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Asylum Information
Database

Country Report: Malta



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This report is up-to-date as of 31 August 2015.

The AIDA project

The AIDA project is jointly coordinated by the European Council on Refugees and Exiles (ECRE), Forum Réfugiés-Cosi, Irish Refugee Council and the Hungarian Helsinki Committee. It aims to provide up-to date information on asylum practice in 16 EU Member States (AT, BE, BG, CY, DE, FR, GR, HR, HU, IE, IT, MT, NL, PL, SE, UK) and 2 non-EU countries (Switzerland, Turkey) which is easily accessible to the media, researchers, advocates, legal practitioners and the general public through the dedicated website www.asylumineurope.org. Furthermore the project seeks to promote the implementation and transposition of EU asylum legislation reflecting the highest possible standards of protection in line with international refugee and human rights law and based on best practice.



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Glossary & List of Abbreviations

AAT	Age Assessment Team
AWAS	Agency for the Welfare of Asylum Seekers
CPT	European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment
DS	Detention Service, Ministry for Home Affairs
DVB	Detainees Visitors Board
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EDAL	European Database of Asylum Law
FAV	Further Age Verification
FSM	Foundation for Shelter and Support to Migrants
IAB	Immigration Appeals Board
IRC	Initial Reception Centre
OHCHR	Office of the United Nations High Commissioner for Human Rights
PHP	Provisional Humanitarian Protection
PQ	Preliminary questionnaire
RAB	Refugee Appeals Board
RefCom	Office of the Refugee Commissioner
THP	Temporary Humanitarian Protection
VAAP	Vulnerable Adult Assessment Procedure

Statistics

Table 1: Applications and granting of protection status at first instance: 2015 (January – August)

	Applicants in 2015	Pending applications in 2015	Refugee status	Subsidiary protection	Humanitarian protection	Rejection ¹	Refugee rate	Subs. Prot. rate	Hum. Prot. rate	Rejection rate
Total	990	366	198	699	38	192	17.5%	62%	3.35%	17%

Breakdown by countries of origin of the total numbers

Libya	607	193	168	527	0	0	24%	76%	0%	0%
Syria	127	71	3	100	0	0	3%	97%	0%	0%
Ukraine	44	31	0	0	18	0	0%	0%	18%	0%
Mali	28	0	0	0	4	25	0%	0%	13.8%	86.2%
Senegal	24	0	0	0	0	27	0%	0%	0%	100%
Ivory Coast	19	3	0	0	3	15	0%	0%	16.5%	83.5%
Somalia	18	10	3	28	2	8	7.3%	68.3%	4.8%	19.6%
Eritrea	12	4	0	23	1	13	0%	62.2%	2.7%	35.1%
Guinea Bissau	12	0	0	0	0	12	0%	0%	0%	100%
Macedonia	11	4	0	0	0	6	0%	0%	0%	100%
Afghanistan ²	0	0	0	0	0	0	-	-	-	-
Kosovo	0	0	0	0	0	0	-	-	-	-

Source: Office of the Refugee Commissioner, September 2015.

Note that as of 30 September 2015, 1,142 applicants have been registered: UNHCR Malta, *Asylum Trends*, available at: <http://bit.ly/1KIRHbb>.

¹ Rejection should include *both* in-merit and admissibility negative decisions (including Dublin decisions).

² The following countries should be included if they are *not* among the top 10 countries of origin.

Table 2: Gender/age breakdown of the total numbers of applicants: 2015 (January-August)

	Number	Percentage
Total number of applicants	990	100%
Men	678	68.5%
Women	139	14%
Children	159	16%
Unaccompanied children	14	1.5%

Source: Office of the Refugee Commissioner, September 2015.

Table 3: Comparison between first instance and appeal decision rates: 2015 (January-August)

The following table excludes humanitarian protection decisions.

	First instance		Appeal	
	Number	Percentage	Number	Percentage
Total number of decisions	1089	100%	237	100%
<i>Positive decisions</i>	897	82.3%	36	15.2%
• <i>Refugee status</i>	198	18.2%	9	3.8%
• <i>Subsidiary protection</i>	699	64.1%	27	11.4%
<i>Negative decisions</i>	192	17.7%	201	84.8%

Source: Office of the Refugee Commissioner and Refugee Appeal Board, September 2015.

Table 4: Applications processed under the accelerated procedure: 2015 (January-August)

	Number	Percentage
Total number of applications	990	100%
Applications treated under accelerated procedure at first instance	0	0%

Source: Office of the Refugee Commissioner, September 2015.

Table 5: Subsequent applications lodged: 2015 (January-August)

	Number	Percentage
Total number of subsequent applications	95	100%
<i>Main countries of origin</i>		
Eritrea	20	21%
Syria	18	19%
Nigeria	16	16.8%
Somalia	10	10.5%
Ethiopia	8	8.4%

Source: Office of the Refugee Commissioner (September 2015)

Table 6: Number of applicants detained per ground of detention: 2013-2015

Data on the number of detentions ordered has not been provided by the police. According to UNHCR, the number of detained applicants as of 31 December 2014 was 30. Between January-May 2015, 376 persons were detained.³

Table 7: Number of applicants detained and subject to alternatives to detention

Measure	2013	2014	2015 (January-May)
Detention	Not available	Not available	376
Alternatives to detention	0	0	0

³ Council of Europe, Secretariat of the Committee of Ministers, *Communication from Malta concerning the Suso Musa group of cases against Malta (Application No 42337/12)*, 2 July 2015, available at: <http://bit.ly/1NPCYnH>.

Overview of the legal framework

Main legislative acts relevant to asylum procedures, reception conditions and detention

Title (EN)	Abbreviation	Web Link
Refugees Act, Chapter 420 <i>Amended by: Act VI of 2015</i> <i>Amended by: Act VII of 2015</i>	Refugees Act	< http://bit.ly/1KuiEsU > (EN) < http://bit.ly/1LQjEov > (EN) < http://bit.ly/1Npu2Vg > (EN)
Immigration Act, Chapter 217	Immigration Act	< http://bit.ly/1ee7pa9 > (EN)
Children and Young Persons (Care Orders) Act, Chapter 285	Care Orders Act	< http://bit.ly/1Npg8Td > (EN)

Main implementing decrees and administrative guidelines and regulations relevant to asylum procedures, reception conditions and detention

Title (EN)	Abbreviation	Web Link
Procedural Standards in Examining Applications for Refugee Status Regulations, Legal Notice 243 of 2005	Procedural Regulations	< http://bit.ly/1KpjAPf > (EN)
Social Security (UN Convention relating to the Status of Refugees) Order, Legal Notice 291 of 2001	Refugees Social Security Regulations	< http://bit.ly/1eUcuVZ > (EN)
Refugees Appeals Board (Procedures) Regulations, Legal Notice 252 of 2001	RAB Regulations	< http://bit.ly/1SwwiYp > (EN)
Board of Visitors for Detained Persons Regulations, Legal Notice 266 of 2007	DVB Regulations	< http://bit.ly/1GURBTA > (EN)
Agency for the Welfare of Asylum-seekers Regulations, Legal Notice 205 of 2009	AWAS Regulations	< http://bit.ly/1GURCHj > (EN)
Asylum Procedures (Application for a Declaration) Regulations, Legal Notice 253 of 2001	Declaration Regulations	< http://bit.ly/1KpiB5V > (EN)
Immigration Appeals Board (Additional Jurisdiction) Regulations, Legal Notice 2 of 2012	IAB Dublin Regulations	< http://bit.ly/1ds1pK9 > (EN)
Refugee Appeals Board (Chambers) Rules, Legal Notice 47 of 2005	RAB Chambers Regulations	< http://bit.ly/1GHgCyh > (EN)
Reception of Asylum-seekers (Minimum Standards) Regulations, Legal Notice 320 of 2005	Reception Regulations	< http://bit.ly/1HpyUcd > (EN)
Common Standards and Procedures for Returning Illegally Staying Third-Country Nationals Regulations, Legal Notice 81 of 2011 <i>Amended by: Common Standards and Procedures for Returning Illegally Staying Third-Country Nationals (Amendment) Regulations, Legal Notice 15 of 2014</i>	Returns Regulations	< http://bit.ly/1GQaxQr > (EN) < http://bit.ly/1NyuzV5 > (EN)
Irregular Immigrants, Refugees & Integration Policy Document (2005)	2005 Policy Document	< http://bit.ly/1GURHuB > (EN)

Overview of the main changes since the previous report update

The report was previously updated in **February 2015**.

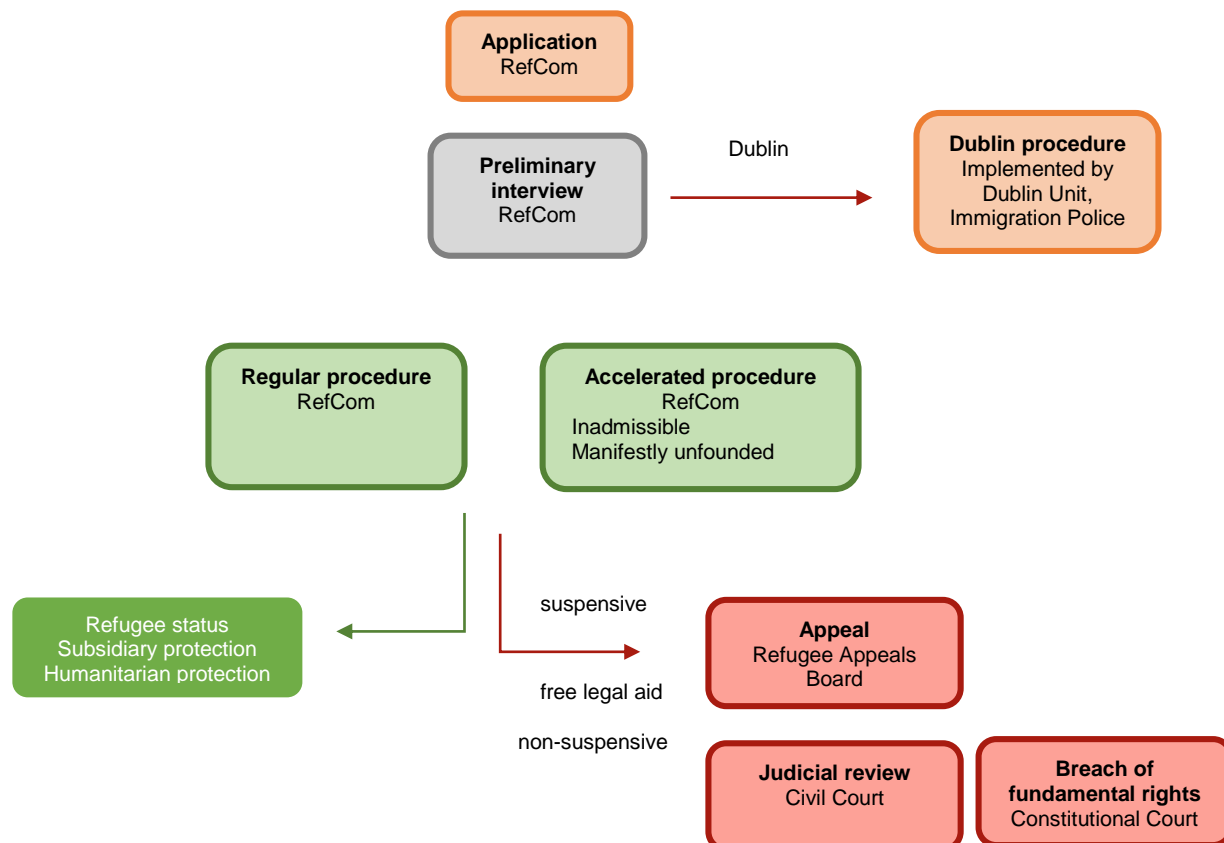
- In December 2014 and March 2015, the Refugees Act and the Procedural Regulations were amended in order to transpose several provisions of the EU's recast Qualification Directive.⁴ The transposition of the remaining provisions of the recast Qualification Directive as well as of the EU recast Directives on Reception Conditions and on Procedures were nearly completed, being discussed in Parliament at the time of writing.
- Following an informal agreement between Italy and Malta, almost all persons rescued at sea in 2015, including persons rescued by the Armed Forces of Malta, and those rescued in Maltese territorial waters or Malta's Search and Rescue Zone, were disembarked in Italy. As a consequence, only 99 persons reached Malta by boat, which constitutes a very unusual situation for the country compared to the past years. The majority of asylum seekers in Malta for 2015 arrived regularly by plane and as a consequence have not been detained.
- Following from 2014, a very high number of Libyan asylum seekers was recorded in the beginning of 2015. For the first eight months of 2015, Libyan applications accounted for more than 60% of the total number of asylum applications in Malta. The vast majority of applicants arrived by plane. The Maltese Office of the Refugee Commissioner (RefCom) initially granted, as a minimum, Temporary Humanitarian Protection (THP) to all applicants who did not qualify for refugee status or subsidiary protection. Following a review of the situation in Libya in January 2015, RefCom came to the conclusion that the armed conflict in Libya was meeting the threshold of Article 15(c) of the recast Qualification Directive. As a consequence, the status of all the beneficiaries of THP was revised and changed to subsidiary protection.

⁴ See aditus foundation & JRS Malta, *Refugees (Amendment) Act, 2014 – Comments on the exercise transposing the EU Recast Qualification Directive*, December 2014, available at <http://bit.ly/1KkpHTt>.

Asylum Procedure

A. General

1. Flow Chart



2. Types of procedures

Indicators: Types of Procedures

Which types of procedures exist in your country?

- | | | |
|---|---|--|
| ❖ Regular procedure: | <input checked="" type="checkbox"/> Yes | <input type="checkbox"/> No |
| ▪ Prioritised examination: ⁵ | <input type="checkbox"/> Yes | <input checked="" type="checkbox"/> No |
| ▪ Fast-track processing: ⁶ | <input type="checkbox"/> Yes | <input checked="" type="checkbox"/> No |
| ❖ Dublin procedure: | <input checked="" type="checkbox"/> Yes | <input type="checkbox"/> No |
| ❖ Admissibility procedure: | <input checked="" type="checkbox"/> Yes | <input type="checkbox"/> No |
| ❖ Border procedure: | <input type="checkbox"/> Yes | <input checked="" type="checkbox"/> No |
| ❖ Accelerated procedure: ⁷ | <input checked="" type="checkbox"/> Yes | <input type="checkbox"/> No |
| ❖ Other: | | |

Are any of the procedures that are foreseen in the law, not being applied in practice? Yes No

3. List of authorities intervening in each stage of the procedure

⁵ For applications likely to be well-founded or made by vulnerable applicants. See Article 31(7) APD.

⁶ Accelerating the processing of specific caseloads as part of the regular procedure.

⁷ Labelled as “accelerated procedure” in national law. See Article 31(8) APD.

Stage of the procedure	Competent authority in EN
Application	Office of the Refugee Commissioner
Dublin (responsibility assessment)	Office of the Refugee Commissioner (designated authority) & Malta Police Force (Dublin Unit) as the implementing agency
Refugee status determination	Office of the Refugee Commissioner
Accelerated procedure	Office of the Refugee Commissioner & Refugee Appeals Board (joint procedure)
Appeal	Refugee Appeals Board
Subsequent application (admissibility)	Office of the Refugee Commissioner

4. Number of staff and nature of the first instance authority

Name in English	Number of staff	Ministry responsible	Is there any political interference possible by the responsible Minister with the decision making in individual cases by the first instance authority?
Office of the Refugee Commissioner	24 caseworkers	Ministry for Home Affairs and National Security	<input checked="" type="checkbox"/> Yes <input type="checkbox"/> No

5. Short overview of the asylum procedure

Applications for international protection are to be lodged with the Refugee Commissioner, as the Office of the Refugee Commissioner (RefCom) is the authority responsible for examining and determining applications for international protection at first instance.⁸ The procedure in place is a single procedure with the examination and determination of eligibility for subsidiary protection being undertaken by the Refugee Commissioner within the context of the same procedure. The Refugee Commissioner is the only entity authorised by law to receive applications for international protection. Should the individual express a need for international protection at the border, this information is passed on to the Refugee Commissioner for the necessary follow-up.

The initial stages of the procedure require the filling in of a form known as the Preliminary Questionnaire (PQ) which asylum seekers are asked to complete following an information session given by RefCom staff members. The PQ is considered to be the registration of the asylum seeker's desire to seek international protection. If, at this stage, an individual provides information that, *prima facie*, renders him or her eligible for a transfer to another EU Member State in terms of the Dublin III Regulation, the examination of the application for protection is suspended pending the outcome of the Dublin procedure. It is pertinent to note that although the Refugee Commissioner is designated as the head of the Dublin Unit, the immigration police are charged with implementing the Dublin procedure in practice.

Following the initial collection of information in the PQ, an appointment is scheduled for an interview with the applicant. Once the applicant is called for the interview, he or she is first asked to fill in an Application Form that contains questions similar to those previously answered in the PQ. The application form is considered to be the official application for international protection. Then the recorded interview takes place and the applicant is informed at the end of the interview that he or she will be notified of the decision in due course.

⁸ Article 4 Refugees Act.

National law specifies a 2-week time period from when an applicant is notified of the decision of the Refugee Commissioner, during which he or she may appeal to the Refugee Appeals Board (RAB). This Board, an administrative tribunal set up in terms of the Refugees Act which is currently made up of 6 chambers, is entrusted to hear and determine appeals against recommendations issued by the Refugee Commissioner. The Refugees Act specifies that the Minister may also lodge an appeal against the recommendation at first instance.⁹ An appeal to the Board has suspensive effect such that an asylum seeker may not be removed from Malta prior to a final decision being taken on his or her appeal.¹⁰

The Refugees Act specifies that no appeal is possible from the decision of the Refugee Appeals Board, although it is possible to submit a judicial review application to the First Hall of the Civil Court.¹¹ Notwithstanding, no appeal lies on the merits of the decision except the possibility of filing a human rights claim alleging a violation of fundamental human rights in terms of the European Convention on Human Rights (ECHR) and/or the Maltese Constitution, should the rejected appellant be faced with a return that is prejudicial to his or her rights.¹²

The above refers to the regular procedure employed in adjudicating the majority of applications for international protection. Accelerated procedures are also foreseen in national law for applications that appear to be *prima facie* inadmissible or manifestly unfounded. All applicants for asylum are interviewed by the Refugee Commissioner although their case might be classified as being inadmissible following an evaluation of their asylum claim. In such cases, the accelerated procedure kicks in at appeal stage. The recommendation of the Refugee Commissioner is transmitted to the Refugee Appeals Board with the Board having a 3-day time-limit, specified at law, during which an examination and review of the Refugee Commissioner's recommendation is to be carried out.¹³

The procedure for determining applications for international protection from detained applicants is identical to that for applicants who are not detained. In practice, detention and the asylum procedure are inextricably linked as an applicant's detention duration is related primarily to the time required to finalise the application. Asylum seekers who arrive in Malta without the required documentation, therefore being classified as 'prohibited immigrants', are detained upon arrival in immigration detention facilities. Their application for protection is examined while they are in detention. If the Refugee Commissioner accepts their application and they are granted international protection they are released from detention. In the case that an application is not finally determined within 12 months from arrival in Malta, the individual will also be released.

If the final decision, at appellate stage is a rejection of an individual's application for protection, the individual may be returned to the relevant country of origin. As detention may not exceed 18 months, if removal is not effected within this time, a failed asylum seeker will be released upon the lapse of 18 months in detention.¹⁴

⁹ Article 7 Refugees Act.

¹⁰ Regulation 12 Procedural Regulations.

¹¹ This is the Chamber of general jurisdiction. For further information on the First Hall of the Civil Court see the website of Malta's judiciary, available at: <http://bit.ly/1ds58HF>.

¹² Article 7(9) Refugees Act.

¹³ Articles 23 and 24 Refugees Act.

¹⁴ This is regulated in the 2005 Policy document 'Irregular Immigrants, Refugees and Integration Policy Document' published by the Ministry for Justice and Home Affairs & Social Solidarity and Regulation 11(8) of the Returns Regulations, although this will be elaborated on below.

B. Procedures

1. Registration of the asylum application

Indicators: Registration

1. Are specific time-limits laid down in law for asylum seekers to lodge their application? Yes No
2. If so, what is the time-limit for lodging an application? 2 months
3. Are there any reports (NGO reports, media, testimonies, etc.) of people refused entry at the border and returned without examination of their protection needs? Yes No

The authority responsible for registering asylum applications in Malta is the Refugee Commissioner (RefCom). The RefCom is also the authority responsible for taking decisions at first instance on asylum applications.¹⁵

An asylum application shall not be valid unless made within 60 days (2 months) of the arrival of the applicant in Malta. The consequence for not adhering to this time limit is the invalidity of the application; however, an application may be allowed after the lapse of 60 days for special and exceptional reasons.¹⁶ An application that is filed after the lapse of 60 days may also be considered to be manifestly unfounded by the RefCom, by virtue of which an accelerated procedure to examine the application is applied.¹⁷ Whether a late application is to be considered invalid or manifestly unfounded is at the discretion of the RefCom.

With respect to asylum seekers who arrive undocumented by boat, the registration of their asylum application is relatively unhindered since they are almost immediately intercepted, registered and channelled into the detention system where everyone is given the opportunity to apply for asylum. On the other hand, with respect to asylum seekers who arrive documented but who do not express a wish to apply for asylum to the immigration officials present or who become refugees *sur place*, problems may arise as a result of the fact that they could not readily know how or where to apply for asylum.

Generally, due to the particular circumstances of persons arriving by boat, asylum applications are registered a few days or – at most – a couple of weeks after arrival by boat. The applications of persons approaching the RefCom directly are immediately registered.

Applications must be made at the RefCom. Any person approaching any other public entity, particularly the Malta Police Force, expressing his or her wish to seek asylum, is referred to the RefCom. Detained asylum seekers complete a Preliminary Questionnaire that indicates their intention to seek asylum, which is followed by the formal application that is completed during their first interview with RefCom case-workers.

Following an informal agreement between Italy and Malta, almost all persons rescued at sea in 2015, including persons rescued by the Armed Forces of Malta, and those rescued in Maltese territorial waters or Malta's Search and Rescue Zone, were disembarked in Italy. As a consequence, only 99 persons have arrived in Malta by boat so far in 2015.¹⁸

In particular, 87 migrants coming from West Africa were rescued at sea by the Armed Forces of Malta in January 2015. They were screened before being allowed off the boat following Ebola procedures. Then, they were immediately put in quarantine for three weeks at the Safi detention centre. Human rights NGOs

¹⁵ Article 4(3) Refugees Act.

¹⁶ Regulation 4(4) Procedural Regulations.

¹⁷ Article 2 Refugees Act.

¹⁸ 87 in January, 5 in April, 2 in June, and 5 in September; See UNHCR, *Malta Asylum Trends*, available at: <http://bit.ly/1SSp1eg>.

and UNHCR raised concerns about the fact that they were denied access to visitors including legal assistance and information on asylum procedures.¹⁹

In 2015, a few individuals were denied the right to enter the Maltese territory because they were not meeting the Schengen requirements for entry. They were detained and deported without being given the opportunity to explain their situation or see a lawyer. Concerns were expressed that asylum seekers in that situation could remain unidentified, and at risk of *refoulement*.²⁰

2. Regular procedure

2.1. General (scope, time limits)

Indicators: Regular Procedure: General

- | | |
|--|---|
| 1. Time-limit set in law for the determining authority to make a decision on the asylum application at first instance: | None |
| 2. Are detailed reasons for the rejection at first instance of an asylum application shared with the applicant in writing? | <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No |
| 3. Backlog of pending cases as of 31 August 2015: | 366 |

The RefCom is a specialised authority in the field of asylum. However, it falls under the Ministry responsible also for Police, Immigration, Asylum, Local Government, Correctional Services and National Security.

As such, there is no time limit set in law for the RefCom to take a decision on the asylum application. However, the law states that when the Commissioner cannot make a recommendation within 6 months, the applicant should be informed of the delay or receive, upon his or her request, information on the time frame within which the decision is to be expected. However, such information does not constitute an obligation for the Commissioner to take a decision within that time frame.²¹ Most of the decisions taken by the RefCom are, in practice, taken before the lapse of 6 months.

According to the Office of the Refugee Commissioner, the average length of the asylum procedure at first instance in 2015 is 65 days.

2.2. Fast-track processing

As a matter of practice, certain caseloads have been prioritised by the RefCom. The types of cases which have been prioritised included cases involving particular vulnerable persons who, on a *prima facie* basis, were likely to be given protection, cases involving persons who were in closed centres over those who were in open centres and, in the case of mass influx, preference was given to those coming from countries whose nationals are, *prima facie*, more liable to be given protection.²² However, in 2015 so far, due to the very few arrivals and asylum applications, no cases have been prioritised by RefCom.

¹⁹ Times of Malta, 'Quarantined migrants denied visitors, lawyers', 25 January 2015, available at: <http://bit.ly/1jV8yGm>.

²⁰ Information provided by aditus foundation.

²¹ Regulation 8 Procedural Regulations.

²² Communication from Refugee Commissioner to Dr Neil Falzon of aditus foundation, 2013.

2.3. Personal interview

Indicators: Regular Procedure: Personal Interview

1. Is a personal interview of the asylum seeker in most cases conducted in practice in the regular procedure? Yes No
❖ If so, are interpreters available in practice, for interviews? Yes No
2. In the regular procedure, is the interview conducted by the authority responsible for taking the decision? Yes No
3. Are interviews conducted through video conferencing? Frequently Rarely Never

National law does not provide for a systematic personal interview of asylum applicants, as there are cases in which the interview can be omitted.²³ The grounds for omitting a personal interview are currently the same as those contained in the 2005 Procedures Directive,²⁴ and will be revised shortly to be in line with the recast Asylum Procedures Directive.

In practice, however, all asylum seekers are interviewed. The interviews are conducted by the RefCom or by one of his representatives, which means that the interviews are conducted by the same authority that takes the decision on the application.

The presence of an interpreter during the personal interview is required according to national legislation.²⁵ Interpreters for Somalis and Eritreans, that constitute the main nationalities of asylum seekers in Malta, are largely available. However, interpreters for other languages are not always readily available. Complaints as to the quality and conduct of the first instance interpreters are at times raised with legal representatives at the appeal stage, with the possibility of these being included in the appeal submissions. It is possible for interview procedures to be gender sensitive by appointing an interpreter and interviewer of the gender preferred by the applicant. However this is not automatic, and requests to this end have to be made either by the applicant him or herself or by his or her legal assistant before the interview is carried out.

National legislation does not provide for audio/video recording of the personal interview. However, such legislation requires that a written report is made of every personal interview containing at least the essential information regarding the application.²⁶ In practice, interview notes are taken during the personal interview whilst the interviewer is asking the questions, as well as the responses provided by the interpreter (if any). However, there is no indication that the consent of the asylum seeker is obtained for the audio recording of the interview and it appears, from several case files of applicants for asylum, that asylum seekers are simply informed of the fact that the interview will be audio recorded. As a matter of standard practice, all interviews are recorded. It is uncertain whether an audio/video recording is admissible in the appeal procedure as there are no known cases wherein the Refugee Appeals Board made use of such recording material.

Interviews can and have been conducted through video conferencing. According to the Refugee Commissioner, interviews through video conferencing are considered to be essential in situations where there is a lack of interpreters available in order to proceed with the interview of an asylum seeker. To date, three asylum interviews have been conducted through video conferencing and, it seems, these were carried for the purpose of interpretation.²⁷

²³ Regulation 5(3) Procedural Regulations.

²⁴ Article 12(2)-(3) Directive 2005/85/EC.

²⁵ Regulations 4(2)(c) and 5(3) Procedural Regulations.

²⁶ Regulation 6 Procedural Regulations.

²⁷ Communication from Refugee Commissioner to Dr Neil Falzon of Aditus Foundation, 2013.

The applicant is usually granted a copy of the Interview Notes with a first instance negative decision. However, this is not always the case, and the applicant would have to make a separate request to be granted such a copy in preparation for his or her appeal. Unfortunately, the applicant is only granted the opportunity to make corrections to the content of the application form and not to the content of the Interview Notes of the personal interview, as a copy of the former is granted to the applicant before the first instance decision is taken. In practice, the quality of the Interview Notes may not be fully ascertained since these are taken during the interview itself and based on the responses provided by the interpreter. The audio recording is hardly ever made available to applicants or their lawyers and, if so, only following a formally reasoned request to RefCom.

2.4. Appeal

Indicators: Regular Procedure: Appeal

- | | | |
|---|---|--|
| 1. Does the law provide for an appeal against the first instance decision in the regular procedure? | <input checked="" type="checkbox"/> Yes | <input type="checkbox"/> No |
| ❖ If yes, is it | <input type="checkbox"/> Judicial | <input checked="" type="checkbox"/> Administrative |
| ❖ If yes, is it suspensive | <input checked="" type="checkbox"/> Yes | <input type="checkbox"/> No |
| 2. Average processing time for the appeal body to make a decision: | Not available | |

An appeal mechanism of the first instance decision is available before a board known as the Refugee Appeals Board. Following the March 2015 amendments to the Refugees Act, the Board consists of 6 separate chambers, each made up of 4 persons - a chairperson and an additional 3 members.²⁸ It is an administrative review and involves the assessment of facts and points of law. An asylum seeker has 2 weeks to appeal and these 2 weeks start to run from the day the asylum seeker receives the written negative decision of the Refugee Commissioner.²⁹ The Refugee Appeals Board does not accept late appeals. There is no time limit set in law for the said Board to take a decision. Nevertheless, the appeal has suspensive effect.

In practice, asylum seekers can face obstacles in appealing a decision. First of all, the decision containing the reasons for the rejection of the application at first instance is always written in English, hindering an asylum seeker who does not understand English from appealing the decision. Moreover, asylum seekers in detention can face obstacles in appealing because there are no clear and established procedures in place for them to lodge an appeal. For instance, standard appeal forms are not always available to asylum seekers in detention as such forms are mostly provided by NGOs who are not present in detention on a daily basis. Unfortunately, official information as to the average time it takes for the appeal body to take a decision is not available. Experience by NGOs supporting asylum-seekers at the appeal stage has shown that this time may vary a lot depending on the Chamber to which the case is assigned, ranging from a couple of months to a couple of years. There are no time limits foreseen in national legislation and the processing time for appeals range from a few weeks to more than a year.

Usually, the appeal takes the form of written submissions to the Refugee Appeals Board, however, the Board can, where appropriate, hold an oral hearing and it shall only hear new evidence which was previously unknown or which could not have been produced earlier when the case was first examined by the Refugee Commissioner.³⁰ As a result, asylum seekers can be heard in practice at the appeal stage but only in very limited and discretionary circumstances. The past two years have shown an increase in the number of oral hearings held by the Board, a significant increase in the proportion of first-instance decisions which have been overturned at appeal stage and lengthier decisions referring to EU and national legal norms, country of origin information and jurisprudence of the ECtHR and the CJEU. Hearings of the Refugee Appeals Board are not public and its decisions are communicated only to the

²⁸ Article 5(1) Refugees Act, as amended by Article 11 Act VII of 2015.

²⁹ Article 7 Refugees Act.

³⁰ Regulation 5(1)(h) RAB Procedures Regulations.

applicant concerned, their legal representative, if known, the Refugee Commissioner, the Minister concerned and the High Commissioner i.e. UNHCR.³¹ In 2015 so far, 51 oral hearings have been held.

One of the main concerns expressed by NGOs regarding the appeal stage remains the lack of asylum-related training and capacity of the Board Members. The quality of the decisions also varies substantially amongst Chambers, with some more effective than others and little coordination amongst them all. The consequences include inconsistency in procedures, process and decisions, as well as the lack of coherent case law.³² While some decisions include a comprehensive examination of the elements of fact and law of the case, others do not include any reasoning at all, rejecting the case on the basis of one sentence.

An onward appeal is not provided in the law in case of a negative decision from the Refugee Appeals Board. However, judicial review of the decisions taken by the Board is possible and several cases to this effect have been filed in the past couple of years.³³ No information on judicial reviews is available for 2015. Unfortunately, judicial review does not deal with the merits of the asylum claim but only with the manner in which the concerned administrative authority reached its decision. Moreover, such cases would not automatically have suspensive effect. Judicial review is a regular court procedure, assessing whether administrative decisions comply with required procedural rules such as legality, nature of considerations referred to and duty to give reasons. Applicants could be granted legal aid if eligible under the general rules for legal aid in court proceedings.

2.5. Legal assistance

Indicators: Regular Procedure: Legal Assistance

1. Do asylum seekers have access to free legal assistance at first instance in practice?

<input type="checkbox"/> Yes	<input type="checkbox"/> With difficulty	<input checked="" type="checkbox"/> No
------------------------------	--	--

 - ❖ Does free legal assistance cover:

<input type="checkbox"/> Representation in interview
<input type="checkbox"/> Legal advice

2. Do asylum seekers have access to free legal assistance on appeal against a negative decision in practice?

<input checked="" type="checkbox"/> Yes	<input type="checkbox"/> With difficulty	<input type="checkbox"/> No
---	--	-----------------------------

 - ❖ Does free legal assistance cover

<input checked="" type="checkbox"/> Representation in courts
<input checked="" type="checkbox"/> Legal advice

National legislation states that at first instance an applicant is allowed to consult a legal adviser at his or her own expense. However, in the event of a negative decision at first instance, free legal aid shall be granted under the same conditions applicable to Maltese nationals.³⁴ In the case of Maltese nationals, legal aid is available for all kinds of cases. However, legal aid for civil cases is subject to a means test whilst legal aid for criminal cases is not.³⁵ According to the office responsible for the provision of free legal assistance within the relevant Ministry, such legal assistance is usually not subject to a means test for asylum seekers. There may, however, be instances when an asylum seeker is channelled through the normal legal aid system available for Maltese nationals. Such instances generally include when there is a lack of information regarding the means of an asylum seeker.³⁶ In practice, the appeal forms the applicants fill in and submit to the Refugee Appeals Board contain a request for legal aid. Unless an

³¹ Regulation 5(1)(n) RAB Procedures Regulations .

³² UN General Assembly, *Report by the Special Rapporteur on the human rights of migrants*, François Crepeau, December 2014.

³³ The judicial review process is regulated by Article 469A of the Code of Organisation and Civil Procedure (COCP), Chapter 12 of the Laws of Malta. These cases include: Court of Appeal (Civil, Superior), *Washimba Paul v Bord Ta' L-Appelli Dwar ir-Rifugjati Et*, Reference No. 65/2008/1, Judgment of 28 September 2012; Civil Court First Hall, *Gebremariam Teshome Tensea K/a Teshome Baerhanu Asbu v Bord Ta' L-Appelli Dwar ir-Rifugjati Et*, Reference No. 65/2010, Judgment of 10 July 2012; Civil Court First Hall, *Saed Salem Saed v Bord Ta' L-Appelli Dwar ir-Rifugjati Et*, Reference No. 1/2008, Judgment of 3 November 2009.

³⁴ Regulation 7(1)-(2) Procedural Regulations.

³⁵ The Judiciary Malta, *Frequently Asked Questions*, available at: <http://bit.ly/1FJWCug>.

³⁶ Communication from Julian Micallef (Assistant Director – Third Country Nationals, Ministry of Home Affairs) to JRS Malta.

applicant is assisted by a lawyer working with an NGO, this request is forwarded to the office responsible for the provision of legal aid within the Ministry, which will distribute the cases amongst a pool of asylum legal aid lawyers. One appointment with the applicant is then scheduled. To date legal aid in Malta for asylum appeals has been financed through the State budget.³⁷

The only free legal assistance available to asylum seekers at first instance is that provided by lawyers working with NGOs. These services are regularly provided by a small group of NGOs as part of their ongoing services and are funded either through project-funding or through other funding sources. It is to be noted that funding limitations could result in the services being reduced due to prioritisation. Generally, such lawyers provide legal information and advice both before and after the first instance decision, including an explanation of the decision taken and, in some cases, interview preparation. They can also attend personal interviews whenever the asylum seeker requests their presence. However, this is at the discretion of the Refugee Commissioner and their contribution throughout the interview is limited.³⁸ The main obstacle with regard to access to this kind of assistance is that there are a limited number of NGO lawyers who are able to provide such a service in relation to the number of asylum seekers requiring it. There are no known private lawyers providing free legal assistance to asylum seekers at first instance. A reason for this could be the fact that most asylum seekers are kept in detention, which prevents them from accessing the services of a private lawyer. In addition, the conditions and location of the detention centres may discourage private lawyers from providing legal assistance to asylum seekers.

Legal assistance at the appeal stage is not restricted by any merits test or considerations, such as that the appeal is likely to be unsuccessful. There are, however, some restrictions in national legislation and in practice that can impinge on the ability of lawyers to effectively assist applicants for asylum at the appeal stage. Such restrictions relate to access to the applicants' files as well as the applicants themselves. For instance, in practice, lawyers that assist applicants for asylum at the appeal stage are not allowed to make photocopies of the relevant information contained in their clients' files in preparation for the appeal. Instead, they are required to manually copy the contents of the files at the Refugee Commissioner's office; thus, further discouraging more lawyers from assisting, or assisting effectively, asylum seekers.

On the other hand, the law states that access to information in the applicants' files may be precluded when disclosure may jeopardise national security, the security of the entities providing the information, and the security of the person to whom the information relates.³⁹ Moreover, access to the applicants by the legal advisers or lawyers can be subject to limitations necessary for the security, public order or administrative management of the area in which the applicants are kept.⁴⁰ In practice, however, these restrictions are rarely, if ever, implemented. Usually, the appeal takes the form of written submissions to the Board by a stipulated time. Thus, it is not a very complicated procedure in practice. Nevertheless, the assistance of lawyer is essential for an effective appeal.

According to a local legal aid lawyer, the amount of €70 paid to a legal aid lawyer for every appeal is not enough to cover the preparatory work (reading the interview notes and decision as well as manually copying the contents of the appellant's file at the Refugee Commissioner's office and preparing questions to ask the appellant), the meeting with the appellant and the writing of the submissions. Meetings with appellants who are in detention can be particularly problematic for practical and logistical reasons that can be of detriment to both the appellants and the lawyers. For instance, at the entrance of the detention centres, legal aid lawyers have to show their identity cards and be given a pass. Sometimes this is a cumbersome procedure because the lawyer's name could not be on the list of people authorised to enter the detention centre. Also, there is rarely an adequate place for the lawyer to discuss the case with his or her client in detention. According to the legal aid lawyer, they sometimes had to speak to their clients in

³⁷ *Ibid.*

³⁸ Regulation 7(4) Procedural Regulations.

³⁹ Regulation 7(2) Procedural Regulations.

⁴⁰ Regulation 7(3) Procedural Regulations.

corridors or sitting on crates. As a result, the financial remuneration does not compensate for the amount of work as well as the practical and logistical obstacles involved in effectively representing asylum seekers at the appeal stage.⁴¹

3. Dublin

3.1. General

Indicators: Dublin: General

No statistics on the operation of the Dublin system are provided by the Dublin Unit.

There is no specific legislative instrument that transposes the provisions of the Dublin Regulation into national legislation. The procedure relating to the transfers of asylum seekers in terms of the Regulation is an administrative procedure, with reference to the text of the Regulation itself. The Refugee Commissioner is the designated head of the Dublin Unit with the Immigration Police implementing the procedure in practice.

Application of the Dublin criteria

According to NGOs' experience,⁴² there is no clear rule on the application of the family unity criteria as it usually depends on the particulars of the individual case. The Maltese Dublin authorities do not apply DNA tests but tend to rely on the documents and information immediately provided by the applicant. In some cases regarding children, when no documents are provided, the authorities can request additional information from UNHCR, IOM or AWAS. They usually put together all the information available as evidence. Matching information between members of the family can be relied on, and may be enough for determining family links.

The family unity criterion is the most frequently used in practice for outgoing requests. For incoming requests, the most frequently used criteria are either the first EU Member State entered (Article 13), or the EU Member State granting a Schengen visa (Article 12).

The discretionary clauses

There is no information available on the use of the humanitarian or the sovereignty clauses, although the Refugee Commissioner has indicated that there are cases where the humanitarian clause is used and Malta takes charge of the applicant on account of health reasons.

3.2. Procedure

Indicators: Dublin: Procedure

- | | |
|--|------------------|
| 1. On average, how long does a transfer take after the responsible Member State has accepted responsibility? | |
| ❖ If appeal is filed | A couple of days |
| ❖ If no appeal is filed | Over 6 months |

All those who apply for asylum are systematically fingerprinted and photographed by the Immigration authorities for insertion into the Eurodac database. Those who enter Malta irregularly, usually by boat, are immediately taken into the custody of the Immigration authorities and are subsequently fingerprinted and photographed. Asylum seekers who are either residing regularly in Malta or who apply for international protection prior to being apprehended by the Immigration authorities, are also sent to the

⁴¹ Correspondence between local legal aid lawyer and JRS Malta.

⁴² Information provided by Katrine Camillieri, Director of JRS Malta.

Immigration authorities to be fingerprinted and photographed immediately after their desire to apply for asylum is registered.

According to the authorities,⁴³ no force or coercion is required to take the fingerprints of asylum seekers. When migrants make attempts to avoid their fingerprints being taken by various means such as applying glue to the fingertips, a note is taken and the migrant is recalled for fingerprinting at a later stage when the effects of the glue would have subsided. When persons have damaged fingerprints, measures, such as repeated attempts, are taken to ensure that a good copy is available.

However, NGOs working with asylum seekers confirmed a recent trend of individuals refusing to be fingerprinted. Migrants arriving in Malta are usually reluctant to be fingerprinted as this identification could prevent them to move beyond Malta. In 2014, individuals claimed that they saw persons being harassed or physically abused following their refusal to have their fingerprints taken. The Special Rapporteur on the human rights of migrants also reported that a degree of force was sometimes used.⁴⁴

In 2014, NGOs also noticed that some migrants damaged their fingers to avoid their fingerprints to be collected. As a consequence, no Eurodac entries were made but the asylum procedure was not postponed or cancelled. Some of them were eventually granted international protection and problems arose when these individuals attempted to apply for passports or travel documents and were refused since their biometric data was not found in Eurodac.⁴⁵

In registering their desire to apply for international protection, asylum seekers are first asked to fill in a 'Dublin questionnaire' wherein they are asked to specify if they have family members residing within the EU. Should this be the case, the information is passed on to the Immigration Police Office responsible for Dublin transfers and the examination of their application for protection is suspended until further notice. It is up to the Immigration Police to then contact the asylum seeker to ask for further information regarding the possibility of an inter-state transfer, such as the possibility of providing documentation proving familial links.

Information is usually provided to the lawyer representing the applicant upon request. Where an applicant is detained, it is inherently more difficult for the individual to follow up on the Dublin case with information being obtained solely through the lawyer.

Individualised guarantees

No information is provided by the Dublin Unit on the interpretation of the duty to obtain individualised guarantees prior to a transfer, in accordance with the ECtHR's ruling in *Tarakhel v Switzerland*.⁴⁶

Transfers

In practice, few asylum seekers are eligible for transfer to another Member State and no official statistics are available regarding the length of time it takes for a transfer to be effected after another Member State would have accepted responsibility. Recent examples however illustrate that the transfer is sought to be effected within a couple of weeks of the date of acceptance by the responsible Member State as the Immigration authorities buy the flight ticket within days of the decision communicated to them. If the asylum seeker was detained prior to lodging the asylum application, detention continues until there is a final answer regarding which state will assume responsibility. In the case that another EU state accepts

⁴³ European Migration Network, *Ad-Hoc Query on EURODAC Fingerprinting*, 22 September 2014, available at: <http://bit.ly/1PBRfaP>.

⁴⁴ UN General Assembly, *Report by the Special Rapporteur on the human rights of migrants*, François Crepeau, *Mission to Malta*, May 2015.

⁴⁵ Information provided by Katrine Camillieri, Director of JRS Malta.

⁴⁶ ECtHR, *Tarakhel v Switzerland*, Application No 29217/12, Judgment of 4 November 2014.

responsibility for the applicant, the asylum seeker remains in detention until the transfer takes place. If Malta assumes responsibility for the application, the status determination procedure continues from after the Preliminary Questionnaire stage. Moreover, if the asylum seeker consents to the transfer, this is carried out without the need for police escorts. The transfer is only carried out under escort if the asylum seeker demonstrates an unwillingness to be transferred.⁴⁷ In 2015 so far, almost no applicants have been detained while they were subjected to a Dublin procedure.

The situation of Dublin returnees

The main impact of the transfer on the asylum procedure relates to the difficulties in accessing the procedure upon return. If an asylum seeker leaves Malta without permission of the Immigration authorities, either by escaping from detention or by leaving the country irregularly, the Refugee Commissioner will consider the application for asylum to have been implicitly withdrawn, in pursuance of Regulation 13 of the Procedural Regulations, transposing the provisions of the Asylum Procedures Directive. Consequently, an asylum seeker who is transferred back will in almost all cases find that his or her asylum application has been implicitly withdrawn leaving him susceptible to return by the Immigration authorities.

Furthermore, persons travelling from Malta in an irregular manner run the risk of facing criminal charges upon being returned, on the basis of the Immigration Act. Upon return, the person would probably be arrested and brought before the Court of Magistrates (Criminal Jurisdiction) to face charges. During this time, pending the case, the asylum seeker would be remanded in custody at Corradino Correctional Facility for the entire duration of the criminal proceedings, which generally last for about 1 to 2 months from the date of institution of proceedings. The asylum seeker will be entitled to request the appointment of a legal aid lawyer, or to avail him or herself of a private lawyer should he or she have access to one. If found guilty, the Court may sentence the asylum seeker to either a fine of not more than around €12,000 or a maximum imprisonment term of 2 years, or for both the fine and imprisonment. It is noted that decisions are largely unpredictable, as some individuals have also been sentenced to imprisonment yet suspended for a number of years.

3.3. Personal interview

Indicators: Dublin: Personal Interview

Same as regular procedure

1. Is a personal interview of the asylum seeker in most cases conducted in practice in the Dublin procedure? Yes No
 - ❖ If so, are interpreters available in practice, for interviews? Yes No
2. Are interviews conducted through video conferencing? Frequently Rarely Never

Upon notification that an asylum seeker might be eligible for a Dublin transfer, he or she will be called by the Immigration Police operating the Dublin Unit to verify the information previously given to the Refugee Commissioner or to the legal representative and will be advised to provide supporting documentation to substantiate the request for transfer. These interviews take place at the Police General Headquarters wherein the asylum seekers are escorted from the detention centre to be questioned by the police. Although the Immigration Police stated that interpreters are provided at the interview stage, legal practitioners who have assisted a number of asylum seekers within the Dublin procedure stated that no cultural mediators⁴⁸ are available at this point, although at times an English-speaking detainee might provide interpreting services. Moreover, the interview is not recorded nor is a transcript available.

⁴⁷ Information obtained by email from Immigration Police on 4 April 2013.

⁴⁸ Different to interpreters, as cultural mediators play a more active role in ensuring culturally appropriate language and communication.

3.4. Appeal

Indicators: Dublin: Appeal

Same as regular procedure

1. Does the law provide for an appeal against the decision in the Dublin procedure?
- | | | |
|----------------------------|---|--|
| ❖ If yes, is it | <input checked="" type="checkbox"/> Yes | <input type="checkbox"/> No |
| ❖ If yes, is it suspensive | <input type="checkbox"/> Judicial | <input checked="" type="checkbox"/> Administrative |
| | <input checked="" type="checkbox"/> Yes | <input type="checkbox"/> No |

Appeals against decisions taken under the Dublin Regulation are possible through the filing of an appeal to the Immigration Appeals Board. The promulgation of subsidiary legislation in 2012 extended the Board's jurisdiction to deal with appeals from decisions taken within the Dublin framework.⁴⁹

The provisions of the Immigration Act indicate that the appeal must be filed within 3 working days from when the individual is notified with the decision.⁵⁰ Immigration legislation regulating procedures before the Immigration Appeals Board does not specify whether such appeals have suspensive effect or otherwise, yet may be interpreted as implying such a suspensive effect if requested, even verbally, by the appellant.

According to NGOs, decisions taken under the Dublin Regulation have never been appealed to date, yet the Board has not created a specific procedure for such appeals so it is not clear whether an oral hearing or written procedure would be resorted to. In all other cases before it, such as relating to visas refusals, the Board holds oral hearings and also received written pleadings.

3.5. Legal assistance

Indicators: Dublin: Legal Assistance

Same as regular procedure

1. Do asylum seekers have access to free legal assistance at first instance in practice?
- | | | | |
|-------------------------------------|--|--|--|
| | <input type="checkbox"/> Yes | <input type="checkbox"/> With difficulty | <input checked="" type="checkbox"/> No |
| ❖ Does free legal assistance cover: | <input type="checkbox"/> Representation in interview | | |
| | <input type="checkbox"/> Legal advice | | |
2. Do asylum seekers have access to free legal assistance on appeal against a Dublin decision in practice?
- | | | | |
|------------------------------------|---|--|--|
| | <input type="checkbox"/> Yes | <input type="checkbox"/> With difficulty | <input checked="" type="checkbox"/> No |
| ❖ Does free legal assistance cover | <input type="checkbox"/> Representation in courts | | |
| | <input type="checkbox"/> Legal advice | | |

No provision is made for the availability of free legal assistance. Instead, if the asylum seeker is in detention, legal assistance is provided by an NGO that is regularly present in detention and offers professional legal services. If the asylum seeker is not detained, he or she can seek the services of a lawyer at his or her own expense or through the services offered by NGOs. In practice, the only way in which an asylum seeker pending a Dublin transfer can obtain consistent information about the stage of the proceedings is through the assistance of a lawyer who is able to follow up with the competent authorities.

⁴⁹ Regulation 3 IAB Dublin Regulations.

⁵⁰ Article 25A Immigration Act.

3.6. Suspension of transfers

Indicators: Dublin: Suspension of Transfers

1. Are Dublin transfers systematically suspended as a matter of policy or jurisprudence to one or more countries? Yes No
- ❖ If yes, to which country or countries? Greece

Following the ECtHR's judgment in *MSS v Belgium and Greece*,⁵¹ Malta suspended the transfers of asylum seekers to Greece although the police will still assist with the transfer should an asylum seeker voluntarily ask to be returned to Greece. When transfers are suspended, Maltese authorities then assume responsibility for the examination of the application and the asylum seeker is treated in the same way as any other asylum seeker who would have lodged the asylum application in Malta.

Apart from these situations, Malta has not suspended transfers as a result of evaluation of systemic deficiencies in any EU Member State.

Suspension of transfers to Malta

In January 2015, the German Administrative Court of Minden accepted a request for the suspensive effect of an appeal against a transfer decision to Malta under the Dublin III Regulation on account that if the applicant were to be transferred he could, as an asylum seeker, face the possibility of being subjected to unreasonable detention conditions for a prolonged period of time, without access to an effective remedy. In reaching this conclusion, the Administrative Court presumed that it can no longer be assumed that asylum seekers in Malta are treated in a manner which is in accordance with the Charter of Fundamental Rights, the 1951 Geneva Convention, and the ECHR, due to serious shortcomings present in reception procedures and conditions. Basing its reasoning on local NGOs' reports, the Court advanced that asylum applicants are routinely detained on account of their protection claim, which consequently fails to meet the standards set in the Asylum Procedures Directive. While taking into account the improvements of reception conditions, the Court stated that the provision of basic needs were still lacking. The Court concluded that the possible harm inflicted to the applicant in case of transfer to Malta prevailed and the suspensive effect of the appeal against the transfer was granted.⁵²

In April 2015, the UK Upper Tribunal judged that the return of an Eritrean asylum seeker to Malta under the Dublin Regulation was lawful. The applicant was challenging, through a judicial review, the respondent's certification of his asylum claim as "clearly unfounded", and prevent his removal to Malta pursuant to the Dublin III Regulation, relying particularly on his vulnerability due to mental health problems. The Tribunal took into account reception conditions for asylum seekers in Malta, specially focusing on psychiatric care available in detention as well as procedures for determining asylum applications. The applicant was arguing that his return to Malta would be a breach in Article 3 ECHR as he would be prosecuted for immigration offences and not given the proper psychiatric assistance needed. The Tribunal deemed that on return to Malta the applicant would have sufficient access to services, facilities and treatment, to meet his psychiatric needs.⁵³

4. Admissibility procedure

4.1. General (scope, criteria, time limits)

⁵¹ ECtHR, *MSS v Belgium and Greece*, Application 30696/09, Judgment of 21 January 2011.

⁵² Administrative Court of Minden, Decision 1 L 551/14.A, 12 January 2015, available at: <http://bit.ly/1GjuOV0>. See EDAL, 'Germany – German Administrative Court suspends transfer to Malta on grounds of serious shortcomings in reception conditions and procedures', available at: <http://bit.ly/1GVCZ18>.

⁵³ UK Upper Tribunal, *R (Binyan Hagos) v Secretary of State for the Home Department* [2015] UKUT 271 (IAC), Judgment of 29 April 2015, available at: <http://bit.ly/1jChUrb>. See EDAL, 'UK: Dublin Regulation transfer to Malta lawful', available at: <http://bit.ly/1PBSoPD>.

Article 24 of the Refugees Act provides for “inadmissible applications” under Part V of the Act, in the provisions related to the accelerated procedures. As amended in March 2015, the following grounds allow for deeming an asylum application inadmissible:⁵⁴

- (a) Another Member State has already granted the applicant international protection under the Dublin III Regulation;
- (b) The applicant comes from a first country of asylum;
- (c) The applicant comes from a safe third country;
- (d) The applicant has lodged a subsequent application presenting no new elements;
- (e) A dependant of the applicant has lodged a separate application after consenting to have his or her case made part of an application made on his or her behalf; and
- (f) The applicant has been recognised in a third country and can avail him or herself of that protection or otherwise enjoys sufficient protection from *refoulement*, and can be readmitted to that country.
- (g) The applicant comes from a safe country of origin.

As the law mentions the inadmissibility of an application for recognition of refugee status, only the Refugee Commissioner can decide upon the admissibility of the application.⁵⁵ According to the Office of the Refugee Commissioner, all asylum applications are processed under the regular asylum procedure with no applications actually processed through the accelerated procedure. In 2015 (January-August), 67 applications have been deemed inadmissible by RefCom, but following the regular procedure and a personal interview.

4.2. Personal interview

Indicators: Admissibility Procedure: Personal Interview

Same as regular procedure

1. Is a personal interview of the asylum seeker in most cases conducted in practice in the admissibility procedure?

	<input checked="" type="checkbox"/> Yes	<input type="checkbox"/> No
❖ If so, are questions limited to identity, nationality, travel route?	<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No
❖ If so, are interpreters available in practice, for interviews?	<input checked="" type="checkbox"/> Yes	<input type="checkbox"/> No
2. Are interviews conducted through video conferencing?

<input type="checkbox"/> Frequently	<input checked="" type="checkbox"/> Rarely	<input type="checkbox"/> Never
-------------------------------------	--	--------------------------------

According to Regulation 5(5) of the Procedural Regulations, the interview may be omitted if the application is unfounded. However, the RefCom systematically interviews all asylum seekers. The same regular procedures therefore apply for inadmissible applications.

4.3. Appeal

Indicators: Admissibility Procedure: Appeal

Same as regular procedure

1. Does the law provide for an appeal against the decision in the admissibility procedure?

	<input checked="" type="checkbox"/> Yes	<input type="checkbox"/> No
❖ If yes, is it	<input type="checkbox"/> Judicial	<input checked="" type="checkbox"/> Administrative
❖ If yes, is it suspensive	<input checked="" type="checkbox"/> Yes	<input type="checkbox"/> No

⁵⁴ Article 24 Refugees Act, as amended by Article 15(a) Act VI of 2015.

⁵⁵ Court of Appeal, *Paul Washimba v Bord tal-Appelli dwar ir-Rifugjati*, 28 September 2012.

All recommendations under the accelerated procedure shall immediately be referred to the Chairman of the Board who shall examine and review the recommendation of the Commissioner within 3 working days.⁵⁶ In practice, the 3 day time limit hinders any legal assistance, particularly in a detention context.

Although, the law foresees a possibility to appeal against a decision considering an application to be inadmissible, this provision does not apply for accelerated procedures.

In practice, when a decision of inadmissibility is taken by RefCom under the accelerated procedure, no appeal is allowed as the recommendation is referred to the RAB. The RAB is effectively a review of the recommendation, and not an appeal procedure. The applicant is usually not notified of this review and is not given the opportunity to submit an appeal submission.

4.4. Legal assistance

Indicators: Admissibility Procedure: Legal Assistance

Same as regular procedure

1. Do asylum seekers have access to free legal assistance at first instance in practice?
 Yes With difficulty No
❖ Does free legal assistance cover:
 Representation in interview
 Legal advice

2. Do asylum seekers have access to free legal assistance on appeal against an inadmissibility decision in practice?
 Yes With difficulty No
❖ Does free legal assistance cover:
 Representation in courts
 Legal advice

Article 23(6) of the Refugees Act provides the right to be assisted by a legal adviser but it does not provide for free legal aid service. It does not differ in any way to the regular procedure.

5. Border procedure

There is no border procedure in Malta.

6. Accelerated procedure

6.1. General (scope, grounds for accelerated procedures, time-limits)

Article 23 of the Refugees Act provides that applications should be examined under accelerated procedures where:⁵⁷

- The application is manifestly unfounded;
- The applicant has or could have found safe protection elsewhere under the Refugee Convention or the asylum Directives; or
- The applicant holds a travel document from a safe country.

⁵⁶ Article 23(3) Refugees Act. This applies to inadmissibility decisions as well: Article 24(2) Refugees Act.

⁵⁷ Article 23(1), (8) and (9) Refugees Act.

The definition of “manifestly unfounded applications” was amended in March 2015 to reflect the grounds for accelerated procedures laid down by Article 31(8) of the recast Asylum Procedures Directive. An application is considered manifestly unfounded where the applicant:⁵⁸

- (a) In submitting his or her application and presenting the facts, has only raised issues that are not relevant to the examination as to whether such applicant qualifies as a beneficiary of international protection;
- (b) Has given clearly insufficient details or evidence to substantiate his claim and his story is inconsistent, contradictory or fundamentally improbable;
- (c) Has based his application on a false identity or on forged or counterfeit documents which he maintained as genuine when questioned about them;
- (d) Has misled the authorities by withholding relevant information or documents with respect to his or her identity and/or nationality that could have had a negative impact on the decision;
- (e) Made false representations of a substantial nature;
- (f) Has, without reasonable cause and in bad faith, destroyed, damaged or disposed of any passport, other document or ticket relevant to his claim, either in order to establish a false identity for the purpose of his application or to make the consideration of his application by the authorities more difficult;
- (g) Having had ample earlier opportunity to submit an application for international protection, submitted the application in order to forestall an impending removal order from Malta, and did not provide a valid explanation for not having applied earlier;
- (h) Is from a safe country;
- (i) Refuses to comply with an obligation to have his or her fingerprints taken in accordance with the relevant legislation;
- (j) May, for serious reasons, be considered a danger to the national security or public order, or the applicant has been forcibly expelled for serious reasons of public security or public order under national law;

Article 23(2) provides that if the RefCom is of the opinion that an application is manifestly unfounded, he shall examine the application within 3 working days and his recommendation shall immediately be referred to the Refugee Appeals Board, who then also examine within 3 working days.

In practice, however, the RefCom does not consider *prima facie* applications and examines all applications under the regular procedure. According to the Office of the Refugee Commissioner, in 2015 no applications were processed under the accelerated procedure.

6.2. Personal Interview

Indicators: Accelerated Procedure: Personal Interview

Same as regular procedure

1. Is a personal interview of the asylum seeker in most cases conducted in practice in the accelerated procedure? Yes No
 - ❖ If so, are questions limited to nationality, identity, travel route? Yes No
 - ❖ If so, are interpreters available in practice, for interviews? Yes No
2. Are interviews conducted through video conferencing? Frequently Rarely Never

The RefCom does not consider *prima facie* manifestly unfounded application and therefore examines all applications under the regular procedure.

⁵⁸ Article 2(k) Refugees Act, as amended by Article 3 Act VI of 2015.

6.3. Appeal

Indicators: Accelerated Procedure: Appeal

Same as regular procedure

1. Does the law provide for an appeal against the decision in the accelerated procedure?
- | | | |
|----------------------------|-----------------------------------|---|
| | <input type="checkbox"/> Yes | <input checked="" type="checkbox"/> No |
| ❖ If yes, is it | <input type="checkbox"/> Judicial | <input type="checkbox"/> Administrative |
| ❖ If yes, is it suspensive | <input type="checkbox"/> Yes | <input type="checkbox"/> No |

Article 23(2) of the Refugees Act provides that if the Refugee Commissioner is of the opinion that an application is manifestly unfounded, he shall examine the application within 3 working days and refer his recommendations immediately to the Refugee Appeals board, which in turn is provided as well 3 working days to examine the application. No further appeal is allowed.

Yet under Regulation 17(1) of the Procedural Regulations the applicant is able to appeal against a decision of inadmissibility on the basis of the safe third country if he or she is able to show that return would subject him or her to torture, cruel, inhuman or degrading treatment or punishment.

6.4. Legal assistance

Indicators: Accelerated Procedure: Legal Assistance

Same as regular procedure

1. Do asylum seekers have access to free legal assistance at first instance in practice?
- | | | | |
|-------------------------------------|--|--|--|
| | <input type="checkbox"/> Yes | <input type="checkbox"/> With difficulty | <input checked="" type="checkbox"/> No |
| ❖ Does free legal assistance cover: | <input type="checkbox"/> Representation in interview | | |
| | <input type="checkbox"/> Legal advice | | |
2. Do asylum seekers have access to free legal assistance on appeal against a negative decision in practice?
- | | | | |
|------------------------------------|---|--|--|
| | <input type="checkbox"/> Yes | <input type="checkbox"/> With difficulty | <input checked="" type="checkbox"/> No |
| ❖ Does free legal assistance cover | <input type="checkbox"/> Representation in courts | | |
| | <input type="checkbox"/> Legal advice | | |

As per the regular procedure, free legal assistance is only provided at the appeal stage. The modalities and obstacles referred to under the regular procedure are also applicable under the accelerated procedure, possibly exacerbated by the extremely short operational time frame and limitation on appeal possibilities.

C. Information for asylum seekers and access to NGOs and UNHCR

Indicators: Information and Access to NGOs and UNHCR

1. Is sufficient information provided to asylum seekers on the procedures, their rights and obligations in practice?
- | | | | |
|---|------------------------------|---|-----------------------------|
| | <input type="checkbox"/> Yes | <input checked="" type="checkbox"/> With difficulty | <input type="checkbox"/> No |
| ❖ Is tailored information provided to unaccompanied children? | <input type="checkbox"/> Yes | <input checked="" type="checkbox"/> No | |
2. Do asylum seekers located at the border have effective access to NGOs and UNHCR if they wish so in practice?
- | | | | |
|--|---|--|-----------------------------|
| | <input checked="" type="checkbox"/> Yes | <input type="checkbox"/> With difficulty | <input type="checkbox"/> No |
|--|---|--|-----------------------------|
2. Do asylum seekers in detention centres have effective access to NGOs and UNHCR if they wish so in practice?
- | | | | |
|--|---|--|-----------------------------|
| | <input checked="" type="checkbox"/> Yes | <input type="checkbox"/> With difficulty | <input type="checkbox"/> No |
|--|---|--|-----------------------------|
3. Do asylum seekers accommodated in remote locations on the territory (excluding borders) have effective access to NGOs and UNHCR if they wish so in practice? Not applicable

The provisions in the law regarding information to asylum seekers are Regulation 3(3) of the Declaration Regulations and Regulation 4(2) of the Procedural Regulations. The latter states that asylum seekers have to be informed, in a language that they may reasonably be supposed to understand, of, among other things, the procedure to be followed and their rights and obligations during the procedure. It also states that asylum seekers have to be informed of the result of the decision in a language that they may reasonably be supposed to understand, when they are not assisted or represented by a legal adviser and when free legal assistance is not available. This provision does not, however, state in which form such information has to be provided except for the decision that, by virtue of Regulation 9 of the Procedural Regulations, has to be provided in a written format. In practice, information is provided both by the Immigration Police and personnel working for the Refugee Commissioner. In the case of the Immigration Police, information on the rights and obligations of asylum seekers is provided almost immediately in the form of a booklet that is available in English, French and Arabic. On the other hand, the information provided by the personnel working in the Refugee Commissioner's office is communicated within 1 or 2 working days of the arrival of the asylum seeker to Malta. These officials visit the closed centres and deliver information about the asylum procedure in Malta.

The information is delivered using different means and includes an explanation of the purpose of the session by the personnel (with the help of an interpreter), an audio-visual presentation available in the most common 11 languages of the asylum population i.e. Amharic, Tigrinya, Arabic, English, Djoula, French, Hawsa, Oromo, Russian, Somali and Swahili; further languages to be added, according to the exigencies of the applicants.⁵⁹ A booklet that contains a transcript of the audio-visual presentation is also available in the said eleven different languages; this is not available online. The same type of information session is provided to asylum seekers who are not in detention but who apply directly at the Refugee Commissioner's office.

However, information provided to persons not detained remains a concern as the asylum system is not structured for asylum seekers arriving legally and therefore not kept (detained) within a controlled environment. There is no systematic and structured way to provide comprehensive information to asylum seekers outside detention. They receive only basic information about the asylum procedure but not about their rights regarding reception. For example, they do not have access to information about access to healthcare or education, while asylum seekers in detention see their basic needs covered.

Alternative sources of information are available in practice mostly through NGOs. For instance, staff of the Jesuit Refugee Service (JRS) Malta visit detention centres after each boat arrival to provide an information session on the asylum procedures as well as on the rights and obligations pertaining to such procedures. When available, booklets containing such information, in English, French, Tigrinya and Somali, are provided to asylum seekers by JRS Malta. JRS Malta is also available to provide information sessions to asylum seekers who are not kept in detention. However, such is only possible if the asylum seekers concerned come to the attention of the said organisation.

Asylum seekers who arrive in Malta in an irregular manner are not effectively informed of the possibility and of the means of challenging their detention decision and the removal order issued against them. Information on how to challenge the latter consists of two sentences written in English on the removal order, which states that they have three days in which to challenge the said order. The information provided by JRS Malta during their information sessions covers the possibility of challenging detention decisions and removal orders. However, it is not always possible to communicate this information within the time limit provided to appeal a removal order. Moreover, NGOs lack sufficient resources to provide this information to all persons and the over crowdedness and lack of appropriate space in detention is not favourable to the dissemination of information.

⁵⁹ Communication from the Refugee Commissioner to Dr Neil Falzon of aditus foundation, 2013.

In addition, personnel from the office of the Refugee Commissioner conduct only one information session per group of arrivals and, usually, such is conducted before asylum seekers register their desire to apply for asylum. There is a lack of a constant flow of information from the authorities throughout the various stages of the procedure, with no information desk or similar initiative at the Refugee Commissioner's office. Throughout the different stages of the asylum procedure, asylum seekers can only obtain further information from NGOs that visit detention centres on a regular basis. With respect to the Dublin Regulation, the only information provided to asylum seekers is contained in a document that is given to each person by the Immigration authorities upon their arrival. The information is contained in a few short paragraphs and is written in English. It does not include information on the consequences of continuing to travel to another EU Member State or absconding from a transfer. As a result of all this, the information provided cannot be considered to be sufficient for asylum seekers to fully understand the way in which the Dublin system functions as well as its consequences. According to legal practitioners operating in the field, it appears that Dublin-related information leaflets for adults and unaccompanied children as included in Annexes X and XI of the Commission Implementing Regulation No 118/2014 are not distributed to asylum seekers.⁶⁰

National legislation provides that UNHCR shall have access to asylum applicants, including those in detention and in airport or port transit zones.⁶¹ Moreover, the law also states that a person seeking asylum in Malta shall be informed of his right to contact UNHCR.⁶² There is no provision in the law with respect to access to asylum applicants by NGOs, however, it states that legal advisers who assist applicants for asylum shall have access to closed areas such as detention facilities and transit zones for the purpose of consulting the applicant.⁶³ Thus, NGOs have indirect access to asylum applicants through lawyers who work for them. In practice, however, asylum seekers located at the border or in closed centres do not face major obstacles in accessing NGOs and UNHCR.

D. Subsequent applications

Indicators: Subsequent Applications

1. Does the law provide for a specific procedure for subsequent applications? Yes No
2. Is a removal order suspended during the examination of a first subsequent application?
 - ❖ At first instance Yes No
 - ❖ At the appeal stage Yes No
3. Is a removal order suspended during the examination of a second, third, subsequent application?
 - ❖ At first instance Yes No
 - ❖ At the appeal stage Yes No

An asylum seeker whose claim has been rejected may submit a subsequent application to the Refugee Commissioner.⁶⁴ A person may apply for a subsequent application, if he or she can provide elements or findings that were not presented before – subject to strict interpretation – at first instance. This evidence would have to be proof of which the applicant was either not aware of, or, which could not have been submitted before. Such new elements need to be presented within 15 days of receiving the information. Very often the assessment of the application is based on written submissions, but an interview is also possible in some cases, at the discretion of the Refugee Commissioner. Once the new elements are

⁶⁰ See Commission Implementing Regulation (EU) No 118/2014 amending Regulation (EC) No 1560/2003 laying down detailed rules for the application of Council Regulation (EC) No 343/2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, OJ 2014 L 39/1.

⁶¹ Regulation 16(a) Procedural Regulations.

⁶² Regulation 3(3)(c) Declaration Regulations.

⁶³ Regulation 7(3) Procedural Regulations.

⁶⁴ Articles 7A and 4 Refugees Act.

evaluated, a decision on the case is communicated to the appellant in writing. Seeing that, at this stage of the proceedings there is no free legal aid, asylum seekers are almost entirely dependent on NGOs.

There is no limit as to the number of subsequent applications lodged, as long as new evidence is presented every time. Second, third and other subsequent applications are generally treated in the same manner.

Removal orders are only suspended once the applicant has formally been confirmed to be an asylum seeker by the Refugee Commissioner, since this confirmation triggers the general protection from *non-refoulement* guaranteed to all asylum seekers.

In the eventuality that a subsequent application is deemed admissible but is not accepted on the merits, there is the possibility of appealing this decision to the Refugee Appeals Board within 15 days, in the same way as with the regular procedure. The time limit within which to appeal is 15 days.⁶⁵

There are two main obstacles faced by asylum seekers. The first is lack of information. Information on the possibility to lodge a subsequent application is never communicated to asylum seekers whose appeal at the RAB has been rejected. The other obstacle is the lack of free legal assistance when submitting a subsequent application. The only alternative for asylum seekers is to approach JRS which is the main NGO offering a free legal service in the field of asylum.

So far in 2015, 95 subsequent applications have been submitted to RefCom.

E. Guarantees for vulnerable groups of asylum seekers (children, traumatised persons, survivors of torture)

1. Special procedural guarantees

Indicators: Special Procedural Guarantees

1. Is there a specific identification mechanism in place to systematically identify vulnerable asylum seekers? Yes For certain categories No
❖ If for certain categories, specify which: Unaccompanied children
2. Are there special procedural arrangements/guarantees for vulnerable people? Yes For certain categories No
❖ If for certain categories, specify which:

Asylum seekers who are deemed to be in a particularly vulnerable situation are assessed with a view to their release from detention, following referral to the Agency for the Welfare of Asylum seekers (AWAS).

The Vulnerable Adults Assessment Procedure (VAAP) is administered by AWAS; the organisation accepts referrals for assessment from any and all of the entities that come in contact with migrants throughout their time in detention, including the Detention Service, medical staff in detention, UNHCR, NGO staff, etc. Referrals could be made on various grounds, including: serious chronic illness; psychological problems, trauma or of some other cause; mental illness; physical disability; and age (where the individual concerned is over 60), and are usually accompanied by medical certificates or other supporting documents.

⁶⁵ Article 7(1A)-(2) Refugees Act.

Assessment is conducted by a member of AWAS staff; where the individual is deemed to be vulnerable a request for release in terms of government policy is made to the Principal Immigration Officer (Commissioner of Police). As a rule the Principal Immigration Officer accepts such requests and grants release wherever AWAS deems it necessary.

Like the Age Assessment Procedure (see section on Age Assessment below), the VAAP is not regulated by clear publicly available rules. Where a referral is rejected, the individual concerned is not always informed of the decision; where the decision is communicated it is rarely communicated in writing and no reasons are ever given to the individual concerned. Where the case is being followed by a social worker, it is usually possible for the said professional to request and obtain information regarding the reasons for rejection on the client's behalf. The VAAP allows for the possibility of review of a decision not to recommend release at any point during an individual's detention, usually upon presentation of new evidence.

The length of time taken to conclude assessment procedures varies. As a rule, cases concerning referrals on grounds of mental health or chronic illness are likely to take longer to determine than cases where vulnerability is immediately obvious, e.g. in the case of physical disability.

Between July 2011 and June 2012, according to JRS records, out of a total of 39 adults released on grounds of vulnerability (mostly mental health problems or serious chronic illness) 1 was released within 2 weeks of referral; 6 within 1 month; 13 within 2 months; 6 within 3 months; 7 within 4 months; 2 within 5 months; 1 within 7 months and 3 within 8 months (JRS Malta, 2012). This effectively means that one-third spent over 3 months in detention awaiting the outcome of vulnerability assessment procedures.

While awaiting the outcome of the assessment procedure vulnerable adults are held in detention, where staff is exclusively made up of security personnel, so their access to any form of psychosocial support is extremely limited. Moreover, those requiring in-patient psychiatric care are accommodated in a closed ward where, according to the Council of Europe Committee for the Prevention of Torture (CPT) 2008 report on their visit to Malta, conditions are extremely harsh.⁶⁶ This was also recently confirmed in a 2014 report by JRS Malta.⁶⁷

Although an asylum seeker will be released from detention if he or she is found to qualify as being in a particularly vulnerable situation, in practice this will not have a bearing on the asylum procedure, unless a specific request is made to the Refugee Commissioner. This means that identification and assessment are not directly or automatically relevant for the asylum procedure, but are directed towards reception-related considerations and decisions.

Requests for adjustments to the procedure in order to cater for the needs of vulnerable individuals are made on an *ad hoc* basis. However, as these safeguards are not set out in the law, approval or otherwise is entirely discretionary with the Refugee Commissioner being in a position to dictate the way in which the interview and assessment of the claim is carried out. Notwithstanding, in practice, when such requests have been made they are usually acceded to. However, this necessarily depends on the asylum seeker being assisted by a legal representative, which is very often not the case in first-instance proceedings.

The Office of the Refugee Commissioner provided information that in the case that an asylum seeker has been identified as being in need of special procedural guarantees, a trained caseworker is assigned to do the interview, during which the caseworker remains sensitive to the fact that the person might be unable to fully disclose details of the asylum claim. Nonetheless, practitioners who have attended several interviews over the last few years indicate that this may not always be taken into consideration as the

⁶⁶ CPT, *Report on the visit to Malta from 19 to 26 May 2008*, CPT/Inf (2011) 5, available at: <http://bit.ly/1LQzMpV>, para 170.

⁶⁷ JRS Malta, *Care in Captivity? An analysis of the provision of care for detained asylum seekers experiencing mental health problems*, December 2014, available at <http://bit.ly/1C1yrgj>.

asylum seeker will still be expected to provide a considerable amount of detail that they might not always be able to provide on account of the trauma they would have experienced. In the absence of a procedure geared towards identifying victims of trauma and torture, and the emphasis on concluding cases in the shortest time possible, these asylum seekers may be at a disadvantage as they could be unable to comprehensively disclose their protection needs.

Within the context of accelerated procedures, the law makes no special provision with regard to victims of torture, rape or other serious forms of psychological, physical or sexual violence or with regard to unaccompanied children. This means that all procedures, including accelerated procedures, may be applied to these categories of persons.

However, the March 2015 amendment to the Refugees Act provides that unaccompanied children may only be subject to the accelerated procedure where (a) they come from a safe country of origin; (b) have introduced an admissible subsequent application; or (c) present a danger to national security or public order or have been forcibly expelled for public security or public order reasons.⁶⁸

2. Use of medical reports

Indicators: Use of medical reports

1. Does the law provide for the possibility of a medical report in support of the applicant's statements regarding past persecution or serious harm?
 Yes In some cases No
2. Are medical reports taken into account when assessing the credibility of the applicant's statements?
 Yes No

The law does not mention the submission of medical reports in support of an asylum seeker's claim. When these are presented, the Refugee Commissioner treats them as documentary evidence presented by the applicant. Practitioners who have assisted a number of asylum seekers at first instance note that medical reports are taken into consideration, especially with regard to applicants with mental health problems where reports provided by medical professionals are given considerable weight in the evaluation of the applicant's need for protection. Medical reports documenting torture and other violence are not routinely provided by asylum applicants.

The Office of the Refugee Commissioner notes that it has very rarely requested an applicant to undergo a medical examination and in these cases the examination is paid for from public funds.⁶⁹

3. Age assessment and legal representation of unaccompanied children

Indicators: Unaccompanied Children

1. Does the law provide for an identification mechanism for unaccompanied children?
 Yes No
2. Does the law provide for the appointment of a representative to all unaccompanied children?
 Yes No

Unaccompanied asylum seekers who declare that they are below the age of 18 upon arrival or during the filling in of the Preliminary Questionnaire are referred to the Agency for the Welfare of Asylum seekers (AWAS) for age assessment.

⁶⁸ Article 23A Refugees Act, added by Article 14 Act VI of 2015.

⁶⁹ Information obtained via email from Refugee Commissioner.

The Age Assessment Procedure was developed and implemented with a view to assessing claims of children. Although there are some references to this procedure in legal and in policy documents, the procedure itself is not regulated by law.

The only reference to age assessment procedures in law is found in Regulation 15(2) of the Procedural Regulations, which deal with the use of medical procedures to determine age, within the context of an application for asylum.

With specific reference to unaccompanied children and age assessment, the 2005 Policy Document states that, in order to avoid abuse by individuals who make false claims about their age to benefit from the protection provided to children, the

“Ministry for Justice and Home Affairs in consultation with the Ministry for the Family and Social Solidarity shall, in those cases where there is good reason to suspect the veracity of the minority age claimed by the immigrant, require the individual concerned to undertake an age verification test as soon as possible after arrival.”⁷⁰

The age assessment procedure was reviewed in late 2014, introducing a number of positive improvements by focusing on a holistic approach, by including a greater integration of the benefit of the doubt in decision-making and by reducing the timeframe of the procedure.

An Initial Reception Centre (IRC) was established in early 2015, with the aim of housing children (accompanied and unaccompanied) for the days required for initial screening and processing, yet since no boat arrivals reached Malta since its opening, its operational details remain unclear at the time of writing.⁷¹

The first age assessment phase consists of an interview conducted jointly by an AWAS staff member and a transcultural counsellor.⁷² For persons visibly under the age of 14, AWAS begins this first phase on the day immediately following their arrival. For other claims, AWAS begins two working days later and this phase must be completed by the sixth working day. Under the new procedure, there is no obligation to take into consideration any documentation provided by the person. At the end of the first phase, if the panel determines that the person is a minor, a Care Order is issued and the minor is transferred to an open reception centre where the asylum procedure resumes.

If the assessment is not conclusive at the end of the first phase, the person is referred for further age assessment. This second phase consists of a more-in-depth interview with a team of three transcultural counsellors. This interview must be completed by the eighth working day after referral. Following the interview, the panel submits its recommendations, which are then presented to a Chairperson. The last phase consists of the decision taken by the Chairperson. This determination must come by the tenth working day after referral. If the person is found to be a minor, a Care Order is issued, the minor is transferred to an open centre where the asylum procedure resumes. Under the new procedure, a Social Report is prepared by AWAS including the findings and the outcome of the assessment, this document is shared with the Department of Social Welfare Standards then send to the Ministry for the Family and Social Solidarity.

At the end of the third phase, if the assessment is still not conclusive, the Chairperson can either refer the person for a second age assessment or for a bone density test, conducted by the Ministry of Health.⁷³

⁷⁰ MJHA and MFSS, *Policy Document 2005*, 13.

⁷¹ For this reason, the information provided relates to the procedure as explained by AWAS.

⁷² The transcultural counsellors consist of a team of recent university graduates trained by JRS. They are not official AWAS employees but they fall under its supervision and responsibility.

⁷³ aditus foundation, *Unaccompanied minor asylum-seekers in Malta: a technical report on age assessment and guardianship procedures*, October 2014, available at <http://bit.ly/1W5M0Pq>.

The Age Assessment Procedure has been improved but is still plagued by a lack of adequate procedural guarantees, including lack of information about the procedure and the possibility of appeal. There is no real possibility to challenge the decision taken by the AAT.

The assigned legal guardian is an AWAS staff member, usually a social worker, although there is no requirement on guardians' general qualifications set out in law. The Procedural Regulations set out that the legal guardian shall inform the unaccompanied child about the meaning and consequences of the personal interview and prepare the child for the interview. Moreover, the representative attends the status determination interview and may ask questions during the procedure. In practice, although the legal guardian does attend the interview together with the child, information and advice regarding the asylum procedure is provided by NGOs upon referral by the children's guardians.

The above procedure is not enshrined in any law, and no formalities exist to ensure compliance. Legal guardians are generally the social workers engaged by AWAS, who are, therefore, not independent from public authorities and in most cases responsible for a large number of children, due to resource constraints. NGOs have expressed the need for additional human resources and the necessity to train staff about the specific needs of minor children from different cultural backgrounds regarding reception and care. The situation is of particular concern regarding traumatised children who have fled situations of war and violence.⁷⁴

F. The safe country concepts

Indicators: Safe Country Concepts		
1. Does national legislation allow for the use of "safe country of origin" concept?	<input checked="" type="checkbox"/> Yes	<input type="checkbox"/> No
❖ Is there a national list of safe countries of origin?	<input checked="" type="checkbox"/> Yes	<input type="checkbox"/> No
❖ Is the safe country of origin concept used in practice?	<input checked="" type="checkbox"/> Yes	<input type="checkbox"/> No
2. Does national legislation allow for the use of "safe third country" concept?	<input checked="" type="checkbox"/> Yes	<input type="checkbox"/> No
❖ Is the safe third country concept used in practice?	<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No
3. Does national legislation allow for the use of "first country of asylum" concept?	<input checked="" type="checkbox"/> Yes	<input type="checkbox"/> No

Article 2 of the Refugees Act defines the notions of safe country of origin and safe third country.

Safe country of origin

According to the Act, a safe country of origin means a country of which the applicant is a national or, being a stateless person, was formerly habitually resident in that country and he has not submitted any serious grounds for considering the country not to be a safe country of origin in his particular circumstances.

The Refugees Act also provides by way of a Schedule the list of countries of origin considered as safe. The Minister responsible for Home Affairs is competent to amend the list of countries and may review the list whenever necessary by means of an administrative act. The last amendment to the list is dated 2008. Currently the list of safe country of origin includes: Australia, Iceland, Benin, India, Botswana, Jamaica, Brazil, Japan, Canada, Liechtenstein, Cape Verde, New Zealand, Chile, Norway, Croatia, Senegal, Costa Rica, Switzerland, Gabon, United States of America, Ghana, Uruguay, Member States of the European Union and European Economic Area. The basis on which countries are listed/removed is unclear.

⁷⁴ IOM & UNHCR, *Unaccompanied Migrant and Refugee Children: Alternatives to detention in Malta*, IOM-UNHCR Joint Technical Mission, May 2014, available at: <http://bit.ly/1rsk1t3>.

The concept of safe country of origin can be used to consider an application manifestly unfounded and therefore would make it fall under the accelerated procedure.⁷⁵ It can also be used to deem an application inadmissible.⁷⁶

In 2015 so far, 28 cases were deemed inadmissible after examination by the Office of the Refugee Commissioner, based on the concept of safe country of origin (25 from Senegal, one from Benin, one from Ghana and one from the United States of America).

Safe third country

A safe third country means a country of which the applicant is not a national or citizen and where:

- (a) Life and liberty are not threatened on account of race, religion, nationality, membership of a particular social group or political opinion;
- (b) The principle of *non-refoulement* in accordance with the Convention is respected;
- (c) The prohibition of removal, in violation of the right to freedom from torture and cruel, inhuman or degrading treatment as laid down in international law, is respected;
- (d) The possibility exists to request refugee status and, if found to be a refugee, to receive protection in accordance with the Convention;
- (e) The applicant had resided in the safe country of origin for a meaningful period of time prior to his entry into Malta.

Under the Refugees Act, the concept of safe third country can be used to determine if an application should be considered under the accelerated procedure as manifestly unfounded or considered inadmissible.⁷⁷

First country of asylum

The concept of first country of asylum is defined as a country where the applicant has been recognised as a refugee or otherwise enjoys sufficient protection, including respect of the *non-refoulement* principle, and maybe readmitted thereto. This is also mentioned as a ground for inadmissibility.⁷⁸

No information is available about the application of this concept. According to RefCom, this provision may apply “on a case by case basis”.

G. Treatment of specific nationalities

Indicators: Treatment of Specific Nationalities

1. Are applications from specific nationalities considered manifestly well-founded? Yes No
❖ If yes, specify which:
2. Are applications from specific nationalities considered manifestly unfounded?⁷⁹ Yes No
❖ If yes, specify which: Jamaica, Brazil, Japan, Canada, US, Cape Verde, New Zealand, Child, Senegal, Costa Rica, Gabon, Ghana, Uruguay, EU/EEA

⁷⁵ Articles 8(1)(h) and 23 Refugees Act.

⁷⁶ Article 24(1)(g) Refugees Act.

⁷⁷ Articles 8(1)(g), 23 and 24(1)(c) Refugees Act.

⁷⁸ Article 24(1)(b) Refugees Act.

⁷⁹ Whether under the “safe country of origin” concept or otherwise.

In recent years, the Office of the Refugee Commissioner has granted some groups of applicants a “Provisional Humanitarian Protection” (PHP) pending a final decision on their application, until a recommendation on protection or return from UNHCR is issued. It was used in case of mass influx or sudden increase of certain groups of asylum seekers coming from countries that *prima facie* were more liable to be given protection.

“Provisional Humanitarian Protection” is essentially a form of temporary protection status pending full determination of the individual case. It is not contained in any law, so quite dependent on the Refugee Commissioner’s discretion. Provisional Humanitarian Protection also lacks clarity as to the content of associated rights and obligations but in general beneficiaries of PHP are treated in the same manner as asylum seekers. In recent years this form of protection was granted to groups of **Eritreans, Libyans and Syrians**. This is no longer the case for these groups.

Situation of Syrian applicants

Prior to the start of the Syrian conflict, Syrian asylum applicants constituted only a small proportion of those seeking international protection in Malta. In the large majority of cases, those Syrians who requested asylum would not have arrived by boat from Libya but applied after being apprehended for having overstayed their permission to stay.

In the initial months of the conflict, Syrian asylum seekers were being granted “Provisional Humanitarian Protection” pending a final determination of their need for international protection. This provided protection from forced removal yet applicants were still considered as being asylum seekers, and were only entitled to the rights of the latter category.

Some months later when the conflict intensified and it seemed unlikely that the situation would be resolved swiftly, applications made by Syrian nationals were finally concluded. At this point a distinction was made between those Syrians who arrived in Malta following the start of the conflict and those who had been in Malta for a number of years and/or months and applied for protection after the start of the conflict.

Those who arrived in Malta and applied for asylum immediately following the start of the conflict had their claims examined in accordance with the normal procedure and were subsequently granted refugee status, or subsidiary protection on account of the serious harm they would face if sent back to Syria at that point in time. The applications of those who had been in Malta for some time and who only applied for asylum after the start of the conflict were also examined in line with the normal procedure, yet if it was found that they were not eligible for refugee status, instead of being granted subsidiary protection they were granted ‘Temporary Humanitarian Protection’ on the same ground that return to Syria would put them at risk because of the nature of the conflict. Temporary Humanitarian Protection, which is to be distinguished from provisional humanitarian protection as discussed above, is a domestic form of protection which, while still providing protection from forced return and a selection of the same rights of beneficiaries of subsidiary protection, is not set out in law and is granted on a discretionary basis.

In 2013 the Refugee Appeals Board disagreed with the assessment that the harm feared by Syrian asylum seekers on account of the civil war rendered them eligible only for Provisional Humanitarian Protection. First-instance decisions were therefore overturned and the asylum seekers concerned granted subsidiary protection. At around this same time, all Syrian applicants who had been granted PHP had their protection changed to subsidiary protection; currently, all Syrian applicants who prove their Syrian nationality are granted, as a minimum, subsidiary protection. A number of persons have also been recognised as refugees.

In 2015 so far, 127 Syrian nationals applied for international protection in Malta. No rejections decisions have been taken. The vast majority of applicants have been granted subsidiary protection.

Situation of Libyan applicants

In 2014, applicants from Libya were granted as a minimum a Temporary Humanitarian Protection (THP) until they could safely return to Libya. This protection was granted to ensure that applicants, who did not qualify for refugee status or subsidiary protection, would be protected against refoulement. At that time, RefCom did not consider the situation in Libya was reaching the threshold of indiscriminate violence in terms of Article 15(c) of the recast Qualification Directive.

In January 2015, RefCom conducted a review of the situation in Libya to assess whether the security situation reached that threshold. The Office identified a number of indicators to measure the level and nature of indiscriminate violence and based its reasoning on European case law, UNHCR guidelines and up-to-date country of origin information. RefCom came to the conclusion that “the armed conflict in Libya meets the threshold of an indiscriminate violence since it is of such intensity that any person, only by returning to the country, would be at risk simply on account of his/her presence there”. As a consequence, the status of all the beneficiaries of THP who RefCom felt did not originally qualify for refugee status or subsidiary protection based on Article 15(b) of the recast Qualification Directive, was revised and changed to subsidiary protection under Article 15(c) of the recast Qualification Directive.

In 2015 so far, no negative decisions have been taken on Libyan applications and no forms of humanitarian protection have been granted. Moreover, two decisions based on exclusion grounds have been taken for Libyan nationals but no details are available about these cases.

Reception Conditions

A. Access and forms of reception conditions

1. Criteria and restrictions to access reception conditions

Indicators: Criteria and Restrictions to Reception Conditions

1. Does the law make material reception conditions available to asylum seekers in the following stages of the asylum procedure?
- | | | | |
|---------------------------|---|--|-----------------------------|
| ❖ Regular procedure | <input checked="" type="checkbox"/> Yes | <input type="checkbox"/> Reduced material conditions | <input type="checkbox"/> No |
| ❖ Dublin procedure | <input checked="" type="checkbox"/> Yes | <input type="checkbox"/> Reduced material conditions | <input type="checkbox"/> No |
| ❖ Admissibility procedure | <input checked="" type="checkbox"/> Yes | <input type="checkbox"/> Reduced material conditions | <input type="checkbox"/> No |
| ❖ Appeal | <input checked="" type="checkbox"/> Yes | <input type="checkbox"/> Reduced material conditions | <input type="checkbox"/> No |
| ❖ Subsequent application | <input checked="" type="checkbox"/> Yes | <input type="checkbox"/> Reduced material conditions | <input type="checkbox"/> No |
2. Is there a requirement in the law that only asylum seekers who lack resources are entitled to material reception conditions? Yes No

Maltese law does not distinguish between the various procedures in order to determine entitlement to reception conditions, nor does it establish any distinction in the content of such conditions linked to the kind of procedure. Relevant legislation simply refers to “applicants”, defined in the Procedural Regulations as “applicants for asylum”. No reference is made to the duration of entitlement to reception conditions.

Asylum seekers who do have access to personal financial resources may be determined to be eligible for material conditions. No indication is provided as to the level of personal resources required and it is unclear how this is determined and by whom, including whether an assessment of risk of destitution is actually carried out. Notably, Regulation 11 of the Reception Regulations states that asylum seekers who are working may be required to contribute to the cost of material reception conditions. Regulation 16 of the Reception Regulations states that asylum seekers who feel aggrieved by a decision relating to the Regulations may be granted leave to appeal before the Immigration Appeals Board, established by the Immigration Act.

Practice until late 2012 was not to grant any reception conditions to asylum seekers arriving in Malta through regular channels, including in situations where the individual did not have personal financial resources to provide for themselves. Towards the end of 2012 the Agency for the Welfare of Asylum seekers (AWAS) amended this policy so as to include these asylum seekers within their provision of reception conditions.

This means that those asylum seekers who are not detained are entitled to reception conditions from the moment their claim is registered by RefCom.

With regard to subsequent applications, whereas the Reception Regulations apply to all asylum seekers, in practice reception conditions may not be offered to asylum seekers who might have benefitted from them earlier and subsequently departed from the Open Centre system. As a matter of policy, persons departing from the Open Centre system are not generally authorised to re-enter it, with consequential lack of provision of reception modalities.

Other practical obstacles relating to access to material reception conditions are essentially linked to the fact that all asylum seekers entering Malta in an irregular manner, so the vast majority of asylum seekers are detained in closed centres where the quality of material reception conditions does not meet the appropriate standards (see section on [Conditions in Detention Facilities](#)).

2. Forms and levels of material reception conditions

Indicators: Forms and Levels of Material Reception Conditions

1. Amount of the monthly financial allowance/vouchers granted to asylum seekers as of 31 August 2015 (in original currency and in €): €130.44

The Reception Regulations cover the provision of “material conditions”, defined as including “housing, food and clothing, provided in kind, or as financial allowances or in vouchers, and a daily expenses allowance.”⁸⁰

In practice, asylum seekers in detention are provided with accommodation, food and clothing in kind. Asylum seekers in Open Centres are provided with accommodation and a daily food and transport allowance.

The Reception Regulations generally specify that the level of material reception conditions should ensure a standard of living adequate for the health of the asylum seekers, and capable of ensuring their subsistence. However, legislation neither requires a certain level of material reception conditions, nor does it set a minimum amount of financial allowance provided to detained asylum seekers. Asylum seekers living in Open Centres are given a small food and transport allowance, free access to state health services, in cases of children, free access to state education services. They are not entitled to social welfare benefits. Asylum seekers in detention enjoy free state health services, clearly within the practical limitations created by their presence within a detention centre.

Asylum seekers living in Open Centres experience difficulties in securing an adequate standard of living. The daily allowance provided is barely sufficient to provide for the most basic of needs, and the lack of access to social welfare support exacerbates these difficulties. Social security policy and legislation precludes asylum seekers from social welfare benefits, except those benefits which are defined as “contributory”. With contributory benefits entitlement is based on payment of a set number of contributions and on meeting the qualifying conditions, which effectively implies that only a tiny number of asylum seekers would qualify for such benefits, if any.

AWAS provides different amounts of daily allowance, associated with the asylum seeker’s status: €4.66 for asylum seekers; persons returned under the Dublin III Regulation receive €2.91; employed asylum seekers receive nothing but are then granted €4.08 upon termination of employment; and children receive €2.33 until they turn 17.

It is to be further noted that asylum seekers living in Open Centres are required to contribute the amount of €8 per week towards the cost of material living conditions.

Asylum seekers in detention receive less favourable treatment than nationals with regard to material support, due to the fact that they are detained. Persons living in Open Centres are treated less favourably than nationals in relation to access to social welfare support, as they are denied access.

⁸⁰ Article 2 Reception Regulations.

3. Types of accommodation

Indicators: Types of Accommodation

1. Number of reception centres:⁸¹ 8
2. Total number of places in the reception centres: 1,500
3. Total number of places in private accommodation: Approx. 400
4. Type of accommodation most frequently used in a regular procedure:
 - Reception centre Hotel or hostel Emergency shelter Private housing Other
5. Type of accommodation most frequently used in an accelerated procedure:
 - Reception centre Hotel or hostel Emergency shelter Private housing Other

The number of available places in reception centres is not available, as these figures were not provided by AWAS. 8 reception centres are being used, 6 of which are run by AWAS and the remaining 2 by NGOs. The latter do, however, fall within AWAS' overall reception system. Overcrowding becomes a problem at various times of the year, owing primarily to increased releases from detention and the failure of residents to leave the Open Centres.

In October 2015, the contract with the NGO running the **Marsa Open Centre**, one of the largest reception centres, was terminated, with daily management reverting to AWAS. The centre was previously run by the Foundation for Shelter and Support to Migrants (FSM). No information was provided on the future of the centre and the role of NGOs therein.⁸² In particular, concerns are raised about the continuation of specific support programmes put in place by FSM.

A new Initial Reception Centre (IRC) was set up in early 2015, for unaccompanied children and accompanied migrant children with up to two family members, in order to process medical clearance, age assessment and registration before a transfer to an open centre. This centre is intended to allow for the non-detention of minors,⁸³ yet it is unclear whether the IRC will effectively constitute deprivation of liberty or otherwise.

The reception centres and respective capacity are as follows:

Open centre	Maximum capacity
Tent Village Hal-Far	400
Hangar Hal-Far	250
Initial Reception Centre	200
Marsa Open Centre	400
Emigrants Commission	200
Peace Lab	Approx. 30
Dar is Sliem ⁸⁴	Approx. 30
Dar il-Liedna	Approx. 60

As of April 2015, 600 persons were accommodated in Open Centres, compared to 764 in 2014.⁸⁵

One NGO also offers accommodation in the form of private houses/flats, also falling within AWAS' overall reception system. In exceptional cases, particularly where the existing facilities are overcrowded,

⁸¹ Both permanent and for first arrivals.

⁸² Times of Malta, 'Marsa Open Centre to be taken over by Government', 30 June 2015, available at: <http://bit.ly/1RpPCdP>.

⁸³ OHCHR, 'Malta / Migrants: UN expert group hails positive move on automatic detention, but calls for long-term solutions', 26 June 2015, available at: <http://bit.ly/1W6TO91>.

⁸⁴ Closed in mid-2015 since all the unaccompanied minors it accommodated turned 18.

⁸⁵ UNHCR Malta, *Malta Asylum Trends: Real time*, available at: <http://www.unhcr.org/mt/charts/>.

alternative venues are utilised as for example shelters for homeless persons. Persons applying at the airport are generally transferred to the main Open Centres.

Some families, single women and unaccompanied children are accommodated in separate Open Centres although families also often share accommodation with other groups. Foster families are hardly ever resorted to and in such cases these would be processed through the mainstream fostering procedures.

Unaccompanied children are generally accommodated alone, or in a centre where families are also accommodated, although the spaces are kept separate. The Reception Regulations do specify (Regulation 15) that unaccompanied children aged 16 years or over may be accommodated with adult asylum seekers, and it has happened in practice.

Apart from the above considerations (age, family composition), there are no clear allocation criteria on the basis of which persons are accommodated in specific centres. There does not seem to be a contingency plan for situations of severe over-crowding.

Whilst efforts are made to segregate single women from single men, it is not uncommon for men and women, single or otherwise to be accommodated in the same centre.

4. Conditions in reception facilities

Indicators: Conditions in Reception Facilities

1. Are there instances of asylum seekers not having access to reception accommodation because of a shortage of places? Yes No
2. What is the average length of stay of asylum seekers in the reception centres? Not available
3. Are unaccompanied children ever accommodated with adults in practice? Yes No

Conditions in the open centres vary greatly from one centre to another, yet overcrowding and related concerns are a common problem. In general, the centres provide sleeping quarters either in the form of rooms housing between 4 (the centres for unaccompanied children) to 24 people (**Marsa Open Centre**), or mobile metal containers sleeping up to 8 persons per container (**Hal-Far Hangar site** [HOC], and **Hal Far Tent Centre** [HTV]). Common cooking areas are provided, as also common showers and toilets. The large number of persons accommodated in each centre (e.g. around 400 in **Marsa Open Centre**) inevitably results in severe hygiene and maintenance problems.

Despite the very large numbers of residents, the majority of open centres are run by small teams that are responsible for the centres' daily management and also for the provision of information and support to residents. Individuals are also referred to AWAS' social welfare team as necessary.

The majority of centres do not offer any form of activities for residents, yet these are able to freely leave the centre as they please.

Overall, the living conditions in the open centres, save for a few exceptions, are extremely challenging. Low hygiene levels, severe over-crowding, lack of physical security, location of most centres in a remote area of Malta, poor material structures and occasional infestation of rats are the main general concerns expressed in relation to the Open Centres.⁸⁶

For asylum seekers living in Open Centres, it is difficult to calculate average length of stay as they will probably finalise their asylum procedure whilst in the Open Centre so consequently switching asylum

⁸⁶ See for example, International Commission of Jurists, *Not Here to Stay*, May 2012.

status. Once their procedure is finalised, either positively or negatively, they will be allowed to remain in the Open Centre. Residence is usually for renewable 4-month periods, following assessments by AWAS staff members.

5. Reduction or withdrawal of reception conditions

Indicators: Reduction or Withdrawal of Reception Conditions

1. Does the law provide for the possibility to reduce material reception conditions?
 Yes No
2. Does the legislation provide for the possibility to withdraw material reception conditions?
 Yes No

The Reception Regulations state that reception conditions may be withdrawn or reduced where the asylum seeker abandons the established place of residence without providing information or consent. The law does not define when a place is considered abandoned. However, practice shows that this is the case where a resident:⁸⁷

- Fails to sign the residence sheet for a set number of times without a valid excuse;
- Does not comply with reporting duties;
- Fails to appear for the asylum interview; or
- Has concealed financial resources.

The Regulations state that such decisions shall be taken “individually, objectively and impartially and reasons shall be given,” with due consideration to the principle of proportionality. Whether this assessment includes risk of destitution cannot be confirmed as this is not specifically mentioned and no such cases have ever arisen.

Asylum seekers may appeal these decisions before the Immigration Appeals Board, in accordance with the Immigration Act. When these decisions are taken regarding reception conditions in detention, it is the Detention Service taking them, whilst AWAS would take these decisions in relation to residents of its Open Centres. It is unclear how reception conditions of asylum seekers living in the community, and not in any AWAS-coordinated centre, are regulated as relevant legislation does not provide this information and no such situation has ever arisen.

Appeals to the Immigration Appeals Board are particularly problematic for asylum seekers who are detained, as no information is provided on how to access the Board and its procedures. This was also highlighted by the ECtHR in its Article 5 ECHR cases against Malta.⁸⁸

6. Access to reception centres by third parties

Indicators: Access to Reception Centres

1. Do family members, legal advisers, UNHCR and/or NGOs have access to reception centres?
 Yes With limitations No

Access to Open Centres is regulated by AWAS, for which permission is also required. Criteria to be granted access to the Centres are unclear, although it does not seem to be problematic for individuals/organisations wishing to provide a service to residents. Non-service-related visits are not

⁸⁷ Regulation 13 Reception Regulations.

⁸⁸ ECtHR, *Louled Massoud v Malta*, Application No 24340/08, Judgment of 27 July 2010; *Aden Ahmed v Malta*, Application No 55352/12, Judgment of 23 July 2013; *Suso Musa v. Malta*, Application No 42337/12, Judgment of 23 July 2013.

granted permission easily, as is the case for academics, friends, research students, reporters, and so forth.

7. Addressing special reception needs of vulnerable persons

Indicators: Special Reception Needs

1. Is there an assessment of special reception needs of vulnerable persons in practice?
 Yes No

The Reception Regulations state that individual evaluations will be conducted to assess the special needs of vulnerable persons.⁸⁹ The Regulations provide an indicative and therefore non-exhaustive list of vulnerable persons: children, unaccompanied children and pregnant women. In terms of the Regulations, this process is intended to assess the nature of the special needs, rather than to identify vulnerable individuals. As such, Maltese legislation does not regulate the formal identification of vulnerable persons. In the detention context, vulnerability assessment is conducted by AWAS seekers through interviews conducted primarily by social or care workers. Outside of detention, no information is available as to the details of any formal vulnerability assessment conducted for the purpose of addressing specific reception needs.

Beyond the general principle, specific measures provided by law for vulnerable persons are as follows: maintenance of family unity where possible;⁹⁰ particular, yet undefined, attention to ensure that material reception conditions are such to ensure an adequate standard of living.⁹¹

In practice, persons identified as vulnerable by the AWAS are released from detention centres when they are identified as such, and necessary release formalities are finalised. Unaccompanied children are then accommodated in separate and more specialised Open Centres. All other vulnerable individuals are treated on a case-by-case basis by AWAS social workers, with the view to providing the required care and support.

Despite all of the above, due to resource and infrastructural limitations some vulnerable individuals are either never identified or, once identified, are unable to access the care and support they require.

With regard to ongoing monitoring, whilst no formal monitoring system exists within detention, vulnerable individuals may be referred to AWAS at any point of their stay. Within open centres, no formal monitoring mechanism is established, yet vulnerable individuals may approach or be referred to open centre management and staff.

8. Provision of information

The Reception Regulations require that within 15 days from lodging the asylum application, the Principal Immigration Officer ensures that all applicants are informed of reception benefits and obligations, and of groups and individuals providing legal and other forms of assistance.⁹²

In the detention centres, all persons are within days provided with the document entitled “Your Entitlements, Responsibilities and Obligations while in Detention”, a publication of the former Ministry for

⁸⁹ Regulation 14 Reception Regulations.

⁹⁰ Regulation 7 Reception Regulations.

⁹¹ Regulation 11(2) Reception Regulations.

⁹² Regulation 4 Reception Regulations.

Justice and Home Affairs.⁹³ The document provides information, albeit in a basic format, on: Dublin procedures; asylum procedure; the Immigration Appeals Board; daily material reception condition rights (e.g. catering, clothing, correspondence, hygiene, etc.) and various responsibilities and obligations e.g. information disclosure, discipline, personal hygiene, medical self-care, etc. The information contained in the booklet is not deemed to be adequate or sufficient due to the limited quantity of information actually provided, the languages in which it is available (English, French and Arabic), the language style and the generality of the issues presented.

In Open Centres, within days of their placement residents are provided with detailed information on their rights and obligations, covering issues such as maintenance, registrations, financial allowance, and so forth. No information is provided on the asylum procedure since in the vast majority of cases this would have been already provided in detention. In fact, asylum seekers who would not have been detained prior to accommodation in an Open Centre do not receive any information on the procedure, unless provided by NGOs.

9. Freedom of movement

Indicators: Freedom of Movement

1. Is there a mechanism for the dispersal of applicants across the territory of the country?
 Yes No
2. Does the law provide for restrictions on freedom of movement? Yes No

Asylum seekers not in detention enjoy freedom of movement around the island(s). All persons living in an Open Centre are required to regularly confirm residence through signing; these signing procedures also confirm eligibility for the *per diem* (see Forms and Levels of Material Reception Conditions) and to ensure a continued right to reside in the Centre.

Malta does not operate any dispersal scheme, since residence in open centres remains voluntary. Nonetheless, placement in a particular open centre generally implies limited possibility to change centre, although such decisions could be taken on a case-by-case basis. Residing in an open centre brings with it entitlement to a financial *per diem*, intended to cover food and transportation costs. With the exception of a few cases, following a specific request which is assessed on a case-by-case basis, persons living outside the open centres do not receive this *per diem*.

Beyond individual situations, movement between centres is sometimes affected due to space considerations. Rarely, asylum seekers might be moved from one centre to another in order to maintain security and order within particular centres.

⁹³ The document is not available online, but is included in the Annex to the 'Responses of the Maltese Government to the report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) on its visit to Malta from 15 to 21 June 2005', 2007, available at: <http://www.refworld.org/docid/4714c9929.html>.

B. Employment and education

1. Access to the labour market

Indicators: Access to the Labour Market

1. Does the law allow for access to the labour market for asylum seekers? Yes No
❖ If yes, when do asylum seekers have access the labour market? 12 months
2. Does the law allow access to employment only following a labour market test? Yes No
3. Does the law only allow asylum seekers to work in specific sectors? Yes No
❖ If yes, specify which sectors:
4. Does the law limit asylum seekers' employment to a maximum working time? Yes No
❖ If yes, specify the number of days per year
5. Are there restrictions to accessing employment in practice? Yes No

Asylum seekers are entitled to access the labour market, without limitations on the nature of employment they may seek. In terms of the Reception Regulations this access should be granted no later than 12 months following the lodging of the asylum application, though the amended Reception Regulations currently discussed in Parliament propose to reduce this time-limit to 9 months. Asylum seekers will be given an employment licence that lasts for 6 months, and can be renewed. Fees are payable for new licences, and for every renewal.

Asylum seekers who are not detained face a number of difficulties, namely: language obstacles, limited or no academic or professional background, intense competition with refugees and other migrants, limited or seasonal employment opportunities.

A number of vocational training courses are available to asylum seekers, yet not specifically organised for them. Eligibility conditions vary between courses and generally reflect eligibility criteria for Maltese nationals.

2. Access to education

Indicators: Access to Education

1. Does the law provide for access to education for asylum-seeking children? Yes No
2. Are children able to access education in practice? Yes No

Article 13(2) of the Refugees Act states that asylum seekers shall have access to state-funded education and training. This general statement is complemented by the Reception Regulations, wherein asylum-seeking children are entitled to access the education system in the same manner as Maltese nationals, and this may only be postponed for up to 3 months from the date of submission of the asylum application. This 3-month period may be extended to 1 year "where specific education is provided in order to facilitate access to the education system".⁹⁴ Primary and secondary education is offered to asylum seekers up to the age of 15-16, as this is also the cut-off date for Maltese students. Access to state schools is free of charge. These rules apply for primary and secondary education.

Detained children are not provided with any form of education whilst they are in detention.

⁹⁴ Proviso to Regulation 9(2) Reception Regulations.

The practical difficulties faced by asylum seeking children relate to the absence of a formal assessment process to determine the most appropriate entry level for children; the absence of preparatory classes; limited or no educational background; language difficulties.

The location of centres might be problematic as the transport provided by the schools (public or private) is not free of charge. In practice, children do attend school. Children with particular needs are treated in the same manner as Maltese children with particular needs, whereby a Learning Support Assistant (LSA) may be appointed to provide individual attention to the child. Yet it is noted that in the situation of migrant or refugee children, language issues are not appropriately provided for, with possible implications on the child's long-term development.⁹⁵

Adults and young asylum seekers are eligible to apply to be exempted from fees at state educational institutions, including the University of Malta, vocational training courses, languages lessons and other adult education. Vocational training courses offered by the Employment and Training Corporation are also accessible to asylum seekers.

Beneficiaries of protection are increasingly making use of these educational services, primarily since information on their availability is becoming available to the various communities through NGO activities and also increased openness by the relevant governmental authorities.

C. Health care

Indicators: Health Care

1. Is access to emergency healthcare for asylum seekers guaranteed in national legislation?

<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No
------------------------------	--
2. Do asylum seekers have adequate access to health care in practice?

<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> Limited	<input type="checkbox"/> No
------------------------------	---	-----------------------------
3. Is specialised treatment for victims of torture or traumatised asylum seekers available in practice?

<input type="checkbox"/> Yes	<input type="checkbox"/> Limited	<input checked="" type="checkbox"/> No
------------------------------	----------------------------------	--
4. If material conditions are reduced or withdrawn, are asylum seekers still given access to health care?

<input checked="" type="checkbox"/> Yes	<input type="checkbox"/> Limited	<input type="checkbox"/> No
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Article 13(2) of the Refugees Act states that asylum seekers shall have access to state medical care, with little additional information provided. The Reception Regulations further stipulate that the material reception conditions should ensure the health of all asylum seekers, yet no specification is provided as to the level of health care that should be guaranteed. Practical difficulties arise for asylum seekers due to the fact that they are detained, as the detention system seriously hinders their access to health services. Although health services are provided in the detention centres, these are not sufficient to meet the entirety of needs in the centres. Asylum seekers who are not detained may access the state health services, with the main obstacles being mainly linked to language difficulties.

Furthermore, institutional obstacles prevent effective recourse to the mainstream health services when required, including in cases of emergencies: limited transport availability, absence of full-time medical staff in the detention centres, informal transactions for medicine, etc.

Persons suffering mental health problems fall under the above-mentioned legal provisions. As with vulnerable persons, detained asylum seekers suffering from mental health problems face the practical difficulty of not being identified, owing to the absence of a formal identification process or of full-time

⁹⁵ Neil Falzon, Maria Pisani and Alba Cauchi, *Research Report: Integration in Education of Third Country Nationals*, aditus foundation, 2012, available at: <http://bit.ly/1Kuge6M>.

specialists within the detention centres. Once identified, they are generally transferred to Mount Carmel mental health hospital for treatment.

No specialised services exist in Malta for victims of torture or trauma, primarily owing to the lack of such capacity on the island.

Decisions to reduce or withdraw material reception conditions would not affect access to health care.

Detention of Asylum Seekers

A. General

Indicators: General Information on Detention

- | | |
|--|-----------------|
| 1. Total number of asylum seekers detained in 2015: ⁹⁶ | Not available |
| 2. Number of asylum seekers in detention at the end of 2015: ⁹⁷ | Not available |
| 3. Number of detention centres: | 2, yet 1 in use |
| 4. Total capacity of detention centres: | 200 |

National law does not specifically regulate the detention of asylum seekers. In terms of the Immigration Act, detention is the automatic consequence of a decision to refuse admission into national territory and/or the issuing of a removal order. The Principal Immigration Officer is the authority competent to issue return decisions and removal orders and to refuse or grant admission into national territory.

Since 2002 the majority of the asylum-seeking population in Malta arrived by boat, having travelled in an irregular manner from Libya. Most are brought ashore after they are rescued from vessels in distress; upon arrival all are issued with a Return Decision and Removal Order in terms of the Immigration Act and placed in detention. Submission of an application for international protection does not imply release from detention. As the majority of asylum seekers reach Malta after travelling irregularly by boat from Libya, most asylum seekers are detained.

As a rule, persons with irregular migration status who apply for asylum before they are apprehended by the immigration authorities for irregular entry or stay are not detained pending the outcome of their asylum application, although this is in fact a small percentage of annual asylum applications.

Between January-May 2015, 93 asylum seekers arrived by boat (15% of the total number of applicants) and were therefore detained for irregular entry, while 526 arrived as “non-boat arrivals”.⁹⁸

The Safi Barracks facility is used to detain both asylum seekers and immigrants awaiting removal. At the end of August 2015, there were around 10 detainees.

B. Legal framework of detention

1. Grounds for detention

Indicators: Grounds for Detention

- | | | |
|---|--|--|
| 1. In practice, are most asylum seekers detained | | |
| ❖ on the territory: | <input type="checkbox"/> Yes | <input checked="" type="checkbox"/> No |
| ❖ at the border: | <input checked="" type="checkbox"/> Yes | <input type="checkbox"/> No |
| 2. Are asylum seekers detained in practice during the Dublin procedure? | <input checked="" type="checkbox"/> Frequently | |
| | <input type="checkbox"/> Rarely | |
| | <input type="checkbox"/> Never | |
| 3. Are asylum seekers detained during a regular procedure in practice? | <input checked="" type="checkbox"/> Frequently | |
| | <input type="checkbox"/> Rarely | |
| | <input type="checkbox"/> Never | |

⁹⁶ Including *both* applicants detained in the course of the asylum procedure and persons lodging an application from detention.

⁹⁷ Specify if this is an estimation, or if it includes rejected asylum seekers as well.

⁹⁸ UNHCR Malta, *Malta Asylum Trends: Real time*, available at: <http://www.unhcr.org/mt/charts/>.

National law does not specifically provide for the detention of asylum seekers, whether during the regular procedure or during the accelerated or Dublin procedures. When asylum seekers are detained it is in terms of the Immigration Act after they have been refused admission into Malta or issued with a Removal Order.

In terms of Article 10 of the Immigration Act, a person refused admission into Malta may be detained on land and, while they are detained, they shall be deemed to be in legal custody and not to have landed. Article 14 provides that the Principal Immigration Officer may issue a Removal Order against a person deemed to be a 'prohibited immigrant' in terms of Article 5 of the same Act. Once such an order is made, the person against whom it is issued shall be held in custody until he or she is removed from Malta.⁹⁹

Persons who apply for asylum after they are taken into custody remain in detention until their asylum application is determined. In terms of national policy on reception of irregular arrivals, which is outlined in a 2005 national policy document entitled "Refugees, Irregular Immigrants and Integration" and is still applicable, pending the transposition of the recast Reception Conditions Directive:

"Although by landing in Malta without the necessary documentation and authorisation irregular immigrants are not considered to have committed a criminal offence, in the interest of national security and public order they are still kept in detention until their claim to their country of origin and other submissions are examined and verified."¹⁰⁰

2. Alternatives to detention

Indicators: Alternatives to Detention

1. Which alternatives to detention have been laid down in the law?
 Reporting duties
 Surrendering documents
 Financial guarantee
 Residence restrictions
2. Are alternatives to detention used in practice?
 Yes No

Neither law nor policy specifically require that alternatives to detention are in place, however both law and policy make passing reference to alternatives.

The 2005 national policy document contains a reference to "alternative centres" in relation to "irregular immigrants who, by virtue of their age and/or physical condition, are considered to be vulnerable", stating that they "are exempt from detention and are accommodated in alternative centres".¹⁰¹

Moreover, Regulation 11(8) of the Returns Regulations states that a third country national may be kept in detention in order to carry out a return and removal procedure unless "other sufficient and less coercive measures" are applicable.

In practice, detention is the automatic consequence of a decision to issue a removal order and it would appear that, in the vast majority of cases, alternatives to detention are not considered. It is unclear whether an assessment is made of the risk of absconding in each case; what is certain is that almost all including those deemed to be prohibited immigrants are subsequently detained.

⁹⁹ Article 14(3) Immigration Act.

¹⁰⁰ MJHA and MFSS, *Refugees, Irregular Migrants and Integration*, January 2005, 11.

¹⁰¹ *Ibid*, 11.

As a rule, even those who are exempt from detention in terms of government policy are detained upon arrival. They are however released after the necessary assessment is conducted, medical clearance is obtained and an alternative placement is identified.

It should be noted that, in addition to the above, Article 25A(6) of the Immigration Act allows the Immigration Appeals Board to grant provisional release from detention upon request, to anyone who is a party to proceedings before it, subject to any conditions it may deem fit. The Criminal Code provisions on bail apply to such requests. In practice such release is normally granted to asylum seekers pending the outcome of an appeal from the removal order/return decision, upon payment of a financial guarantee and the provision of an assurance of accommodation and financial support, on condition that they sign at a police station a number of times per week. As such proceedings are usually put off until any asylum claim is finally determined, this effectively means that applicants are not detained for the duration of their asylum procedure. In practice this remedy is used mostly by over-stayers; boat arrivals very rarely have the resources necessary to avail themselves of this remedy.

There are no available statistics on compliance rates.

3. Detention of vulnerable applicants

Indicators: Detention of Vulnerable Applicants

1. Are unaccompanied asylum-seeking children detained in practice? Frequently
 Rarely
 Never
- ❖ If frequently or rarely, are they only detained in border/transit zones? Yes No
2. Are asylum seeking children in families detained in practice? Frequently
 Rarely
 Never

Vulnerable asylum seekers are released from detention in terms of government policy to await the outcome of their asylum application in the community, once their vulnerability is confirmed through an individual assessment conducted by the AWAS; an alternative non-custodial placement is identified.

In terms of the 2005 policy document, “irregular immigrants who, by virtue of their age and/or physical condition, are considered to be vulnerable are exempt from detention and are accommodated in alternative centres.”¹⁰² The said document contains an inclusive list of those categories of migrants considered vulnerable, which includes: “unaccompanied minors, persons with disability, families and pregnant women”.¹⁰³

In order to give effect to this policy, two procedures were put in place to assess ‘vulnerability’ in individual cases. These procedures are known as the Age Assessment Procedure and the VAAP (see section on Asylum Procedure: Guarantees for Vulnerable Groups). Both of these procedures are implemented by AWAS. Although AWAS has not specifically and legally been assigned responsibility for assessing vulnerability,¹⁰⁴ in practice, it has full responsibility for these procedures.

It should be noted that in cases where vulnerability is immediately apparent and relatively easy to establish, e.g. in the case of family units with very young children or pregnant women, the assessment procedure is quite straightforward and release is usually effected within 1 or 2 weeks of arrival in Malta.

¹⁰² *Ibid*, 11.

¹⁰³ *Ibid*, 13.

¹⁰⁴ The functions of the Agency are set out in Regulation 6 AWAS Regulations.

Where vulnerability is less evident, e.g. in the case of unaccompanied children who are not obviously of minor age, or where the individual concerned is being assessed with a view to release on grounds of mental health, psychological problems or chronic illness, the assessment procedure adopted is necessarily more complex and often takes considerably longer.

It should be stressed that, although these procedures can have a determining impact on the continued detention of individuals detained in terms of the Immigration Act, they are not formally regulated by law or by publicly available rules or guidelines.

According to JRS, one couple was referred in 2015 on vulnerable grounds and was eventually released from detention following a vulnerability assessment.

4. Duration of detention

Indicators: Duration of Detention

- | | |
|--|-----------|
| 1. What is the maximum detention period set in the law (incl. extensions): | 12 months |
| 2. In practice, how long in average are asylum seekers detained? | 3 months |

National law only specifies a time limit for the detention of third-country nationals detained with a view to removal.

The maximum duration for the detention of asylum seekers, in terms of national policy but not clearly contained in law, is set at 12 months. This was introduced following the enactment of the Reception Regulations, which transposed the 2003 Reception Conditions Directive into national legislation. It is based on Regulation 10, which provides that asylum seekers who are still awaiting a first-instance decision after 12 months must be allowed access to the labour market.¹⁰⁵

To date this has been interpreted to mean that all asylum seekers, whose application is pending after 12 months, are released to live in the community and allowed access to the labour market. When computing the 12-month period, any time spent outside the detention centre, e.g. if the person concerned escaped, is not counted.

In practice, asylum seekers who are granted some form of protection are detained for as long as it takes to determine their asylum application.

In 2015, due to the very small number of boat arrivals, very few asylum seekers were detained. Almost all of them have been released after 3 months following the first review of their detention. According to the authorities, in 2015, 9 asylum seekers were detained 15 to 30 days, 1 was detained 31 to 45 days, 1 was detained 75 to 100 days and 77 were detained more than 100 days.¹⁰⁶

¹⁰⁵ Regulation 10 Reception Regulations, which echoes the provisions of Article 11 of the 2003 Reception Conditions Directive.

¹⁰⁶ Council of Europe, Secretariat of the Committee of Ministers, *Communication from Malta concerning the Suso Musa group of cases against Malta (Application No 42337/12)*, 2 July 2015, available at: <http://bit.ly/1NPCYnH>.

C. Detention conditions

1. Place of detention

Indicators: Place of Detention

1. Does the law allow for asylum seekers to be detained in prisons for the purpose of the asylum procedure (i.e. not as a result of criminal charges)? Yes No
2. If so, are asylum seekers ever detained in practice in prisons for the purpose of the asylum procedure? Yes No

There are currently two detention centres, yet only one facility is in use due to the limited number of boat arrivals: **Safi Barracks, B Block**, with a maximum capacity of 200. The facilities known as the Warehouses in Safi Barracks were closed for refurbishment at the beginning of 2014 and have not been used since. **Lyster Barracks**, the other detention facility, was closed in mid-2015 because no more migrants were detained there.

2. Conditions in detention facilities¹⁰⁷

Indicators: Conditions in Detention Facilities

1. Do detainees have access to health care in practice? Yes No
❖ If yes, is it limited to emergency health care? Yes No
2. Is access to detention centres allowed to
❖ Lawyers: Yes Limited No
❖ NGOs: Yes Limited No
❖ UNHCR: Yes Limited No
❖ Family members: Yes Limited No

Asylum seekers and other third country nationals, who have over-stayed their visa, are detained in the military barracks, which offer inadequate sanitation and hygiene facilities, and allow no privacy for the detainees. Whilst detainees are provided with a bed each, there is little space in between the beds and no place where they may store their personal possessions. The UN Special Rapporteur on the human rights of migrants recently visited the detention centre and acknowledged that the facility lacks personal space, privacy as well as potable water and decent quality food.¹⁰⁸ Detainees are provided with cleaning materials and are expected to take care of the cleaning of the centre. Although detainees are issued with basic items of clothing upon arrival, there is no systematic or consistent practice for the distribution of clothes which are weather-appropriate. Most of the clothing which is provided to detainees is donated on a charitable basis to the detention service management and is then distributed accordingly. Moreover, there is little to no heating or ventilation, exposing migrants to extreme cold and heat.

All detainees are seen by a doctor in the first week after their arrival. The services of a doctor are available in the detention centres between two to three mornings a week. Communication with the health professionals however is very often difficult, if not impossible, as the services of a translator or cultural

¹⁰⁷ See generally: Human Rights Watch, *Boat Ride to Detention*, 2012, available at: <http://bit.ly/1LH81Pz>; Council of Europe Commissioner for Human Rights, *Report by Thomas Hammarberg following his visit to Malta from 23 to 25 March 2011*, 2011, available at: <http://bit.ly/1QWf6zv>; CPT, *Report to the Maltese Government on the visit to Malta carried by the CPT from 19 to 26 May 2008*, 2011, available at: <http://bit.ly/1LQzMpV>; International Commission of Jurists, *Malta: not here to stay*, 2012, available at: <http://bit.ly/1PC1M5U>; Médecins sans Frontières, *Not Criminals*, 2009, available at: <http://bit.ly/1W6WWsD>; JRS Malta, *Becoming Vulnerable in Detention: National Report Malta*, 2007, available at: <http://bit.ly/1PlodW1>.

¹⁰⁸ UN General Assembly, *Report by the Special Rapporteur on the human rights of migrants*, François Crépeau, December 2014.

mediator are not provided. In emergencies, the detainees are usually taken to the nearest health centre. Migrants and asylum seekers requiring more specialised care are referred to the general hospital for an appointment. Medicines prescribed by the doctors in detention, are brought from pharmacies outside the centre, resulting in undue delays - from a few days up to a couple of weeks.¹⁰⁹

Detainees are given daily access to a yard from late morning to late afternoon, and television watching is the only recreational activity. None of the centres or facilities is fully accessible to people with disabilities.¹¹⁰

Persons with special reception needs are usually identified by visiting NGOs who then refer the individuals in question to AWAS for vulnerability assessment. Detainees who are referred for vulnerability assessment remain in detention pending the outcome of the assessment procedure. In practice, vulnerable persons and persons with special needs are not provided with specific support or special treatment when in detention. They receive the same medical care as the general detainee population.

Men are detained separately from women, as are families and couples.

JRS, Integra Foundation, Malta Red Cross and UNHCR visit detention centres on a weekly basis, with other organisations visiting on a less regular basis. A request for a permit to visit detention is made to the Principal Immigration Officer, and once this permit is obtained, access to detention is possible. Representatives of different religions are also given unrestricted access. However, detained asylum seekers and undocumented migrants are not permitted visits by family or friends.

Moreover, reading and leisure materials are not systematically provided and detainees rely on NGO staff visiting detention as well as friends and family on the outside to bring them books, magazines and other basic recreational items. Detainees only have access to news and other media through the television set which is in place per centre as no newspapers are ever provided. There are no computers or internet access within the centres.

The detention centre is managed by the Detention Service (DS), a government body that falls under the Ministry for Home Affairs and National Security. The DS was set up specifically “to cater for the operation of all closed accommodation centres; provide secure but humane accommodation for detained persons; and maintain a safe and secure environment”¹¹¹ within detention centres. The DS is neither established nor regulated by a specific law. It is made up of personnel seconded from the armed forces and civilians specifically recruited for the purpose, many of whom are ex-security personnel. DS staff receives some in-service training, however people recruited for the post of DS officer or seconded from the security services are not required to have particular skills or competencies.

In recent years there have been a number of incidents within the centres which raised concern because of allegations of excessive use of force, as well as because of the lack of any systematic review of DS conduct and of any effective remedies to provide redress wherever abuse or ill-treatment by DS staff is alleged.

The use of excessive force and other questionable forms of punishment remains an issue primarily in contexts such as protests or escapes from detention, when force is used in an attempt to assert control or, at times, to discipline detainees.

In recent years two migrants, Mamdou Kamara (June 29, 2012) and Christian Ifeanyi Nwokaye (16-17 April 2011), died following recapture by the DS after they escaped from custody. In both cases there were

¹⁰⁹ Médecins Sans Frontières, *Not Criminals: Médecins Sans Frontières Exposes Conditions for Undocumented Migrants and Asylum-seekers in Maltese Detention Centers*, April 2009.

¹¹⁰ Human Rights Watch, *Boat Ride to Detention: Adult and Child Migrants in Malta*, July 2012.

¹¹¹ For more information see Ministry for Home Affairs, *Detention services*, available at: <http://bit.ly/1M7HMkS>.

allegations that the migrants were beaten during the capture. According to newspaper reports, Mamdou Kamara died from a cardiac arrest triggered by intense pain when he was struck in his groin area.¹¹² Christian Ifeanyi Nwokaye died of a cardiac arrest one hour after being placed in an isolation cell; unlike Mamadou Kamara, there is no evidence that he died as a direct result of his injuries.¹¹³

A number of AFM soldiers are currently undergoing criminal proceedings in both cases. In the case of Christian Ifeanyi Nwokaye, three soldiers stand charged with involuntary homicide. In the case of Mamadou Kamara, on 5 February 2015, a Maltese officer was found guilty of intentionally covering up for his two colleagues accused of killing Mamadou Kamara and was sentenced for 18 months imprisonment after being found guilty of changing details of the crime. The criminal proceedings against the two others soldiers involved remain pending.¹¹⁴

In December 2014, two years after its finalisation, the “Valenzia report” of the independent inquiry into Mamadou Kamara’s death was finally published. It concluded that the case of Mamadou Kamara’s death was found to be a direct cause of the beating of the detainee by two detention officers. The report strongly criticised Malta’s detention policy and its services. Whilst acknowledging that the Detention Service staff works under challenging conditions, the inquiry identified serious concerns with some of the personnel taking advantage of their position. The report also highlighted the horrific detention conditions and criticised the national policy of mandatory and automatic detention.¹¹⁵

Several Maltese NGOs reacted to the publication by issuing a public statement expressing their shock that the report was published two years after its completion with no action being taken by the authorities in the meantime to put an end to the violations and implement its recommendations.¹¹⁶ UNHCR, whilst acknowledging the Government’s efforts to improve detention conditions and review the system, agreed with the main findings of the report.¹¹⁷

In the case of Nwokaye, the board of inquiry was not in a position to finalise its work since it was not granted access to the autopsy results,

Since 2008 there have been at least four detainee protests where there were allegations of excessive use of force by the DS. The most recent incident took place on 25 February 2014 at Lyster Barracks. On this occasion an inquiry was ordered, and the Board of Inquiry found no excessive force was used.¹¹⁸ However concerns were raised regarding the independence and impartiality of the Board of Inquiry as all the members worked within the Ministry responsible for the Detention Service.¹¹⁹

The 2005 policy document, Irregular Immigrants, Refugees and Integration states that:

“Media access to detention centres shall be restricted so as to:

¹¹² Times of Malta, ‘Updated - Accused had 31 bite marks caused by victim - Migrant suffered such intense pain, he died of a heart attack’, 20 September 2012, available at: <http://bit.ly/1PC2ekA>.

¹¹³ Times of Malta, ‘Migrant died after being beaten by DS officer, court told’, 6 February 2014, available at: <http://bit.ly/1XIH0xg>.

¹¹⁴ Times of Malta, ‘Soldier who tampered with migrant Mamadou Kamara’s death evidence jailed’, 6 February 2015, available at: <http://bit.ly/1MbRnrE>.

¹¹⁵ People for Change Foundation, *Malta Human Rights Report 2015*, 2nd edition, available at: <http://bit.ly/1krWpZO>.

¹¹⁶ aditus foundation, Integra Foundation, Jesuit Refugee Service (Malta), KOPIN, Malta Emigrants’ Commission, Migrant’s Network for Equality, Organisation for Friendship in Diversity, SOS Malta, ‘Not even in death is there dignity for detained migrants – NGO reaction to the Valenzia Report’, 12 December 2014, available at: <http://bit.ly/1MyBnza>.

¹¹⁷ UNHCR, ‘UNHCR welcomes publication of Kamara inquiry’, 12 December 2014, available at: <http://bit.ly/20tuCsO>.

¹¹⁸ Times of Malta, ‘No excessive force used during Hal Far incidents – inquiry’, 14 March 2014, available at: <http://bit.ly/1QWg9Q1>.

¹¹⁹ Times of Malta, ‘Updated: Hal Far riots inquiry skewed – NGOs’, 19 March 2014, available at: <http://bit.ly/1RpVALE>.

- protect potential refugees;
- protect detainees' family and friends who are still in their homeland from retribution by the regime against which protection claims are being made.

Media visits to detention centres may in exceptional cases be authorised as part of the government's aim to promote an informed public debate on issues concerning irregular immigrants and asylum seekers."¹²⁰

In practice the media were allowed access to detention several times, particularly in recent years. As with all other visits to detention, access must be authorized in advance, usually following a written request.

There is no published policy position regarding visits by politicians, but politicians have visited the detention centres on occasion.

Access to detention centres is regulated by the Immigration Police, which in turn needs to provide authorisation. No formal procedures exist for friends and family members to visit detained persons and practice is erratic and largely discretionary. When such visits are allowed, logistical modalities are also extremely erratic and discretionary with no clear procedures and rules.

UNHCR, legal advisers and NGOs are allowed access at any time in order for them to provide their services to detained persons. No specific criteria seem to apply, except possibly the provision of services or support to detained asylum seekers. Persons in detention centres encounter difficulties communicating with legal advisers, UNHCR and NGOs primarily due to the fact that little or no information is provided on the existence and means of contacting these entities, and actual contact is only possible to a limited extent and due to the limited means available to NGOs and UNHCR.

D. Procedural safeguards

1. Judicial review of the detention order

Indicators: Judicial Review of Detention

- | | | |
|---|---|-----------------------------|
| 1. Is there an automatic review of the lawfulness of detention? | <input checked="" type="checkbox"/> Yes | <input type="checkbox"/> No |
| 2. If yes, at what interval is the detention order reviewed? | 3 months | |

Detention is effectively authorised by an administrative authority, as it is the automatic consequence of a decision taken by the Principal Immigration Officer. To date, detention is not imposed by means of a detention order; it is the automatic consequence of the issuing of a removal order in terms of the Immigration Act. The removal order contains the reasons why the individual concerned is considered a prohibited immigrant in terms of law, as opposed to the reasons for detention. It also states that the individual concerned will be held in detention until removal is effected.

It would appear that asylum seekers who arrive in Malta in an irregular manner are not always effectively informed of the possibility and/or of the means of challenging the removal order issued against them. The removal order, which is often issued in English, does state that the person against whom the order is issued has three working days in which to appeal the said order, however asylum seekers arriving in Malta irregularly by boat rarely, if ever, appeal from the Removal Order.

In 2014, amendments were made to the Returns Regulations in order to further transpose the Returns Directive. The amendments introduced the review, either on application by the detained individual or *ex officio* by the Principal Immigration Officer, of a person's detention at reasonable intervals that shall not

¹²⁰ MJHA & MFSS, *Irregular Immigrants, Refugees and Integration*, January 2005, 14 and 15.

exceed 3 months. As it is provided for in the law, Regulation 11(8) further specifies that in situations of detention lasting 6 months or more, this review process is obligatory and the Principal Immigration Officer is duty-bound to inform the Immigration Appeals Board of it, with the Board supervising the review.

Throughout the second half of 2014 a number of reviews were in fact conducted, resulting, in most cases, in the release of the detained person. Although the Regulations apply to persons in a return procedure, some reviews of the detention of asylum seekers awaiting a decision on their asylum application were also conducted. Some of these reviews resulted in the asylum seeker's release from detention. Limited information is available on the details of the review procedures, but it seems that those implemented so far have consisted of an assessment of the "returnability" of persons based on their nationalities.

In 2015 so far, reviews were conducted by the Principal Immigration Officer after 3 months and almost all the asylum seekers still detained were released following this review.

Application in terms of Regulation 10(11) of the Returns Regulations

Since the transposition of the Returns Directive, the law provides for the possibility to institute proceedings to challenge the lawfulness of detention before the Immigration Appeals Board.

In addition to the fact that the extent to which this Act applies to detained asylum seekers, who by definition cannot be subject to removal proceedings, is questionable, from the text of the law it would appear that migrants arriving by boat who are apprehended at sea or upon arrival and migrants who are refused admission into Malta are exempt from the benefits of this provision, as Regulation 11(1) states that:

"The provisions of Part IV shall not apply to third country nationals who are subject to a refusal of entry in accordance with Article 13 of the Schengen Borders Code or who are apprehended or intercepted by the competent authorities in connection with the irregular crossing by sea or air of the external border of Malta and who have not subsequently obtained an authorisation or a right to stay in Malta".

This said, in one case the Board held that the benefits of this provision are indeed applicable to detained asylum seekers, however it ceases to apply once their application is no longer pending.

To date the remedy has not proved particularly speedy, with few applications decided prior to the applicant's release from detention in terms of Government policy. Moreover, it remains to be seen how the Board will interpret the concept of 'lawfulness'.

Other remedies

Although there are a number of remedies available to detainees to challenge their detention, in addition to the remedy introduced in 2014, the ECtHR clearly stated in *Louled Massoud v Malta* that three of these remedies do not qualify as "speedy, judicial remedies" in terms of Article 5(4) ECHR.¹²¹

(1) Human rights action before the national courts

This remedy, which allows a detainee to challenge the lawfulness of his or her detention in terms of the ECHR and the Constitution of Malta, has failed the Article 5(4) ECHR test as, although it is clearly judicial, it is far from speedy.

In addition to the length of time for delivery of judgments, constitutional proceedings are virtually inaccessible to detainees as in practice most asylum seekers do not have access to a lawyer who could

¹²¹ ECtHR, *Louled Massoud v Malta*, Application No 24340/08, 27 July 2010.

file a court case on their behalf. In fact, to date most cases have been filed by lawyers working in collaboration with NGOs assisting asylum seekers. In such cases there is no waiver of court fees, as there would be if the applicant had been granted the benefit of legal aid.

(2) Application in terms of Article 409A of the Criminal Code

This remedy too allows a detainee to challenge the lawfulness of detention before the Court of Magistrates, and is based on an assessment of the legality of the person's detention. Though this remedy is both speedy and judicial in nature, it failed the test because it does not allow for an examination of the lawfulness of detention in terms of Article 5 ECHR, since the Courts interpreted their remit under this Article as being strictly limited to provisions of Maltese law.

(3) Application in terms of Article 25A of the Immigration Act

In the terms of Article 25A of the Immigration Act, the Immigration Appeals Board is competent to

“[H]ear and determine applications made by persons in custody in virtue only of a deportation or removal order to be released from custody pending the determination of any application under the Refugees Act or otherwise pending their deportation... the Board shall only grant release... where in its opinion the continued detention of such person is taking into account all the circumstances of the case, unreasonable as regards duration or because there is no reasonable prospect of deportation within a reasonable time.”

This remedy too was deemed to be inadequate by the ECtHR for a number of reasons: the fact that the relevant legal provision is limited since a request for release from custody has no prospect of success in the event that the identity of the detainee, including his or her nationality, has yet to be verified, in particular where he or she has destroyed his or her travel or identification documents or used fraudulent documents in order to mislead the authorities; the fact that over the years there were only very few cases where this remedy was used successfully; and the duration of such proceedings.

Detainees who apply for asylum from detention are subject to the same asylum procedure as those who apply from the community. The Refugee Commissioner will proceed to examine the application of the detained asylum seeker in the same manner as those who are not deprived of their liberty. The main difference lies in that detainees are escorted to the Refugee Commissioner's offices and are not informed in advance of the date of their interview. They are usually informed on the day that their presence is required at the Office of the Refugee Commissioner. Detained asylum seekers do however face considerable difficulties in obtaining documents and compiling all the information which they might want to present in support of their application as their means of communication are severely restricted. Very often, detained asylum seekers rely on support from NGOs to obtain documentation and any other information which might be required.

2. Legal assistance for review of detention

Indicators: Legal Assistance for Review of Detention

1. Does the law provide for access to free legal assistance for the review of detention?
 Yes No
2. Do asylum seekers have effective access to free legal assistance in practice?
 Yes No

National law provides for legal aid within the context of constitutional proceedings before the First Hall of the Civil Court or the Constitutional Court. However, in practice it is almost impossible for detained asylum seekers to obtain access to this service and this for a number of reasons, including the way the system,

which does not make any specific provision for detainees, works in practice, as well as the lack of information about the existence of this possibility and access to it. If a detainee is represented by legal counsel then the lawyer may ask for permission to access the centre in order to communicate with his or her client.

Regulation 11(5) of the Returns Regulations provides that within the context of an application to the Board to review decisions related to return, a legal adviser shall be allowed to assist the third-country national and free legal aid will be provided where the said individual meets the criteria for entitlement in terms of national law. It is however questionable whether an application to the Board to review the lawfulness of detention would qualify as a request to review a decision relating to return, which are usually understood to include a decision to issue a removal order and/or a return decision

In the case of the asylum procedure, while applicants may be represented by a lawyer at first instance, this is not available for free and they will have to bear all the costs involved. Free legal aid is however provided at the appeal stage of the asylum procedure. JRS Malta and aditus foundation are the only two organisations providing free legal services to detainees, yet capacity is very much limited according to available resources.

ANNEX - Transposition of the CEAS in national legislation

Directives and other CEAS measures transposed into national legislation

Directive	Articles	Deadline for transposition	Date of transposition	Official title of corresponding act	Web Link
Directive 2011/95/EU Recast Qualification Directive	Partial transposition	21 December 2013	3 March 2015	Act No VI of 2015	http://bit.ly/1LQjEov (EN)
Directive 2013/32/EU Recast Asylum Procedures Directive	Partial transposition	20 July 2015	16 May 2014	Legal Notice 161 of 2014	http://bit.ly/1SXvt08 (EN)

Pending transposition and reforms into national legislation

Directive / Regulation	Articles	Deadline for transposition	Stage of transposition	Participation of NGOs
Directive 2011/95/EU Recast Qualification Directive	Remaining provisions	21 December 2013	Currently discussed at the Parliament	<input checked="" type="checkbox"/> Yes ¹²² <input type="checkbox"/> No
Directive 2013/32/EU Recast Asylum Procedures Directive	Remaining provisions	20 July 2015 Article 31(3)-(5) to be transposed by 20 July 2018	Currently discussed at the Parliament	<input checked="" type="checkbox"/> Yes ¹²³ <input type="checkbox"/> No
Directive 2013/33/EU Recast Reception Conditions Directive	Full transposition	20 July 2015	Currently discussed at the Parliament	<input checked="" type="checkbox"/> Yes ¹²⁴ <input type="checkbox"/> No

¹²² aditus & JRS Malta, *Comments on the exercise transposing the EU recast Qualification Directive*, December 2014, available at: <http://bit.ly/1KkpHTt>.

¹²³ aditus & JRS Malta, *Submissions to the Ministry of Home Affairs and National Security on the transposition of the Recast Procedures Directive*, July 2015.

¹²⁴ aditus & JRS Malta, *Submissions to the Ministry of Home Affairs and National Security on the transposition of the Recast Reception Conditions Directive*, July 2015.

Regulation (EU) No 604/2013 Dublin III Regulation		Directly applicable 20 July 2013		<input checked="" type="checkbox"/> Yes <input type="checkbox"/> No
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Reception conditions

- Access to the labour market will be granted after 9 months

Detention

- The maximum duration of detention of asylum seekers will be set at 9 months