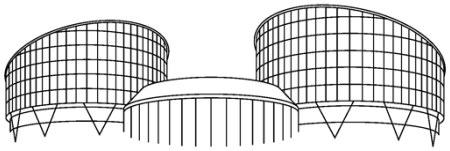

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

CASE OF A.B. AND Y.W. v. MALTA

(Application no. 2559/23)

JUDGMENT

Art 3 (procedural) • Expulsion • Respondent State's failure to assess the risk of treatment contrary to Art 3 before confirming the removal to China of two Uighur Muslims, six years after the rejection of their asylum claim • Removal without an *ex nunc* rigorous risk assessment would entail a breach • Art 35 § 1 • Applicants not required to lodge a subsequent asylum application as they exhausted the relevant remedy available to them at the material time, against their removal, namely the Immigration Appeals Board, which did not carry out a fresh risk assessment notwithstanding its competence to do so

Prepared by the Registry. Does not bind the Court.

STRASBOURG

4 February 2025

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

In the case of A.B. and Y.W. v. Malta,

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

Lado Chanturia*, President*,
Tim Eicke,
Lorraine Schembri Orland,
Ana Maria Guerra Martins,
Anne Louise Bormann,
Sebastian Răduleţu,
András Jakab*, judges*,
and Simeon Petrovski, *Deputy Section Registrar,*

Having regard to:

the application (no. 2559/23) 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 two Chinese nationals, Mr A.B. and Ms Y.W. ("the applicants"), on 13 January 2023;

the decision to give notice to the Maltese Government ("the Government") of the application;

the decision not to have the applicants' names disclosed;

the decision to indicate an interim measure to the respondent Government under Rule 39 of the Rules of Court that the applicants should not be removed to China;

the parties' observations;

Having deliberated in private on 14 January 2025,

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

INTRODUCTION

1. The application concerns two married Chinese nationals of Uighur ethnicity and Muslim faith from Xinjiang who were refused international protection in Malta and issued a removal decision. The applicants relied on Articles 2 and 3 alone and in conjunction with Article 13 of the Convention.

THE FACTS

2. The applicants were both born in 1986 and were at the time of lodging the application detained in Safi. The applicants were represented by Ms K. Gatt, a lawyer from Aditus Foundation practising in Ħamrun.

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

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

BACKGROUND TO THE CASE

A. The applicants' arrival in Malta

5. The applicants are married Chinese nationals of Uighur ethnicity and Muslim faith from Xinjiang (Xinjiang Uighur Autonomous Region-XUAR).

6. They arrived in Malta regularly, by air, from Italy on 1 August 2016. They entered Malta with a valid Chinese passport bearing a Schengen visa which had been issued by the embassy of Malta in Beijing. The visa was valid for a three-month period, ending on 1 October 2016.

B. Application for International Protection

7. According to the applicants, prior to the expiration of their visa they sought legal advice. As a result, on 28 September 2016, the applicants approached the Office of the Refugee Commissioner asking for international protection. On 30 November 2016 they filled in an application form to that effect and later were required to fill in a questionnaire and submit themselves to a personal interview. Their personal interview was held on 1 December 2016, in English.

8. They claimed in particular that (a) the police searched their house in XUAR; (b) they had been subjected to numerous searches at checkpoints in China; (c) they belonged to the Uighur ethnic group; and (d) that there were arbitrary arrests in China. The second applicant also claimed that her family in China had been threatened by the Chinese authorities.

9. Their claims were rejected by the Refugee Commissioner ('RC') with a decision of 19 January 2017 which stated the following:

> "The Refugee Commissioner is of the opinion that, even if such claims, as described by you, were true, there is no reason to believe that such alleged claims, in the circumstances described by you, (a) amount to any of the grounds for refugee recognition according to the 1951 Geneva Convention, (b) amount to the possibility of you suffering serious harm as defined in the Refugees Act, Chapter 420 and the Council Directive 2011/95/EU of 13 December 2011 ... the Office of the Refugee Commissioner is of the opinion that you did not provide evidence of a well-founded fear of persecution."

10. The reports (of around seventy pages) attached to the RC's decision contained a recapitulation of facts since the applicants arrived in Malta, the transcript of their interview, and an evaluation of their claims in the light of their statements made in the interview and the relevant Country of Origin Information ('COI'). According to the reports, the assessors did not doubt the applicants' marriage, nationality, religion or ethnicity. In respect of the second applicant, doubts were raised about the searches to her house, as she had forgotten to mention it at the interview and the description she gave when questioned was considered short and superficial. It thus concluded that there had been no evidence that the authorities inspected her house for any reasons

related to any persecution grounds. In respect of the first applicant, even assuming the truthfulness of the search, it was not aimed at his house, but it concerned the entire block. The same was held with respect to the alleged checks at the check point. In respect of both claims the situation was not one which could lead to the possibility of suffering serious harm as defined in the Refugees Act. While people of Uighur ethnicity were discriminated, the level of discrimination was not sufficiently serious, by its nature or repetitiveness, to constitute a severe violation of basic human rights.

11. The reports further noted that their families had not suffered any repercussions ever since the applicants had left China. In respect of both applicants, circumstances related to the issuance of their passport and their departure for educational purposes, as set out in their interview, led to the consideration that there had been no grounds justifying their refugee status. Furthermore, while they had suffered some restrictions, neither the applicants nor their families risked suffering serious harm as a result of their departure from China. They had also not suffered serious restrictions on their freedom of movement, expression or religion, and the first applicant's father's eviction from his home had been one of 100,000 such evictions and he had been compensated for it. Their fears concerning, *inter alia*, arbitrary arrest and persecution were based on assumptions and things that happened to others, rather than facts and personal situations. Lastly, the applicants had not applied for protection in Italy, as they had not known it was a possibility (see in this regard the applicants' submissions at paragraph 49 below).

12. The applicants appealed against this decision before the Refugee Appeals Board ('RAB'). They emphasised that it should not be disputed that the Uighur ethnic group in China was experiencing severe violations of their human rights in numerous regards. They referred to the COI available and relied on numerous reports dated 2015-2016, the persecution of their close relatives and colleagues and noted, *inter alia*, that the first applicant was at even higher risk as an IT specialist given the Chinese Government's censorship, surveillance and prosecution of online and offline computer activities, targeting particularly and deliberately Uighurs in XUAR. They further argued that relocation within China was not effective because such residence permits were not issued by the authorities, people were regularly sent back to the XUAR, and because discrimination and persecution of Uighurs affected all China.

13. After receiving the applicants' appeal and their legal submissions, as well as the reply of the RC, the RAB held a hearing on 26 September 2017 and proceeded to judgment on 30 October 2017, confirming the first-instance decision. The RAB noted that, in the interview with the RC, the applicants had focused on the general situation of the Uighur community and how they were treated, but they had not claimed that they themselves had been involved in any protests nor had they been commenting on the Chinese government. The home searches referred to had been general searches in the area and had

not aimed at the applicants, nor had the applicants suffered any consequences following those searches. The first applicant confirmed that his fears had been for the future and not related to the past, and that he considered that he could not move to another part of China because of his religion.

14. The RAB was of the opinion that since the applicants had left China legally (and had been given a passport to do so) they would not be at risk of persecution if returned, and they had not proved that if returned to China they would be in real danger. Furthermore, the situation at check points had been the result of the situation in XUAR, which had been infiltrated by a separatist movement fighting against Chinese authorities for liberation from China and Islamic extremism, which was common in the region. Relying on a country advice document published by the Australian Refugee Review Tribunals, the RAB noted that despite little information, it did not appear that Chinese authorities imputed all rejected asylum seekers with political opinions hostile to the Communist Party of China ('CPC'). There was also little evidence that rejected asylum seekers were harmed upon return due to their imputed beliefs. There was, however, evidence that high-profile rejected asylum seekers had been ill-treated upon return. However, in this case the applicants were not high-profile dissidents or activists against the CPC and therefore were not regarded as subject to potential persecution. Thus, the RAB had not been convinced that the applicants suffered a well-founded fear of persecution and even assuming their claims were true, there had been no reason to believe that they could not have sought a more appropriate residence in other parts of China.

C. Subsequent events

15. During the above proceedings the first applicant had been working legally in Malta. Following that decision, the applicants remained in Malta. In 2022, following their application for a nomad residence permit, the Principal Immigration Officer (hereinafter 'PIO') discovered that the applicants were in Malta without a valid permit. They were therefore declared "prohibited immigrants" in terms of Article 5 of the Immigration Act (see paragraph 29 below) and were issued with a return decision and removal order on 1 August 2022.

16. The return decision was issued against the applicants on various grounds, namely that they were in Malta without leave from the PIO; that they were unable to show that they had the means to support themselves and were therefore likely to become a burden on public funds; that they had contravened the provisions of the Immigration Act or any of the regulations made thereunder; and that they were found to be overstaying in Malta since 2016.

17. Upon being issued with a return decision and removal order, the applicants allegedly agreed to a period of voluntary departure from Malta to travel to Istanbul and obtain a work permit from there.

D. Proceedings before the Immigration Appeals Board

18. On 4 August 2022, the applicants challenged their removal order before the Immigration Appeals Board ('IAB') in terms of Article 25A of the Immigration Act (see paragraph 29 below), with the aid of legal representation. They argued that their removal from Malta would constitute a violation of the principle of *non-refoulement*. They relied, *inter alia*, on the fact that the US State Department and the Parliaments of Canada and the Netherlands had found that China's conduct against Uighurs in XUAR constituted a genocide under International Law and also referred to the Court's findings in *M.A. and Others v. Bulgaria* (no. 5115/18, 20 February 2020).

19. A hearing was held before the IAB where the applicants raised a claim under Article 3 of the Convention. The IAB ordered the applicants to provide further evidence of their claim. On 18 August 2022 they submitted documentary evidence, namely their affidavits; a copy of message exchanges they had had with their family in 2017; a note of submissions (highlighting that the situation of the Uighur community had deteriorated since the 2016 assessment, thus requiring a new risk assessment, and that no EU country had effected such returns in recent years); a defence brief from the non-governmental organisation Safeguard Defenders (outlining the grave risk of irreparable harm in case the applicants were deported on the basis of documented assessments by competent international human rights bodies and national authorities regarding the grave human rights violations in XUAR (see paragraph 33 below); and evidence regarding pressure to return from Chinese authorities through reprisals against their family members in China. They further explained that they had not filed a new application for asylum "since the whole procedure was mentally and emotionally exhausting and they felt disheartened by the system in Malta". At the hearing of 13 October 2022, the applicants declared that they had not applied for asylum and that they were considering various available options. They further submitted in evidence the United Nations (UN) Office of the High Commissioner for Human Rights (OHCHR) assessment of human rights concerns in the XUAR, People's Republic of China, of 31 August 2022 (see paragraph 31 below).

20. On 24 November 2022 the applicants' representative insisted that the IAB was to focus on the lawfulness of the removal order in light of the *non-refoulment* principle, irrespective of an application for asylum. According to the minutes of that hearing:

> "The Board clarified that going forward, that assessment is part of the final judgment. The Board also clarified that the application for asylum is not dependent on the decision

> *in parte* on this matter. The way forward is; either there is an application for asylum followed by a stay in proceedings until the asylum request is processed, and if the decision is in the affirmative, they are given the protection the appellant is after, or, the Board proceeds to give a final decision on the subject matter and the appellant proceeds to apply for asylum afterwards."

At this hearing the applicants were requested once again to clarify their claim.

21. According to the Government, and on the basis of the above minutes, during the sittings before the IAB, the latter brought to the applicants' attention that if they wished to claim international protection, proceedings before the IAB were not the appropriate forum. The parties disagree as to whether during these proceedings there had been discussions about the possibility that the applicants would re-apply for asylum. The applicants submitted that such discussions had not concerned them, but rather a third individual who was also party to the domestic proceedings and who had never applied for asylum, but did so subsequent to that hearing.

22. The applicants subsequently requested the IAB to decide whether it was competent to assess the risks under Article 3 of the Convention, given its previous practice on the matter. The IAB accepted that it had competence to assess the matter, nevertheless, on 12 January 2023 it considered that the RAB had already examined the applicants' claims and found that the applicants would not be at risk. Thus, it concluded that:

> "the Board rests on the judgment delivered by the RAB and declares that appellants failed to produce further evidence to substantiate the principle of non-refoulement post judgment delivered by the RAB. The Board confirms the return decision, removal order and entry ban issued and finds that appellants' removal from Malta does not constitute a breach of Article 2 and 3 ECHR".

E. The situation following the IAB decision

23. The applicants were detained at the IAB premises and taken to the PIO's office where they were issued with removal orders and subsequently taken to Safi Detention Centre where they were kept until after they lodged their application with the Court. At the time, their legal representatives had no physical access to the applicants and their phones had been confiscated.

24. Following the applicants' request under Rule 39 of the Rules of Court, on 16 January 2023 the Court indicated to the Government of Malta that the applicants should not be removed to China for the duration of the proceedings before the Court. The following day they were released from detention.

RELEVANT LEGAL FRAMEWORK AND PRACTICE

I. DOMESTIC LAW

25. The relevant domestic law is set out in *S.H. v. Malta* (no. 37241/21, §§ 30-34, 20 December 2022). For ease of reference some of those provisions are reiterated hereunder, together with additional legal provisions also relevant to the present case.

A. International Protection Act

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

Article 2

> ""person eligible for subsidiary protection" means a third country national who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his country of origin, would face a real risk of suffering serious harm, and is unable or, owing to such risk, unwilling to avail himself of the protection of that country, and has not been excluded from being eligible for such protection under article 17(1);
>
> "refugee" means a third country national who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence, as a result of such events is unable or, owing to such fear, is unwilling to return to it, but does not include a person excluded in terms of article 12:
>
> Provided that in the case where a person has more than one nationality, the term "country", mentioned above, shall refer to each country of which he is a national, and such a person shall not be considered as not having the protection of his country if, without any founded fear of persecution, he has not sought the protection of one of the countries of which such a person is a national:
>
> Provided further that:
>
> (a) acts of persecution within the meaning of Article 1A of the Convention must be sufficiently serious by their nature or repetition as to constitute a severe violation of basic human rights, in particular the right from which derogation cannot be made under Article 15(2)of the European Convention for the Protection of Human Rights and Fundamental Freedoms; or
>
> (b) be an accumulation of various measures, including violations of human rights, which is sufficiently severe as to affect an individual in a similar manner as in paragraph (a).
>
> For the purpose of paragraph (a), "acts of persecution" means:
>
> (a) acts of physical or mental violence, including acts of sexual violence;
>
> (b) legal, administrative, police, and/or judicial measures which are in themselves discriminatory or which are implemented in a discriminatory manner;

(c) prosecution or punishment which is disproportionate or discriminatory;

(d) denial of judicial redress resulting in a disproportionate or discriminatory manner;

(e) prosecution or punishment for refusal to perform military service in a conflict, where performing military service would include crimes or acts falling within the scope of the grounds for exclusion as set out in article 12(2);

(f) acts of a gender-specific or child-specific nature:

Provided that refugee status on the grounds of fear of persecution shall only be granted if there is a connection between the reasons for persecution mentioned in regulation 18 of the Procedural Standards in Examining Applications for International Protection Regulations and the acts of persecution referred to in this definition;

"subsequent application" means a further application for international protection made after a final decision has been taken on a previous application."

Article 7

"(1) The [International Protection Appeals] Tribunal shall have power to hear and determine appeals against a decision of the International Protection Agency including appeals from decisions for the transfer of a third country national from Malta to another Member State in accordance with the provisions of Council Regulation 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third country national or stateless person.

(1A) For the purpose of this article, an appeal on both facts and points of law shall lie against:

(a) a decision taken on an application for international protection:

(i) considering an application to be unfounded in relation to refugee status and, or subsidiary protection status;

(ii) considering an application to be inadmissible pursuant to article 24;

Provided that for the purpose of this provision, the review conducted by the Chairperson of the International Protection Appeals Tribunal shall be deemed to constitute an appeal.

[...]

(10) Notwithstanding the provisions of any other law, but without prejudice to article 46 of the Constitution of Malta and without prejudice to the provisions of article 4 of the European Convention Act the decision of the Tribunal shall be final and conclusive and may not be challenged and no appeal may lie therefrom, before any court of law, saving the provisions of article 7A.

(11) Where the Tribunal finds in favour of the applicant the International Protection Agency shall issue a declaration accordingly."

Article 7A

"(1) A person who has applied for international protection may make a subsequent application after a final decision to the International Protection Agency:

Provided that such application shall only be considered on the presentation of new elements or findings, relating to the examination of whether the person making the

subsequent application qualifies as a beneficiary of international protection, and of which the applicant could not have been aware or which he could not have submitted.

(2) The person submitting a subsequent application shall:

(a) indicate facts and provide evidence which justify this procedure; and

(b) submit such new information within fifteen days from the day on which the person making the subsequent application obtained such information.

(3) The examination may be conducted on the sole basis of written submissions and the person making the subsequent application is to be informed of the outcome of the examination and of his right for an appeal.

(4) For the purpose of taking a decision on the admissibility of an application pursuant to article 24, a subsequent application shall be subject to a preliminary examination as to whether new elements or findings have arisen or have been presented since the lodging of the first application.

(5) If the preliminary examination referred to in sub-article (4) concludes that new elements or findings have arisen or have been presented by the applicant which significantly add to the likelihood of the applicant qualifying as a beneficiary of international protection, a further examination of the application shall be carried out:

Provided that an application shall only be further examined if the applicant concerned was, through no fault of his own, incapable of concluding that new elements or findings have arisen.

(6) When a subsequent application is not further examined pursuant to this article, it shall be considered inadmissible, in accordance with article 24(1)(d). ..."

Article 13

"(1) A person seeking international protection in Malta may apply to the International Protection Agency in the prescribed form for a declaration and shall be interviewed by the International Protection Agency as soon as practicable.

(2) An applicant for international protection shall have access to state education and training in Malta and to receive state medical care and services."

Article 14

"(1) A person shall not be expelled from Malta or returned in any manner whatsoever to the frontiers of territories where the life or freedom of that person would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."

Article 17

"(1) The International Protection Agency shall decide as to whether subsidiary protection status may be granted to an applicant for international protection whose application has been dismissed but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his country of origin, or in the case of a stateless person, to his country of former habitual residence, would face a real risk of suffering serious harm, and the International Protection Agency shall continue to be able to take such a decision in cases where the real risk of suffering serious harm arises even after a decision not to grant subsidiary protection has been taken:

...

Provided also that the decision concerning the granting of subsidiary protection shall be given in conjunction with the formal determination that the applicant does not meet the criteria of a refugee under this Act.

(2) For the purpose of this article, a real risk of suffering serious harm may be based on events which have taken place after the applicant has left his country of origin or activities engaged in by applicant since leaving the country of origin, except when based on circumstances which the applicant has created by his own decision since leaving the country of origin."

27. Regulation 3 of the International Protection Appeals Tribunal (Procedures) Regulations, Subsidiary Legislation 420.01 of the Laws of Malta, reads as follows:

"It shall be the function of the International Protection Appeals Tribunal to hear and determine appeals against a recommendation of the Chief Executive Officer in accordance with articles 5 to 7 of the Act."

28. Regulation 19 of the Procedural Standards for Granting and Withdrawing International Protection Regulations, Subsidiary Legislation 420.07 of the Laws of Malta, reads as follows:

"(1) When considering an application for refugee status, in assessing the fear of persecution, the International Protection Agency shall take account of the following elements:

(a) the concept of race which shall in particular include considerations of colour, descent, or membership of a particular ethnic group;

(b) the concept of religion which shall in particular include the holding of theistic, non-theistic and atheistic beliefs, the participation in or abstention from, formal worship in private or in public, either alone or in community with others, other religious act or expressions of view, or forms of personal or communal conduct based on or mandated by any religious belief;

(c) the concept of nationality which shall not be confined to citizenship or lack thereof but shall in particular include membership of a group determined by its cultural, ethnic, or linguistic identity, common geographical or political origins or its relationship with the population of another State;

(d) a group shall be considered to form a particular social group where in particular:

(i) members of that group share an innate characteristic, or a common background that cannot be changed, or share a characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it; and

(ii) that group has a distinct identity in the relevant country, because it is perceived as being different by the surrounding society; and

(iii) depending on the circumstances in the country of origin, a particular social group might include a group based on a common characteristic or sexual orientation. Sexual orientation cannot be understood to include acts considered to be criminal in Malta. Gender and sex related aspects, including gender identity, gender expression index characteristics, shall be given due consideration for the purposes of determining membership of a particular social group or identifying a characteristic of such a group;

(e) the concept of political opinion which shall in particular include the holding of an opinion, thought or belief on a matter related to the potential actors of persecution which include the State, parties or organizations controlling the State or a substantial part of the territory of the State and non-State actors if it can be demonstrated that the other actors are unable or unwilling to provide protection against persecution or serious harm, and to their policies or methods, whether or not that opinion, thought or belief has been acted upon by the applicant.

(2) When assessing if an applicant has a well-founded fear of being persecuted, it is immaterial whether the applicant actually possesses the racial, religious, national, social or political characteristic which attracts the persecution, provided that such a characteristic is attributed to the applicant by the actor of persecution."

B. The Immigration Act

29. The relevant provisions of the Immigration Act, Chapter 217 of the Laws of Malta, read as follows:

Article 2

""removal order" means an order enforcing the return decision or an order made in relation to the restriction of the free movement of a Union citizen and his family members as provided for in the Free Movement of European Union Nationals and their Family Members Order;

"return decision" means a decision issued by the Principal Immigration Officer, stating or declaring the stay of a third country national to be illegal and imposing or stating an obligation to return."

Article 5

"(1) Any person, other than one having the right of entry, or of entry and residence, or of movement or transit under the preceding Parts, may be refused entry, and if he lands or is in Malta without leave from the Principal Immigration Officer, he shall be a prohibited immigrant.

(2) Notwithstanding that he has landed or is in Malta with the leave of the Principal Immigration Officer or that he was granted a residence permit, a person shall, unless he is exempted under this Act from any of the following conditions or special rules applicable to him under the foregoing provisions of this Act, be a prohibited immigrant also –

(a) if he is unable to show that he has the means of supporting himself and his dependants (if any) or if he or any of his dependants is likely to become a charge on the public funds; ...

(e) if he contravenes any of the provisions of this Act or of any regulations made thereunder; or

(f) if he does not comply or ceases to comply with any of the conditions, including an implied condition, under which he was granted leave to land or to land and remain in Malta or was granted a residence permit; or

(g) if any circumstance which determined the granting of leave to land or to land and remain in Malta or the extension of such leave or the granting of a residence permit ceases to exist; ..."

Article 14

"(1) If any person is considered by the Principal Immigration Officer to be liable to return as a prohibited immigrant under any of the provisions of article 5, the said Officer may issue a return decision against such person who shall have a right to appeal against such decision in accordance with the provisions of article 25A.

(2) If such a return decision is accompanied by a removal order, such person against whom such order is made, may be detained in custody until he is removed from Malta: [...]

(3) Nothing in this article shall affect the obligation of any person who does not fulfil or who no longer fulfils the conditions of entry, residence or free movement to leave Malta voluntarily without delay.

(4) Removal of a person shall be to that person's country of origin or to any other State to which he may be permitted entry, in particular under the relevant provisions of any applicable re-admission agreement concluded by Malta and in accordance with international obligations to which Malta may be party:

Provided that, following the issue of a removal order by the Principal Immigration Officer in accordance with the provisions of this article, to any person considered as a prohibited immigrant under any of the provisions of article 5, if such person files an application for asylum in terms of the International Protection Act, all the effects of the removal order shall be suspended pending the final determination of the asylum application. Following the final rejection of the asylum application, the removal order along with its effects shall again come into force:

Provided that, notwithstanding that the effects of the removal order are suspended pending the final determination of the asylum application, the detention of such person shall continue until a final decision on detention is reached in terms of the regulations issued under the International Protection Act:

Provided further that, whenever a prohibited immigrant has filed an application for asylum, the Principal Immigration Officer shall not be required to issue a return decision or a removal order.

(5) Nothing in this article shall preclude or prejudice the application of Maltese law on the right to asylum and the rights of refugees and of Malta's international obligations in this regard.

...

(8) The Principal Immigration Officer shall not execute any return decision or removal order if appeal proceedings before the Immigration Appeals Board are pending. ..."

Article 17

"Notwithstanding any other law to the contrary, no return decision or removal order shall be obstructed nor shall the implementation of any such return decision or removal order be delayed by means of any warrant issued under the Code of Organization and Civil Procedure:

Provided that this article shall not apply to orders issued by the Constitutional Court."

Article 25A

"(1) (a)There shall be a board, to be known as the Immigration Appeals Board, hereinafter referred to as the Board ...

(c) The Board shall have jurisdiction to hear and determine appeals or applications in virtue of the provisions of this Act or regulations made thereunder or in virtue of any other law. ...

(5) Any person aggrieved by any decision of the competent authority under any regulations made under Part III, or in virtue of article 7, article 14 or article 15 may enter an appeal against such decision and the Board shall have jurisdiction to hear and determine such appeals.

(6) During the course of any proceedings before it, the Board, may, even on a verbal request, grant provisional release to any person who is arrested or detained and is a party to proceedings before it, under such terms and conditions as it may deem fit, and the provisions of Title IV of Part II of Book Second of the Criminal Code shall, mutatis mutandis apply to such request.

(7) Any appeal has to be filed in the Registry of the Board within three working days from the decision subject to appeal:

Provided that the period applicable for the filing of an appeal from the refusal, annulment or revocation of a visa shall be of fifteen days.

(8) The decisions of the Board shall be final except with respect to points of law decided by the Board regarding decisions affecting persons as are mentioned in Part III, from which an appeal shall lie within ten days to the Court of Appeal (Inferior Jurisdiction). The Rule Making Board established under article 29 of the Code of Organization and Civil Procedure may make rules governing any such appeal.

(9) The Board shall also have jurisdiction to hear and determine applications made by persons in custody in virtue only of deportation order or return decision and removal order to be released from custody pending the determination of any application under the International Protection Act or otherwise pending their deportation in accordance with the following subarticle of this article.

(10) The Board shall grant release from custody where the detention of a person is, taking into account all the circumstances of the case, not required or no longer required for the reasons set out in this Act or subsidiary legislation under this Act or under the International Protection Act, or where, in the case of a person detained with a view to being returned, there is no reasonable prospect of return within a reasonable time-frame.

(11) The Board shall not grant such release in the following cases:

(a) when elements on which any claim by applicant under the International Protection Act is based, have to be determined, where the determination thereof cannot be achieved in the absence of detention;

(b) where the release of the applicant could pose a threat to public security or public order.

(12) A person who has been released under the provisions of subarticles (9) to (11) may, where the Principal Immigration Officer is satisfied that there exists a reasonable prospect of deportation or that such person is not co-operating with the Principal Immigration Officer with respect to his repatriation to his country of origin or to another country which has accepted to receive him, and no proceedings under the International

Protection Act are pending, be again taken into custody pending his removal from Malta.

(13) It shall be a condition of any release under subarticles (9) to (12) that the person so released shall periodically (and in no case less often than once every week) report to the immigration authorities at such intervals as the Board may determine."

30. In so far as relevant, the Common Standards and Procedures for Returning Illegally Staying Third-Country Nationals Regulations, Subsidiary Legislation 217.12 of the Laws of Malta, read as follows:

Regulation 3

"(1) Without prejudice to the provisions of sub-regulations (2),(3) and (4), the Principal Immigration Officer shall issue a return decision to any third country national staying illegally in Malta.

...

(8) The Principal Immigration Officer shall provide, upon request, a written or oral translation of the main elements of a return decision and information on the legal remedies in a language the third-country national may reasonably be supposed to understand."

Regulation 6

"(1) The Principal Immigration Officer shall not effect removal where:

(a) it violates the principle of non-refoulement; or

(b) an appeal has been filed with the Board in accordance with the provisions of article 25A(7) of the Act and a decision thereon is pending:

Provided that the Principal Immigration Officer may postpone removal for an appropriate period taking into account the specific circumstances of the case, in particular the third-country national's physical state or mental capacity, or technical reasons.

(2) Where a removal is postponed temporarily in accordance with the provisions of sub-regulations (1)(a) and (b) the Principal Immigration Officer may impose, on the third-country national for the duration of the period for voluntary departure, obligations aimed at avoiding the risk of absconding."

Regulation 12

"(1) The [Immigration Appeals] Board shall have the power to review decisions related to return and the possibility of temporarily suspending their enforcement:

Provided that where the third-country national is informed about the removal an order postponing such removal shall take place.

(2) The Board shall review any removal postponed for an appropriate period in accordance with regulation 6(2)."

II. INTERNATIONAL LAW

United Nations

1. Office of the UN High Commissioner for Human Rights

31. According to the most recent OHCHR assessment of human rights concerns in the Xinjiang Uighur Autonomous Region, People's Republic of China, dated 31 August 2022[1]:

> "139. Over the past few years, credible information has been received about members of the Uighur community living abroad in several countries, having been forcibly returned, or being placed at risk of forcible return to China, in breach of the prohibition under international law of refoulement. The UN human rights mechanisms, including the UN Committee on the Elimination of Racial Discrimination as well as the Special Procedures, have expressed concerns about reports of forcible return of Uighurs to China, and have recalled the human rights and refugee law obligations of both China and third countries in such circumstances ...
>
> ...
>
> "142. ... in light of the overall assessment of the human rights situation in XUAR, countries hosting Uighurs and other Muslim minorities from XUAR should refrain from forcibly returning them, in any circumstance of real risks of breach of the principle of non-refoulement.
>
> ...
>
> "153. OHCHR recommends to the international community that it supports efforts to strengthen the protection and promotion of human rights in the XUAR region in follow-up to these recommendations. States should further refrain from returning members of Uighur and other predominantly Muslim minorities to China who are at risk of refoulement and provide humanitarian assistance, including medical and psycho-social support, to victims in the States in which they are located."

2. UN High Commissioner for Refugees (UNHCR)

32. The Guidelines on International Protection no. 4: "Internal Flight or Relocation Alternative" within the Context of Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees, part of the Handbook on procedures and criteria for determining refugee status and Guidelines on International protection, February 2019, which are intended to provide interpretative legal guidance for, *inter alia*, governments, legal practitioners, decision-makers and the judiciary, reads, in particular, as follows[2]:

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[1] OHCHR, Assessment of human rights concerns in the Xinjiang Uyghur Autonomous Region, People's Republic of China, 31 August 2022, available at https://www.ohchr.org/en/documents/country-reports/ohchr-assessment-human-rights-concerns-xinjiang-uyghur-autonomous-region (last accessed January 2025).

[2] The complete text of The Guidelines on International Protection no. 4, pg. 107-114 is accessible at: https://www.unhcr.org/sites/default/files/legacy-pdf/5ddfcdc47.pdf(last accessed January 2025).

"**A. Part of the holistic assessment of refugee status**

...

6. The 1951 Convention does not require or even suggest that the fear of being persecuted need always extend to the whole territory of the refugee's country of origin. The concept of an internal flight or relocation alternative therefore refers to a specific area of the country where there is no risk of a well-founded fear of persecution and where, given the particular circumstances of the case, the individual could reasonably be expected to establish him/herself and live a normal life.

Consequently, if internal flight or relocation is to be considered in the context of refugee status determination, a particular area must be identified and the claimant provided with an adequate opportunity to respond.

7. In the context of the holistic assessment of a claim to refugee status, in which a well-founded fear of persecution for a Convention reason has been established in some localised part of the country of origin, the assessment of whether or not there is a relocation possibility requires two main sets of analyses, undertaken on the basis of answers to the following sets of questions:

I. The Relevance Analysis

a. Is the area of relocation practically, safely, and legally accessible to the individual? If any of these conditions is not met, consideration of an alternative location within the country would not be relevant.

b. Is the agent of persecution the State? National authorities are presumed to act throughout the country. If they are the feared persecutors, there is a presumption in principle that an internal flight or relocation alternative is not available.

c. Is the agent of persecution a non-State agent? Where there is a risk that the non-State actor will persecute the claimant in the proposed area, then the area will not be an internal flight or relocation alternative. This finding will depend on a determination of whether the persecutor is likely to pursue the claimant to the area and whether State protection from the harm feared is available there.

d. Would the claimant be exposed to a risk of being persecuted or other serious harm upon relocation? This would include the original or any new form of persecution or other serious harm in the area of relocation.

II. The Reasonableness Analysis

a. Can the claimant, in the context of the country concerned, lead a relatively normal life without facing undue hardship? If not, it would not be reasonable to expect the person to move there."

III. OTHER MATERIAL

33. A summary overview of the most recent institutional determinations and actions, prepared by the organisation Safeguard Defenders, and adduced by the applicants in the domestic proceedings, reads as follows:

"**a. European Union**

On 22 March 2021, the European Council imposed restrictive measures on eleven individuals and four entities responsible for serious human rights violations and abuses in various countries around the world. The violations targeted include the large-scale arbitrary detentions of, in particular, Uighurs in Xinjiang in China[3].

In its 2021 Human Rights and Democracy in the World (country reports) report of 22 April 2022, the EU states: 'In Xinjiang, the government maintained a large network of political re-education camps, conducted widespread surveillance, and systemic restrictions on the exercise of fundamental freedoms, including freedom of religion or belief, and on people belonging to the Uyghur and other minorities. Forced sterilisation and birth control, separation of families and sexual and gender-based violence were also reported. Reports, based on interviews with people who experienced Chinese policies in Xinjiang and on the analysis of open source information, defined Chinese policies in Xinjiang as 'crimes against humanity'[4]

On 9 June 2022, the European Parliament denounced ongoing crimes against humanity and a serious risk of genocide in its resolution on the human rights situation in Xinjiang, including the Xinjiang police files[5]:

...

F. whereas the Uyghur Tribunal and other credible, independent investigative bodies and research organisations have concluded that China's serious and systemic human rights violations against the Uyghurs and other ethnic Turkic peoples amount to torture, crimes against humanity and genocide; whereas the US Government and legislative bodies in the US, Canada, the UK, the Netherlands, Belgium, France, Lithuania, Czechia and Ireland have made similar determinations;

G. whereas since 2017, various NGOs have repeatedly reported that China has been pursuing the mass detention of Uyghurs, Kazakhs and other predominantly Muslim ethnic groups in Xinjiang;

H. whereas the atrocities against the Uyghurs have to be seen in the context of China's wider repressive and aggressive internal and external policies;

1. Condemns in the strongest possible terms the fact that the Uyghur community in the People's Republic of China has been systematically oppressed by brutal measures, including mass deportation, political indoctrination, family separation, restrictions on religious freedom, cultural destruction and the extensive use of surveillance;

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[3] EU High Representative for Foreign Affairs and Security Policy, *2021 EU Annual Report on Human Rights and Democracy in the World*, 22 April 2022, p. 133, av. at: https://www.eeas.europa.eu/sites/default/files/documents/2021%20Annual%20Report%20on%20Human%20Rights%20and%20Democracy%20in%20the%20World%20-%20Report%20by%20the%20European%20Union%20High%20Representative...pdf (last accessed January 2025).

[4] EU 2021 Human Rights and Democracy in the World (country reports), p. 189, 22 April 2022, av. at: 2021 Human Rights and Democracy in the World (country reports) - EU Neighbours (last accessed January 2025).

[5] European Parliament, European Parliament resolution of 9 June 2022 on the human rights situation in Xinjiang, including the Xinjiang police files, 9 June 2022, av. at: Texts adopted - The human rights situation in Xinjiang, including the Xinjiang police files - Thursday, 9 June 2022 (europa.eu) (last accessed January 2025).

2. States that the credible evidence about birth prevention measures and the separation of Uyghur children from their families amount to crimes against humanity and represent a serious risk of genocide; calls on the Chinese authorities to cease all government-sponsored programmes of forced labour and mass forced sterilisation and to put an immediate end to any measures aimed at preventing births in the Uyghur population, including forced abortions or sanctions for birth control violations;

3. Expresses its serious concerns about the excessive and arbitrary prison sentences handed down as a result of allegations of terrorism or extremism [...]; expresses its concerns over the alleged accusations of the systematic rape, sexual abuse and torture of women in China's re-education camps;

...

b. National Institutions (...)

c. United Nations

On 10 June 2022, twenty-four UN Special Procedures - the largest body of independent experts in the UN Human Rights system – reiterated: 'Since 2017, we have repeatedly raised concerns about widespread violations of the rights of Uyghurs and other Muslim minorities in the Xinjiang Uyghur Autonomous Region (XUAR) on the basis of religion or belief and under the pretext of national security and preventing extremism. Several reports submitted to the Human Rights Council by Special Rapporteurs also have repeatedly raised these and related issues.'[6]

On 19 July 2022, the UN Special Rapporteur on contemporary forms of slavery, including its causes and consequences, Tomoya Obokata, issued his report to the UN General Assembly on Contemporary forms of slavery affecting persons belonging to ethnic, religious and linguistic minority communities[7], stating:

...

23. Based on an independent assessment of available information, including submissions by stakeholders, independent academic research, open sources, testimonies of victims, consultations with stakeholders, and accounts provided by the Government, the Special Rapporteur regards it as reasonable to conclude that forced labour among Uighur, Kazakh and other ethnic minorities in sectors such as agriculture and manufacturing has been occurring in the Xinjiang Uighur Autonomous Region of China. Two distinct State mandated systems exist: (a) the vocational skills education and training centre system, under which minorities are detained and subjected to work placements; and (b) the poverty alleviation through labour transfer system, where surplus rural labourers are transferred into secondary or tertiary sector work. ...

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[6] United Nations Office of the High Commissioner for Human Rights, China must address grave human rights concerns and enable credible international investigation: UN experts, 10 June 2022, av. at:
China must address grave human rights concerns and enable credible international investigation: UN experts | OHCHR (last accessed January 2025).

[7] United Nations General Assembly, [Contemporary forms of slavery affecting persons belonging to ethnic, religious and linguistic minority communities], *Report of the Special Rapporteur on contemporary forms of slavery, including its causes and consequences, Tomoya Obokata*, 19 July 2022, pp. 7-8, av. at:
https://documents.un.org/doc/undoc/gen/g22/408/97/pdf/g2240897.pdf?token=l0gKEYftUd2B6ADsqK&fe=true
(last accessed May 2024).

24. While these programmes may create employment opportunities for minorities and enhance their incomes, as claimed by the Government, the Special Rapporteur considers that indicators of forced labour pointing to the involuntary nature of work rendered by affected communities have been present in many cases. Further, given the nature and extent of powers exercised over affected workers during forced labour, including excessive surveillance, abusive living and working conditions, restriction of movement through internment, threats, physical and/or sexual violence and other inhuman or degrading treatment, some instances may amount to enslavement as a crime against humanity. ...

d. Other

On 9 December 2021, following extensive hearings and documentation, the independent Uyghur Tribunal[8] headed by Sir Geoffrey Nice – part of the International Criminal Tribunal for the Former Yugoslavia and lead prosecutor at Slobodan Milošević's trial - delivered its judgement at Church House Westminster. In the judgment of the Uyghur Tribunal[9]:

...

'180. Torture of Uyghurs attributable to the PRC is established beyond reasonable doubt.

181. Crimes against humanity attributable to the PRC is established beyond reasonable doubt by acts of: deportation or forcible transfer; imprisonment or other severe deprivation of physical liberty; torture; rape and other sexual violence; enforced sterilisation; persecution; enforced disappearance; and other inhumane acts.

190. Accordingly, on the basis of evidence heard in public, the Tribunal is satisfied beyond reasonable doubt that the PRC, by the imposition of measures to prevent births intended to destroy a significant part of the Uyghurs in Xinjiang as such, has committed genocide.'"

34. A recapitulation of other relevant material is set out in *M.A. and Others v. Bulgaria* (cited above, §§ 46-54). In particular, from the latter it appears that, according to the US Department of State 2017 Country Reports on Terrorism, issued in September 2018:

"Egyptian authorities arrested and deported at least 34 Chinese-nationality Uighurs in July, reportedly following a Chinese government order that Uighur students in Egypt return to China. Those Uighurs who returned were reportedly sent to re-education camps, where at least two have died."

35. According to Amnesty International's Annual Report 2017-18 (see ibid., § 54):

"In May, there were media reports that the Chinese authorities in the XUAR had initiated a policy to compel all Uighurs studying abroad to return to China. Six Uighurs who had studied in Turkey but had returned to the XUAR were given prison sentences ranging from 5 to 12 years on undefined charges. In April, Chinese authorities detained relatives of several students in Egypt to coerce them to return home by May. Reports

[8] The Tribunal was tasked with considering whether crimes had been committed against Uyghurs, Kazakhs and other Turkic Muslim minorities in Xinjiang.

[9] Uyghur Tribunal, Judgment, 9 December 2021, pp. 56-57, av. at: https://uyghurtribunal.com/wp-content/uploads/2021/12/Uyghur-Tribunal-Summary-Judgment-9th-Dec-21.pdf. (last accessed January 2025).

were received that some who returned were tortured and imprisoned. In July, the Egyptian authorities began a massive round-up of hundreds of Chinese nationals in Egypt, mainly Uighurs. Of these, at least 22 Uighurs were forcibly returned to China.

Buzainafu Abudourexiti, a Uighur woman who returned to China in 2015 after studying for two years in Egypt, was detained in March and sentenced in June to seven years' imprisonment after a secret trial."

36. In August 2018 the UN Committee on the Elimination of Racial Discrimination, also expressed concern as to the fate of Uighur students, refugees and asylum-seekers involuntarily returned to China, and urged the Chinese government to disclose those people's location and status (see ibid., §§ 55-56).

THE LAW

I. ALLEGED VIOLATION OF ARTICLES 2 AND 3 OF THE CONVENTION ALONE AND IN CONJUNCTION WITH ARTICLE 13

37. The applicants complained that they would be at risk of treatment contrary to Articles 2 and 3 of the Convention if returned to China. In this connection they noted that they had sufficiently substantiated their claim, including that they were members of a group systemically exposed to ill-treatment, which the authorities had failed to properly assess contrary to Articles 2 and 3 alone and in conjunction with Article 13 of the Convention. These Articles read as follows:

Article 2

"1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

2. Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:

(a) in defence of any person from unlawful violence;

(b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;

(c) in action lawfully taken for the purpose of quelling a riot or insurrection."

Article 3

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

Article 13

"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

1. The parties' submissions

38. The Government submitted that the complaints were inadmissible for non-exhaustion of domestic remedies. Firstly, the applicants had not complained, in substance, before the constitutional jurisdictions that the decision-making process before the IAB was such as to deprive them of their right to an effective remedy as safeguarded by Article 13. Secondly, in respect of the complaint under Articles 2 and 3, the Government were of the view that the remedy against their removal which they should have pursued was a subsequent asylum application to be lodged with (nowadays) the International Protection Agency ('IPA') and a possible appeal to the International Protection Appeals Tribunal ('IPAT'). The Government denied that the applicants would certainly be detained during this process, as detention only ensued where no other alternatives were possible.

39. The Government further submitted that the asylum proceedings which were undertaken in 2016 could not be subject to the Court's assessment as they had come to an end more than four/six months before the application was lodged with the Court.

40. The applicants submitted that the constitutional jurisdictions would not have been an effective remedy for their complaint under Article 13 in conjunction with Articles 2 and 3 of the Convention, in so far as those proceedings could never be an effective remedy for their substantive complaints, both because they were not speedy and because they had no suspensive effect. As to their complaints under Articles 2 and 3, relying on their submissions on the merits, they considered that they should not have to retry a remedy which they had already pursued and had been ineffective. Moreover, under domestic law (see Article 7A of the International Protection Act, at paragraph 26 above) the submission of a further application was allowed when an individual was able to present "new elements or findings, relating to the examination of whether the person making the subsequent application qualifies as a beneficiary of international protection, and of which the applicant could not have been aware or which he could not have submitted" previously, a criterion interpreted very strictly at a preliminary stage of the application. Such applications usually took more than six months to be decided and were regularly dismissed as inadmissible, despite new evidence being submitted (according to statistics collected by Aditus Foundation, representing the applicants in this case), and any appeal before the IPAT against a decision finding a claim manifestly ill-founded would be

processed via an accelerated procedure with which this Court had already taken issue. Moreover, as per usual practice the applicants would have been detained during such period. Lastly, they noted that subsequent applications under Article 7A of the International Protection Act were available *ad eternum* as long as there was new evidence to present. Thus, the applicants underlined that, should the Court uphold the Government's objection, it would be running the risk of rendering the Court and its human rights protection effectively inaccessible for asylum-seekers.

2. The Court's assessment

(a) Applicability of the invoked provisions

41. The Government did not challenge the applicability of the invoked provisions. The Court reiterates that Article 13 requires the provision of a domestic remedy to deal with the substance of an "arguable complaint" under the Convention and to grant appropriate relief (see, among many other authorities, *M.S.S. v. Belgium and Greece* [GC], no. 30696/09, §§ 288-89, ECHR 2011, and *Gebremedhin [Gaberamadhien] v. France*, no. 25389/05, § 53, ECHR 2007-II). In order to determine whether Article 13 applies to the present case, the Court must ascertain whether the applicants can arguably assert that their removal to China would infringe Article 2 or Article 3 of the Convention. It notes that, when lodging their application the applicants produced, in support of their fears, copious COI, as well as plausible accounts of their individual situations. Indeed, the applicants' nationality, religion or ethnicity, as well as the fact that they left China to study in Malta and their rejected asylum seeker status, has not been put into doubt. In consequence and in the light of the COI provided particularly on these matters the Court considers that the applicants can arguably claim that they belong to a category of persons exposed to reprisals at the hands of the Chinese authorities and therefore have an arguable claim, at least for the purposes of Article 3 of the Convention.

42. In that light, the Court being the master of the characterisation to be given in law to the facts of a case (see *Radomilja and Others v. Croatia* [GC], nos. 37685/10 and 22768/12, §§ 114 and 126, ECHR 2018) deems that the complaint falls to be considered under Article 3 of the Convention alone and in conjunction with Article 13.

(b) Exhaustion of domestic remedies

43. The Court reiterates that, pursuant to Article 35 § 1 of the Convention, it can only deal with a matter after all domestic remedies have been exhausted. The purpose of this rule is to afford the Contracting States the opportunity of preventing or putting right the violations alleged against them before those allegations are submitted to the Court. Thus, the complaint submitted to the Court must first have been made to the appropriate national

courts, at least in substance, in accordance with the formal requirements of domestic law and within the prescribed time-limits. The rule of exhaustion of domestic remedies requires an applicant to have normal recourse to remedies within the national legal system which are available and sufficient to afford redress in respect of the breaches alleged (see, amongst many authorities, *Micallef v. Malta* [GC], no. 17056/06, § 55, ECHR 2009). The existence of these remedies must be sufficiently certain not only in theory but also in practice, failing which they will lack the requisite accessibility and effectiveness. To be effective, a remedy must be capable of directly redressing the impugned state of affairs and must offer reasonable prospects of success (see *Communauté genevoise d'action syndicale (CGAS) v. Switzerland* [GC], no. 21881/20, § 139, 27 November 2023).

44. As to the Government's claim that the applicants had not made use of available remedies regarding their complaint that their right under Article 13 of the Convention had been violated, the Court notes that it has already examined such an objection, in precisely the same context, and considered, *inter alia*, that any separate domestic remedies for Article 13 complaints would not necessarily be effective for the arguable claim under the provision of the Convention with which Article 13 is invoked. Applicants would thus be forced to exhaust domestic remedies that did not provide an effective remedy for their main claim. The Court considered that that would be against the object and purpose of Article 13, which is to guarantee the provision of an effective remedy for arguable claims of breaches of the substantive provisions of the Convention. It thus found that the remedies that need to be exhausted under Article 35 § 1 of the Convention relate to the substantive provision in conjunction with which Article 13 of the Convention is being invoked. Accordingly, it did not share the opinion of the Government that Article 35 § 1 of the Convention requires applicants alleging a violation of Article 13 of the Convention to exhaust any separate domestic remedies pertaining to that claim and thus dismissed this objection (see *Diallo v. the Czech Republic*, no. 20493/07, §§ 49-58, 23 June 2011, and *J.B. and Others v. Malta*, no. 1766/23, § 61, 22 October 2024). There is no reason to hold otherwise in the present case. The Government's objection in this respect is therefore dismissed.

45. In so far as the Government considered that the domestic remedies in respect of the complaint under Article 3 of the Convention had not been exhausted because the applicants had not lodged a subsequent asylum application and if necessary, an appeal against that decision, the Court observes that the applicants have already lodged an asylum application and, subsequently, an appeal, which were both rejected. They further unsuccessfully challenged their removal on substantive grounds. It is precisely those proceedings which are at the basis of the applicants' procedural complaints. Given the close connection between the Government's argument as to the exhaustion of domestic remedies and the

substance of the applicants' complaint, the Court considers it necessary to join this objection to the merits (see, *mutatis mutandis*, *Kurt v. Austria* [GC], no. 62903/15, § 109, 15 June 2021, and *A.M. v. the Netherlands*, no. 29094/09, § 58, 5 July 2016).

(c) Four/six months

46. The Court reiterates that, while the date of the final domestic decision providing an effective remedy is normally the starting-point for the calculation of the six-month (now four-month) time-limit under Article 35 § 1 of the Convention, the responsibility of a sending State under Articles 2 or 3 of the Convention is, as a rule, incurred only when steps are taken to remove the individual from its territory. The date of the State's responsibility under Articles 2 or 3 corresponds to the date when that time-limit starts to run for the applicant. Consequently, if a decision ordering a removal has not been enforced and the individual remains on the territory of the State wishing to remove him or her, the time-limit has not yet started to run (see *J.A. and A.A. v. Türkiye*, no. 80206/17, § 41, 6 February 2024 and the case-law cited therein). Since the applicants in the present case have not yet been deported, the time-limit has not yet started to run and their complaints have been lodged in time.

47. The Government's objection is therefore dismissed.

(d) Conclusion

48. The Court notes that these complaints are neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. They must therefore be declared admissible.

B. Merits

1. The parties' submissions

(a) The applicants

49. The applicants submitted that they are facing a real risk of being subjected to treatment contrary to Article 3 of the Convention if they were returned to China on account of their ethnicity and religion. The risk was further compounded by evidence submitted by the applicants of reprisals against their family members in China with regard to their case (see paragraph 19 above). In reply to the Government's observations, they noted that the fact that they had not applied for refugee status in Italy was irrelevant, as international refugee law did not require refugees to seek refuge in a particular State. It was within the European Union that such a requirement had been created through the Dublin Regulation. Had Malta deemed the applicants' passage through Italy relevant to their handling of the situation, the relevant procedures under the Dublin Regulation could have been

triggered, which was not the case. They further noted that domestic law did not provide for a time-limit to lodge an application for international protection, thus the fact that they had applied for protection a few days before their visa expired was also irrelevant. On the substance, they referred to the domestic decisions whose outcome they challenged and recalled the evidence they had submitted during the domestic proceedings.

50. In particular, the applicants had provided the IAB with personal statements, photos which had been taken upon the request of the Chinese Government and chats between the first applicant and his family in China, which had clearly shown the use of irregular methods by Chinese authorities to obtain their return to China. The applicants had also submitted a copy of a letter and a report drafted by the organisation Safeguard Defenders (see paragraph 33 above) which highlighted the overall critical situation of human rights in the People's Republic of China and the ongoing human rights violations against Uighurs in XUAR and throughout China, with determinations condemning genocide, crimes against humanity, forced labour and forced-labour transfers. This report also provided an overview of the principle of *non-refoulement* and a risk assessment produced by the organisation confirming that the expulsion or removal from Maltese territory would constitute a clear breach of Malta's obligations under international customary law, the European Convention of Human Rights, the UN Convention against Torture and the UN Convention on the Protection of Refugees.

51. Furthermore, the applicants submitted that the Maltese authorities did not provide them with an effective remedy whereby they could raise the complaint under Article 3 and therefore also in breach of Article 13 of the Convention. In respect of their asylum process, they considered that shortcomings both at first instance and on appeal had led to the rejection of their claim. Indeed, the RC had completely disregarded that a well-founded fear of persecution, as defined by the 1951 Geneva Convention, was future-oriented in its nature, and that past persecutions were only indications of the applicants' well-founded fear of persecution or real risk of suffering serious harm. On appeal, the RAB totally disregarded the COI which had been put forward by the applicants. It considered that the discrimination suffered was not serious enough and failed to undertake an individualised assessment in relation to the internal flight alternative, in line with UNHCR guidelines (see paragraph 32 above).

52. Five years after their failed asylum procedure, when faced with risk of removal, the applicants lodged proceedings before the IAB which, as admitted by the Government, could decide on the legality of the return decision and removal order should there be a risk of *refoulment*. However, notwithstanding the evidence provided to the IAB, which had clearly shown that the applicants' return to China would be in breach of the principle of *non-refoulment*, the IAB had proceeded to merely confirm a five-year-old

decision without reviewing the evidence presented before it. In that way the IAB had failed to conduct a full and *ex nunc* assessment of their situation as required by the Court's case-law. They further noted the Government's inconsistency in considering the IAB a "mere" remedy against the removal order, while at the same time acknowledging its competence to assess the grounds for the return decision.

53. In conclusion, the applicants submitted that the national authorities had failed to carry out an assessment of the risk of ill-treatment upon return despite being aware of facts suggesting that such risk existed and therefore had acted in breach of Article 3 of the Convention.

(b) The Government

54. The Government submitted that despite having landed in Italy, where they could have requested to be recognised as refugees or to be granted subsidiary protection status, the applicants had continued in their journey towards Malta. Moreover, they had asked for recognition as refugees a mere few days before their visa expired, which could only shed doubt on their need for international protection.

55. As to the asylum procedure undertaken in 2016, the Government submitted that, while the formal decision itself was not very long, it had been attached to a report which dissected and examined in minute detail every claim made by the applicants during their interviews. At first instance each claim was assessed, firstly, against the applicants' own statements and the evidence brought forward, and secondly, against pertinent COI and other international material. In so far as the applicants challenged the Internal Flight or Relocation Alternative, the Government submitted that the RC could not in 2016 apply guidelines published in 2019. The RAB, on appeal, reconsidered the claims made by the applicants against all the information that had been submitted, international material, the personal interview transcript, and the submissions of both parties. It, however, found that the applicants had not proved the risk of persecution which they claimed, and thus rejected the appeal. The Government reiterated their arguments about the availability of the subsequent application for asylum, which the applicants had failed to use and instead had merely appealed to the IAB against the removal order and return decision issued against them (see paragraph 38 above).

56. As to the IAB, the Government submitted that under Article 14 of the Immigration Act (see paragraph 29 above), the PIO's decision to issue a return decision and removal order may be appealed before the IAB, a remedy having suspensive effect. However, according to the Government the IAB "could not delve into the issue of whether or not their removal would constitute *refoulment*, as such". Although the IAB has the power to revoke a return decision and removal order, it could only do so on the grounds that the return decision was issued in a manner inconsistent with the Immigration Act,

which in their view concerned the "legality" of the decision. In the present case, the issue of *refoulement*, and whether or not the applicants would face persecution if returned to China, had already been assessed by the RC and the RAB, albeit six years earlier. Due to that time lapse the IAB requested the applicants to further substantiate their allegations, however, it was not for the IAB to assess for itself whether the applicants were worthy of international protection, but only to assess whether there was new evidence, which could render the return decision illegal. If the IAB had found that the PIO issued the return decision contrary to the provisions of the Immigration Act, then the IAB would have struck down the return decision. However, even had the removal order been annulled, without lodging a new application for asylum with the asylum authorities (currently the IPA and the IPAT, respectively), the applicants would have had to remain in Malta irregularly, undocumented and without any rights.

57. Thus, the Government insisted that the applicants had had a remedy for the purposes of Article 3 of the Convention, namely a subsequent application for asylum. In the latter procedure they could have brought all the evidence which they considered necessary to substantiate their claim, had they considered that the situation had changed since 2016. That was the only remedy capable of giving the applicants international protection. In so far as the applicants had considered that this procedure would be futile, they had relied on statistics collected and published by their own representatives (Aditus Foundation), and not by official Government statistics or international institutions.

58. In the Government's view, a remedy did exist, but the applicants failed to undertake it, and it was not for the authorities themselves to decide, without the applicants' cooperation, on the applicants' need for international protection.

2. The Court's assessment

(a) General principles

59. The Contracting States have the right, as a matter of well-established international law and subject to their treaty obligations, including the Convention, to control the entry, residence and expulsion of aliens (see, for example, *Hirsi Jamaa and Others v. Italy* [GC], no. 27765/09, § 113, ECHR 2012, and *Üner v. the Netherlands* [GC], no. 46410/99, § 54, ECHR 2006-XII). However, the removal of an alien by a Contracting State may give rise to an issue under Article 3, and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person in question would face a real risk of being subjected to treatment contrary to Article 3 in the destination country; in these circumstances, Article 3 implies an obligation not to remove the person in question to that country (see, among other authorities, *Saadi v. Italy* [GC],

no. 37201/06, §§ 124-25, ECHR 2008, and *Khasanov and Rakhmanov v. Russia* [GC], nos. 28492/15 and 49975/15, § 93, 29 April 2022).

60. The Court has on many occasions acknowledged the importance of the principle of *non-refoulement* (see, for example, *M.S.S. v. Belgium and Greece*, cited above, § 286, and *M.A. v. Cyprus*, no. 41872/10, § 133, ECHR 2013 (extracts)) and the related general principles under Article 3 were summarised by the Court in *J.K. and Others v. Sweden* ([GC], no. 59166/12, §§ 77-105, 23 August 2016), *F.G. v. Sweden* ([GC], no. 43611/11, §§ 110-27, 23 March 2016) and, more recently, in *Khasanov and Rakhmanov* (cited above, §§ 95-116).

61. In particular, the risk assessment must focus on the foreseeable consequences of the applicant's removal to the country of destination, in the light of the general situation there and of his or her personal circumstances. It must be considered whether, having regard to all the circumstances of the case, substantial grounds have been shown for believing that the person concerned, if returned, would face a real risk of being subjected to treatment contrary to Article 3 of the Convention. If the existence of such a risk is established, the applicant's removal would necessarily breach Article 3, regardless of whether the risk emanates from a general situation of violence, a personal characteristic of the applicant, or a combination of the two (see *F.G. v. Sweden*, § 116, and *Khasanov and Rakhmanov*, § 95, both cited above).

62. The domestic authorities are obliged to take into account not only the evidence submitted by the applicant but also all other facts which are relevant in the case under examination (ibid., § 113, and *J.K. and Others v. Sweden*, cited above, § 87). As regards the distribution of the burden of proof, the Court clarified in *J.K. and Others v. Sweden* (cited above, §§ 91-98) that it was the shared duty of an asylum-seeker and the immigration authorities to ascertain and evaluate all relevant facts in asylum proceedings (see also *A.M.A. v. the Netherlands*, no. 23048/19, § 68, 24 October 2023).

63. Whether examined under Article 3 or Article 13 in conjunction with the latter, the Court's main concern in cases concerning the expulsion of asylum-seekers is "whether effective guarantees exist that protect the applicant against arbitrary *refoulement*, be it direct or indirect, to the country from which he or she has fled" (see, for example, *M.S.S. v. Belgium and Greece*, cited above, § 286, and *J.K. and Others*, cited above, § 78).

64. Indeed, the Court has found that States have a procedural obligation under Article 3 of the Convention to assess the risk of treatment contrary to that provision before removing an applicant (see, for example, *Ilias and Ahmed v. Hungary* [GC], no. 47287/15, § 163, 21 November 2019, and *Shenturk and Others v. Azerbaijan,* nos. 41326/17 and 3 others, § 116, 10 April 2022) and the assessment of whether there are substantial grounds for believing that the applicant faces a real risk of being subjected to treatment in breach of Article 3 must necessarily be a rigorous one (ibid., § 127, and

F.G. v. Sweden, cited above, § 113). Similarly, the Court has held that the effectiveness of a remedy within the meaning of Article 13 imperatively requires independent and rigorous scrutiny of any claim that there exist substantial grounds for fearing a real risk of treatment contrary to Article 3, as well as a particularly prompt response; it also requires that the person concerned should have access to a remedy with automatic suspensive effect (see, *inter alia*, *M.S.S. v. Belgium and Greece*, cited above, § 293, and *S.H. v. Malta*, cited above, § 79).

(b) Application of the above general principles to the present case

65. In cases concerning expulsion the main issue before the Court is whether the domestic authorities' risk assessment prior to the applicants' removal, had met the procedural standards required under Article 3 of the Convention (compare, *A.M.A. v. the Netherlands*, cited above, § 70, where the Court focused on the "last-minute" proceedings, and not the first asylum decision and subsequent judicial review). Its main concern is whether effective guarantees exist that protect the applicant against arbitrary *refoulement*, be it direct or indirect, to the country from which he or she has fled (see *S.H. v. Malta*, cited above, § 100).

66. For the purposes of its own examination of such complaints, the Court has previously held that since the nature of the Contracting States' responsibility under Article 3 in cases of this kind lies in the act of exposing an individual to the risk of ill-treatment, the existence of the risk must be assessed primarily with reference to those facts which were known or ought to have been known by the Contracting State at the time of the expulsion (see *F.G. v. Sweden*, cited above, § 115, and *Khasanov and Rakhmanov*, cited above, § 106). This proviso demonstrates that the primary purpose of the *ex nunc* principle is to serve as a safeguard in cases where a significant amount of time has passed between the adoption of the domestic decision and the consideration of the applicants' Article 3 complaint by the Court, and therefore where the situation in the receiving State might have developed, that is to say, deteriorated or improved (ibid.).

67. The Court considers that the same principle applies at the domestic level, in the context of a removal remedy which is undertaken a considerable time after the asylum assessment. Accordingly, the relevant point in time was 2022 when the applicants challenged the removal order that had been issued against them. As to the asylum proceedings undertaken in 2016, the Court considers that given the passage of time between the decisions issued in 2017 and the date of the applicants' expected removal (2022), those proceedings are less relevant to the assessment of the present case. Even assuming that at the time those procedures and the consequent decisions had conformed to the Convention standards, given the passage of time and the worsening situation in XUAR as documented by various international bodies (see paragraph 33 above), it was at the time of the applicants' expected removal that they should

have had an available effective remedy. In any event, and bearing in mind the shortcomings referred to by the applicants (see paragraph 51 above), the Court considers it relevant to reiterate that while past persecution or mistreatment would weigh heavily in favour of a positive assessment of risk of future persecution, its absence is not a decisive factor (see *T.K. and Others v. Lithuania*, no. 55978/20, § 81, 22 March 2022; see also *A.S.N. and Others v. the Netherlands*, nos. 68377/17 and 530/18, § 119, 25 February 2020, and the cases cited therein). The Court also reiterates that Article 3 does not, as such, preclude Contracting States from placing reliance on the existence of an internal flight alternative in their assessment of an individual's claim that a return to his country of origin would expose him to a real risk of being subjected to treatment proscribed by that provision (see *Salah Sheekh v. the Netherlands*, no. 1948/04, § 141, 11 January 2007; *Chahal v. the United Kingdom*, 15 November 1996, § 98, *Reports* 1996-V; and *Hilal v. the United Kingdom*, no. 45276/99, §§ 67-68, ECHR 2001-II). However, the Court has held that reliance on an internal flight alternative does not affect the responsibility of the expelling Contracting State to ensure that the applicant is not, as a result of its decision to expel, exposed to treatment contrary to Article 3 of the Convention (see *Salah Sheekh*, cited above, § 141, and *J.K. and Others*, cited above, § 82). Therefore, as a precondition of relying on an internal flight alternative, certain guarantees have to be in place: the person to be expelled must be able to travel to the area concerned, gain admittance and settle there, failing which an issue under Article 3 may arise, the more so if in the absence of such guarantees there is a possibility of his ending up in a part of the country of origin where he may be subjected to ill-treatment (see *Salah Sheekh*, cited above, § 141, and *Sufi and Elmi v. the United Kingdom*, nos. 8319/07 and 11449/07, § 266, 28 June 2011).

68. As to the proceedings undertaken in 2022 before the IAB the Court notes *a priori* the confusion at the domestic level as to the role of the IAB (see also to this effect *S. H. v. Malta*, cited above, § 97). In the present case the Government considered that the role of the IAB was not to assess any risks related to *refoulement*, but solely the legality of the removal order, namely whether it was issued in a manner consistent with the Immigration Act. The Court considers this argument to be incongruous. In this connection it observes that, the law provides for an appeal to anyone aggrieved by a return decision and removal order and does not limit the grounds for appeal (see Articles 14 (1) and (2) and 25A (5) of the Immigration Act, at paragraph 29 above). Regulation 12(2) of S.L 217.12 "Common Standards and Procedures for returning Illegally Staying Third-Country Nationals Regulations", which transposes the Return Directive into the national law, also establishes no limits to the review of the removal order (see paragraph 30 above). Importantly, its Regulation 6 specifically provides that the PIO shall not affect removal where it violates the principle of *non-refoulement.* It follows that the latter is intrinsic to the legality of a removal order and

therefore such an assessment falls squarely within the IAB's competence as envisaged by domestic law. Indeed, the IAB itself considered that it had the competence to examine the matter and requested the applicants to further substantiate that complaint (see paragraph 22 above).

69. Accordingly, irrespective of any other asylum procedures which had been undertaken or could be undertaken in future if the applicants seek to remain legally in Malta, the IAB's function at that stage was to rigorously assess the risk of treatment contrary to Article 3 that the applicants would face if returned to China, before confirming the return decision and removal order. For that body to be an effective remedy it could not be a mere rubber stamp of any prior asylum decision. This is even more so where there has been a substantial lapse of time between the rejection of the asylum application and the date of the removal order and its subsequent challenge.

70. Nevertheless, as is evident from the IAB's brief decision (see paragraph 22 above), it merely relied on an assessment undertaken six years earlier. Thus, while accepting that it had competence to examine the matter, it nonetheless refrained from doing so, in line with what appears to be its usual practice (see *S.H. v. Malta*, cited above, § 27, and the Government's observations in that case to the effect that the IAB had no power to review the decisions of the asylum authorities, § 75). That decision is final in terms of domestic law, although its effects may be suspended pending the processing of an asylum application (see Articles 14 and 25A (8) of the Immigration Act, at paragraph 29 above).

71. In these circumstances, the Court considers that the respondent State has not satisfied its procedural obligation under Article 3 of the Convention to assess the risk of treatment contrary to that provision before confirming the removal of the applicants – which was suspended solely on the force of the interim measure issued by this Court under Rule 39 of its Rules (see paragraph 24 above). In light of the material presented before the Court and of the material previously submitted by the applicants before the national authorities, the Court concludes that the applicants have sufficiently shown that their claim under Article 3 on the basis of their nationality, religion or ethnicity, as well as the fact that they left China to study in Malta warranted an assessment by the national authorities in line with the situation as it stood just prior to their expected removal. It was and remains for the domestic authorities to take this material into account, as well as any further development regarding the general situation in XUAR and the particular circumstances related to the applicants' situation just prior to their removal, including in the light of any specific relocation alternatives. Such an assessment is required irrespective of whether the applicants decide to legalise their status in Malta via a subsequent asylum application. Indeed, neither the Convention nor its Protocols protect, as such, the right to asylum. The protection they afford is confined to the rights enshrined therein, including particularly the rights under Article 3. That provision prohibits the

return of any alien who is within the jurisdiction of one of the Contracting States for the purposes of Article 1 of the Convention to a State in which he or she faces a real risk of being subjected to inhuman or degrading treatment or even torture. In that respect, it embraces the prohibition of *refoulement* under the Geneva Convention (see *N.D. and N.T. v. Spain* [GC], nos. 8675/15 and 8697/15, § 188, 13 February 2020).

72. Thus, the Court finds that there would be a violation of Article 3 if the applicants were to be removed to China without an *ex nunc* rigorous assessment of the risk they would face on their return to XUAR as Uighur Muslims rejected asylum seekers (see, for a similar approach, *F.G. v. Sweden*, cited above, § 158, *S.H. v. Malta*, cited above, § 102, *T.K. and Others v. Lithuania*, cited above, § 90, and *M.A.M. v. Switzerland*, no. 29836/20, § 80, 26 April 2022).

73. Having regard to the reasoning which has led it to conclude that Article 3 of the Convention in its procedural aspect was breached in the present case, the Court finds nothing that would justify a separate examination of the same facts from the standpoint of Article 13 of the Convention. It therefore deems it unnecessary to rule separately on the merits of that provision (see, *mutatis mutandis*, *Amerkhanov v. Turkey*, no. 16026/12, § 59, 5 June 2018, and *A.M.A. v. the Netherlands*, cited above, § 83).

74. Bearing in mind its considerations set out at paragraph 68 above the Court considers that the applicants had undertaken the relevant remedy available to them under domestic law at that point in time. The Government's objection of non-exhaustion of domestic remedies relating to the possibility of lodging a subsequent asylum application, even assuming the latter fulfilled all the procedural requirements and had any prospects of success (see, for example, *a contrario*, *S.H. v. Malta*, cited above, § 94), is therefore dismissed.

II. RULE 39 OF THE RULES OF COURT

75. The Court reiterates that, in accordance with Article 44 § 2 of the Convention, the present judgment will not become final until (a) the parties declare that they will not request that the case be referred to the Grand Chamber; or (b) three months after the date of the judgment, if referral of the case to the Grand Chamber has not been requested; or (c) the Panel of the Grand Chamber rejects any request to refer under Article 43 of the Convention.

76. It considers that the indication made to the Government under Rule 39 of the Rules of Court (see paragraph 4 above) should remain in force until the present judgment becomes final or until the Court takes a further decision in this connection (see operative part).

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

77. 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."

78. The applicants did not submit a claim for just satisfaction. Accordingly, the Court considers that there is no call to award them any sum on that account.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Decides* to join to the merits the Government's objection of non-exhaustion of domestic remedies and *dismisses* it;

2. *Declares* the application admissible;

3. *Holds* that there would be a violation of Article 3 if the applicants were to be removed to China without an *ex nunc* rigorous assessment of the risk they would face on their return to Xinjiang Uighur Autonomous Region as Uighur Muslims rejected asylum seekers;

4. *Holds* that it is not necessary to examine the complaint under Article 13 in conjunction with Article 3;

5. *Decides* to continue to indicate to the Government under Rule 39 of the Rules of Court that it is desirable in the interests of the proper conduct of the proceedings not to expel the applicants until such time as the present judgment becomes final or until further notice.

Done in English, and notified in writing on 4 February 2025, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Simeon Petrovski	Lado Chanturia
Deputy Registrar	President