



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

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FOURTH SECTION

Application no. 30737/24

M.S.

against Malta

lodged on 25 October 2024

communicated on 19 March 2025

SUBJECT MATTER OF THE CASE

The application concerns, a Bangladeshi national claiming, *inter alia*, to be at risk of ill-treatment contrary to Article 3 of the Convention (by both private and State actors) if returned to Bangladesh as a member of the LGBTI community. The applicant, M.S., was registered as male at birth and identifies as a woman (gender identity), who is attracted to men (sexual orientation).

On arrival to Malta, on 17 April 2023, the applicant was detained and continued to be so until 2 November 2024 (of which the first sixteen days were for unspecified reasons, four months were related to criminal charges and undertaken in a correctional facility, the rest concerned immigration related detention), despite the authority's vulnerability assessment of 20 November 2023 concluding that the applicant was vulnerable due to mental and psychological concerns and being identified as a person with diverse sexual orientation, gender identity, expression, and sex characteristics (SOGIESC). The applicant claims to have been subjected to repeated incidents of mocking, harassment, and mistreatment due to SOGIESC, nevertheless, requests for release remained unheeded, only one automatic review took place, and detention in isolation was put in place on certain occasions.

The applicant requested asylum on the basis of homosexuality and gender identity (female); referring to the physical harassment and sexual and violent assault, suffered in the past, at the hands of various private individuals in

Bangladesh including family members (half-brothers) and considering that if returned to Bangladesh there would be a risk of being beaten and imprisoned (due to sexual identity) and of being killed by the half-brothers.

On 14 May 2024 the applicant received a rejection decision by the International Protection Agency (IPA) dated 10 May 2014 which concluded that the asylum application was manifestly unfounded on the grounds that Bangladesh is a “safe country of origin”. Having determined that the applicant was not a homosexual it considered that no risk would ensue on return to a safe country. Two days later, in line with the accelerated procedure, the International Protection Appeals Tribunal (APAT) upheld the decision of the IPA.

A return decision and removal order were issued against the applicant on 17 May 2024 and notified on 20 May 2024. The applicant filed a challenge against it the following day. After one hearing, on 18 October 2024 the Immigration Appeals Board (IAB) dismissed the challenge lodged against the removal order finding that the applicant “failed to produce any evidence to substantiate the principle of *non-refoulement*.”

Upon request, on 28 October 2024 the Court decided that it was in the interests of the parties and the proper conduct of the proceedings before it to indicate to the Government of Malta, under Rule 39 of the Rules of Court, that the applicant should not be removed to Bangladesh for the duration of the proceedings before the Court. On 2 November 2024 the applicant was released into an open centre subject to the condition of signing daily with the authorities. The applicant did not fulfil that condition and was deemed by the Government to have absconded. Following a request by the Court the legal representative confirmed that they were still in touch with the applicant.

The applicant complains that they would be at risk of ill-treatment contrary to Article 3 of the Convention (by both private and State actors) if returned to Bangladesh on account of their diverse SOGIESC and past trauma, however none of the domestic bodies (the IPA, IPAT, and IAB) conducted a rigorous assessment of that claim contrary to Article 3 of the Convention taken alone and in conjunction with Article 13. Moreover, they argued that both the IPAT and the IAB could not be considered as independent and impartial tribunals and thus could not provide an independent assessment. Under the same provisions the applicant also complained about the conditions of detention due to their vulnerability, established by the authorities, and the lack of an effective remedy in that regard. Under Article 5 §§ 1 and 4 the applicant complained about the arbitrariness of the detention of eight months and fourteen days pending the determination of the asylum claim, as well as that of five months pending the deportation, and the lack of an effective remedy in that respect since the IAB, was not an impartial and independent body and had failed to undertake the relevant automatic reviews envisaged in law.

QUESTIONS TO THE PARTIES

1. Did the applicant have an effective domestic remedy, for the purposes of Article 3 of the Convention alone and in conjunction with Article 13 of the Convention, providing for an independent and rigorous assessment of whether there are substantial grounds for believing that the applicant would face a real risk of being subjected to treatment in breach of Article 3 of the Convention if returned to Bangladesh (see *F.G. v. Sweden* ([GC], no. 43611/11, § 113, 23 March 2016; *M.S.S. v. Belgium and Greece* [GC], no. 30696/09, § 293, ECHR 2011; and *S.H. v. Malta*, no. 37241/21, § 101-02, 20 December 2022)? In particular, can the IPAT and the IAB be considered independent (see, *mutatis mutandis*, *J.B. and Others v. Malta*, no. 1766/23, § 155, October 2024)?

2. In the light of the claims and the materials submitted, would the applicant face a real risk of being subjected to treatment in breach of Article 3 of the Convention if returned to Bangladesh?

3. Has the applicant been subjected to inhuman or degrading treatment, in breach of Article 3 of the Convention? Did the conditions of the applicant's detention (in Safi detention centre, following release from the Corradino Correctional Facility) amount to inhuman or degrading treatment, particularly bearing in mind the relevant sexual orientation, gender identity, expression, and sex characteristics (SOGIESC) at play - the applicant claims to be a person identifying as female (gender identity) who is attracted to males (homosexual) – and in the light of the applicant's mental health?

4. Did the applicant's deprivation of liberty following release from the Corradino Correctional Facility (presumably on 7 September 2023) until 2 November 2024 fall under any of the sub-paragraphs of Article 5 § 1 and did it conform to the requirements relevant to the different limbs of that provision, including it being free from arbitrariness (see, for general principles, *Suso Musa v. Malta*, no. 42337/12, §§ 89-93, 23 July 2013)? In particular, was there an individualised assessment and was the applicant's vulnerability taken into account when the detention was ordered (compare *O.M. v. Hungary*, no. 9912/15, 5 July 2016)? In respect of the period following the rejection of the applicant's asylum proceedings, were deportation proceedings in progress and if so, were they pursued with due diligence (see *Aden Ahmed v. Malta*, no. 55352/12, § 144-45, 23 July 2013)?

5. Did the applicant have an effective procedure by which to challenge the lawfulness of the detention, as required by Article 5 § 4 of the Convention (see *J.B. and Others*, cited above, §§ 149 et seq.)? Did the automatic reviews

envisaged by law take place during the applicant's detention? If so, the Government is invited to submit the minutes of such hearings.

6. Did the applicant have an effective domestic remedy for the complaints under Article 3 concerning the conditions of detention, as required by Article 13 of the Convention (see *J.B. and Others*, cited above, §§ 70-71)?