of Asylum Seekers and Rejected Asylum-Seekers.