



# aida

Asylum Information  
Database

Asylum Information Database

# National Country Report

## *Malta*

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**This report is up-to-date until March 2013.**

## 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 14 EU Member States (AT, BE, BG, DE, FR, GR, HU, IE, IT, MT, NL, PL, SE, UK) which is easily accessible to the media, researchers, advocates, legal practitioners and the general public and includes the development of a dedicated website which will be launched in the second half of 2013. 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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## Statistics

**Table 1: Applications and granting of protection status at first and second**

|  | Total applicants in 2012 | Refugee status | Subsidiary protection | Humanitarian Protection | Rejections (in-merit and admissibility) | Otherwise closed / discontinued | Refugee rate    | Subs. Pr. rate  | Hum. Pr. rate   | Rejection rate  |
|--|--------------------------|----------------|-----------------------|-------------------------|---|---------------------------------|-----------------|-----------------|-----------------|-----------------|
|  | A                        | B              | C                     | D                       | E                                       | F                               | $B/(B+C+D+E)$ % | $C/(B+C+D+E)$ % | $D/(B+C+D+E)$ % | $E/(B+C+D+E)$ % |
| <b>Total numbers</b>   | 2251                     | 35             | 1239                  | 154                     | 231                                     | 64                              | 2%              | 75%             | 9%              | 14%             |
| <i>Breakdown by countries of origin of the total numbers</i> |                          |                |                       |                         |   |                                 |                 |                 |                 |                 |
| <b>Somalia</b>   | 1261                     | 3              | 1083                  | 2                       | 22                                      | 5                               | 0%              | 98%             | 0%              | 2%              |
| <b>Eritrea</b>   | 470                      | 6              | 150                   | 4                       | 43                                      | 4                               | 3%              | 74%             | 2%              | 21%             |
| <b>Syria</b>   | 177                      | 1              | 0                     | 0                       | 0                                       | 8                               | 100%            | 0%              | 0%              | 0%              |
| <b>Nigeria</b>   | 94                       | 3              | 1                     | 2                       | 49                                      | 12                              | 5%              | 2%              | 4%              | 89%             |
| <b>Libya</b>   | 64                       | 1              | 0                     | 22                      | 6                                       | 23                              | 3%              | 0%              | 76%             | 21%             |
| <b>Ethiopia</b>  | 67                       | 13             | 0                     | 4                       | 22                                      | 1                               | 33%             | 0%              | 10%             | 56%             |
| <b>Pakistan</b>  | 31                       | 1              | 0                     | 2                       | 20                                      | 0                               | 4%              | 0%              | 9%              | 87%             |
| <b>Afghanistan</b>   | 0                        | 0              | 0                     | 0                       | 0                                       | 0                               | -               | -               | -               | -               |
| <b>Russia</b>  | 0                        | 0              | 0                     | 0                       | 0                                       | 0                               | -               | -               | -               | -               |
| <b>Iran</b>  | 0                        | 0              | 0                     | 0                       | 0                                       | 0                               | -               | -               | -               | -               |

Sources: Office of the Refugee Commissioner and the Refugee Appeals Board

**Table 2: Gender/age breakdown of the total numbers of applicants in 2012**

|                                   | Number      | Percentage |
|-----------------------------------|-------------|------------|
| <b>Total number of applicants</b> | <b>2251</b> |            |
| <b>Men</b>                        | 1610        | 71.52      |
| <b>Women</b>                      | 436         | 19.37      |
| <b>Unaccompanied children</b>     | 205         | 9.11       |

**Table 3: Comparison between first instance and appeal decision rates in 2012**

|                                  | First instance |                   | Appeal        |                   |
|----------------------------------|----------------|-------------------|---------------|-------------------|
|                                  | <i>Number</i>  | <i>Percentage</i> | <i>Number</i> | <i>Percentage</i> |
| <b>Total number of decisions</b> | <b>1654</b>    |                   | <b>69</b>     |                   |
| <b>Positive decisions</b>        |                |                   |               |                   |
| <b>Total</b>                     | <b>1428</b>    | 86.34             | 0             | 0                 |
| <i>Refugee Status</i>            | 35             | 2.12              | 0             | 0                 |
| <i>Subsidiary protection</i>     | 1239           | 74.91             | 0             | 0                 |
| <i>Hum/comp protection</i>       | 154            | 9.31              | 0             | 0                 |
| <b>Negative decisions</b>        | <b>226</b>     | 13.66             | <b>69</b>     | 100               |

**Table 4: Applications processed under an accelerated procedure in 2012**

|  | Number   | Percentage |
|--|----------|------------|
| <b>Total number of applicants (A)</b>  | <b>0</b> |            |
| <b>Number of applications treated under an accelerated procedure at first instance (B)</b> | 0        |            |

**Table 5: Subsequent applications submitted in 2012**

|                                   | Number of subsequent applications submitted |
|-----------------------------------|---|
| <b>Total number</b>               | 23  |
| <b>Top 5 countries of origin*</b> |   |
| <b>Syria</b>                      | 5   |
| <b>Nigeria</b>                    | 5   |
| <b>Libya</b>                      | 3   |
| <b>Somalia</b>                    | 2   |
| <b>Sudan</b>                      | 2   |

Sources: Office of the Refugee Commissioner and the Refugee Appeals Board

## Overview of the legal framework

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

| <b>Title in English</b>   | <b>Abbreviation<br/>(unofficial)</b> | <b>Weblink</b>  |
|---|--------------------------------------|---|
| Refugees Act, Chapter 420   | Refugees Act                         | <a href="http://www.mjha.gov.mt/MediaCenter/PDFs/1_chapt420.pdf">http://www.mjha.gov.mt/MediaCenter/PDFs/1_chapt420.pdf</a>   |
| Procedural Standards in Examining Applications for Refugee Status Regulations, Legal Notice 243 of 2005 | Procedural Regulations               | <a href="http://www.justiceservices.gov.mt/DownloadDocument.aspx?app=lom&amp;itemid=10663&amp;l=1">http://www.justiceservices.gov.mt/DownloadDocument.aspx?app=lom&amp;itemid=10663&amp;l=1</a> |
| Immigration Act, Chapter 217  | Immigration Act                      | <a href="http://www.justiceservices.gov.mt/DownloadDocument.aspx?app=lom&amp;itemid=8722&amp;l=1">http://www.justiceservices.gov.mt/DownloadDocument.aspx?app=lom&amp;itemid=8722&amp;l=1</a>   |
| Social Security (UN Convention relating to the Status of Refugees) Order, Legal Notice 291 of 2001      | Refugees Social Security Regulations | <a href="http://www.justiceservices.gov.mt/DownloadDocument.aspx?app=lom&amp;itemid=9776&amp;l=1">http://www.justiceservices.gov.mt/DownloadDocument.aspx?app=lom&amp;itemid=9776&amp;l=1</a>   |
| Refugees Appeals Board (Procedures) Regulations, Legal Notice 252 of 2001                               | RAB Regulations                      | <a href="http://www.justiceservices.gov.mt/DownloadDocument.aspx?app=lom&amp;itemid=10657&amp;l=1">http://www.justiceservices.gov.mt/DownloadDocument.aspx?app=lom&amp;itemid=10657&amp;l=1</a> |
| Children and Young Persons (Care Orders) Act, Chapter 285   | Care Orders Act                      | <a href="http://www.justiceservices.gov.mt/DownloadDocument.aspx?app=lom&amp;itemid=8773&amp;l=1">http://www.justiceservices.gov.mt/DownloadDocument.aspx?app=lom&amp;itemid=8773&amp;l=1</a>   |
| Board of Visitors for Detained Persons Regulations, Legal Notice 266 of 2007                            | DVB Regulations                      | <a href="http://www.justiceservices.gov.mt/DownloadDocument.aspx?app=lom&amp;itemid=9563&amp;l=1">http://www.justiceservices.gov.mt/DownloadDocument.aspx?app=lom&amp;itemid=9563&amp;l=1</a>   |
| Agency for the Welfare of Asylum-seekers Regulations, Legal Notice 205 of 2009                          | AWAS Regulations                     | <a href="http://www.justiceservices.gov.mt/DownloadDocument.aspx?app=lom&amp;itemid=9566&amp;l=1">http://www.justiceservices.gov.mt/DownloadDocument.aspx?app=lom&amp;itemid=9566&amp;l=1</a>   |
| Asylum Procedures (Application for a Declaration) Regulations, Legal Notice 253 of 2001                 | Declaration Regulations              | <a href="http://www.justiceservices.gov.mt/DownloadDocument.aspx?app=lom&amp;itemid=10658&amp;l=1">http://www.justiceservices.gov.mt/DownloadDocument.aspx?app=lom&amp;itemid=10658&amp;l=1</a> |
| Immigration Appeals Board (Additional Jurisdiction) Regulations, Legal Notice 2 of 2012                 | IAB Dublin Regulations               | <a href="http://www.justiceservices.gov.mt/DownloadDocument.aspx?app=lom&amp;itemid=11834&amp;l=1">http://www.justiceservices.gov.mt/DownloadDocument.aspx?app=lom&amp;itemid=11834&amp;l=1</a> |
| Refugee Appeals Board (Chambers) Rules, Legal Notice 47 of 2005   | RAB Chambers Regulations             | <a href="http://www.justiceservices.gov.mt/DownloadDocument.aspx?app=lom&amp;itemid=10660&amp;l=1">http://www.justiceservices.gov.mt/DownloadDocument.aspx?app=lom&amp;itemid=10660&amp;l=1</a> |
| Reception of Asylum-seekers (Minimum Standards) Regulations, Legal Notice 320 of 2005                   | Reception Regulations                | <a href="http://www.justiceservices.gov.mt/DownloadDocument.aspx?app=lom&amp;itemid=10662&amp;l=1">http://www.justiceservices.gov.mt/DownloadDocument.aspx?app=lom&amp;itemid=10662&amp;l=1</a> |

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

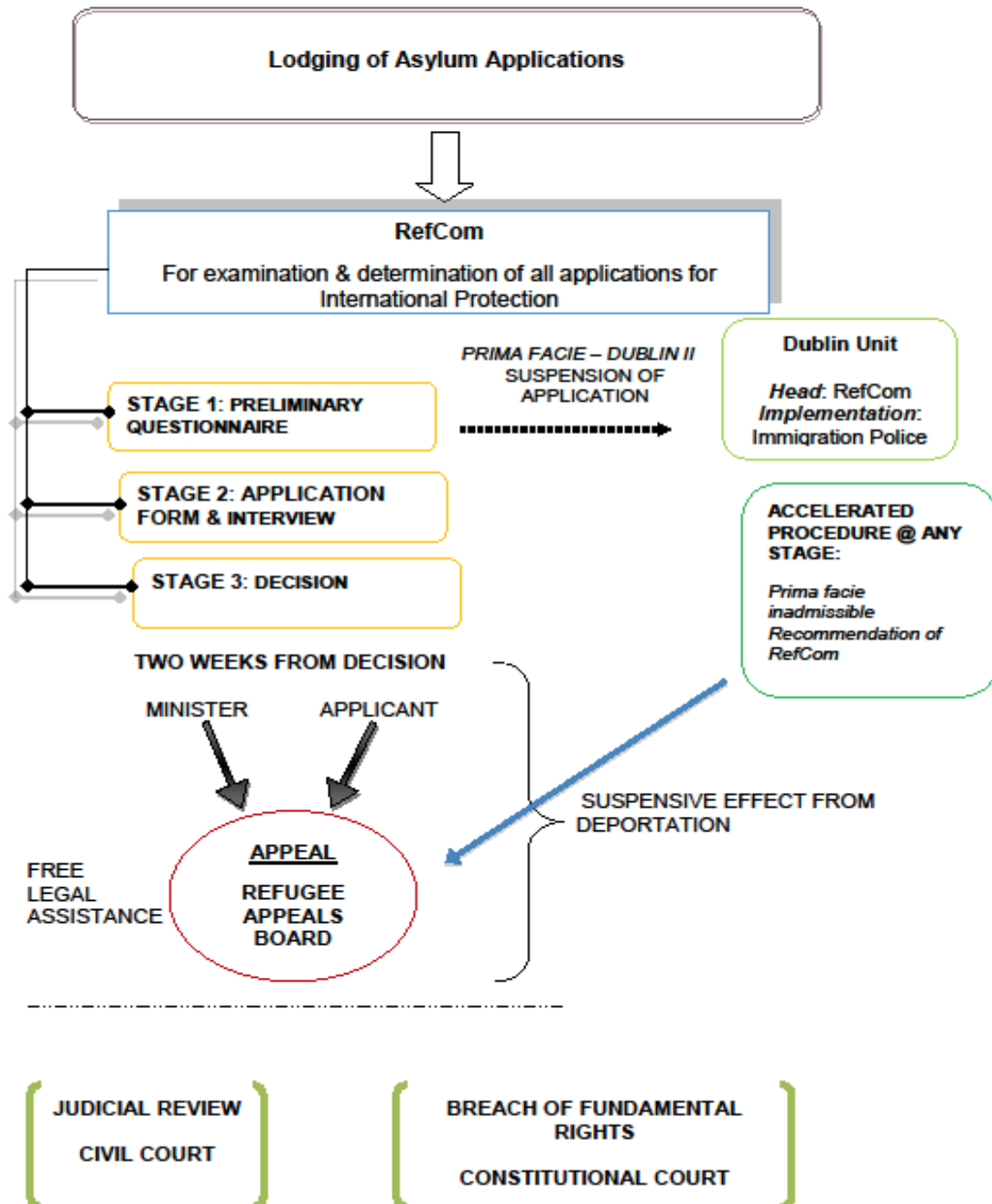
| <b>Title in English</b>   | <b>Abbreviation</b>  | <b>Weblink</b>  |
|---|----------------------|---|
| Irregular Immigrants, Refugees & Integration Policy Document (2005) | 2005 Policy Document | <a href="http://www.enaro.eu/documents/immigration-English.pdf">http://www.enaro.eu/documents/immigration-English.pdf</a> |



# Asylum Procedure

## A. General

### 1. Organigram



## 2. Types of procedures

### Indicators:

Which types of procedures exist in your country? Tick the box:

- regular procedure:                      yes                       no
- border procedure:                        yes                         no
- admissibility procedure:                yes                       no
- accelerated procedure:                yes                       no
- Dublin Procedure                         yes                       no

Are any of the procedures that are foreseen in national legislation, not being applied in practice? If so, which one(s)? No.

## 3. List of authorities intervening in each stage of the procedure (including Dublin)

| Stage of the procedure   | Competent authority in EN  |
|--|--|
| Accelerated procedure  | Office of the Refugee Commissioner, Refugee Appeals Board (joint procedure)  |
| Dublin (responsibility assessment)   | Office of the Refugee Commissioner (designated authority), Malta Police Force (Dublin Unit) as the implementing agency |
| Refugee status determination (admissibility, substantive)                                    | Office of the Refugee Commissioner   |
| Appeal procedure   | Refugee Appeals Board  |
| Subsequent application (follows same steps as an original application, including for appeal) | Office of the Refugee Commissioner   |

## 4. Number of staff and nature of the first instance authority (responsible for taking the decision on the asylum application at the first instance)

| Name in English                    | Number of staff (specify the number of people involved in making decisions on claims if available) | 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 | 19   | Ministry for Home Affairs | Y  |

## 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.<sup>1</sup> 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 eligible for a transfer to another EU Member State in terms of the Dublin II 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 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 will be notified of the decision in due course.

National law specifies a two-week time period from when an applicant is notified of the decision of the Refugee Commissioner, during which they may appeal to the Refugee Appeals Board. This Board, an administrative tribunal set up in terms of the Refugees Act, 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.<sup>2</sup> 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 appeal.<sup>3</sup>

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<sup>4</sup>. 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 and/or the Maltese Constitution should the rejected appellant be faced with a return that is prejudicial to their rights.<sup>5</sup>

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 three-day time-limit, specified at law, during which an examination and review of the Refugee Commissioner's recommendation is to be carried out.<sup>6</sup>

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<sup>1</sup> Refugees Act, Chapter 420 of the Laws of Malta, Article 4.

<sup>2</sup> Refugees Act, Article 7.

<sup>3</sup> Procedural Standards in Examining Applications for Refugee Status Regulations (Procedural Regulations), Subsidiary Legislation 420.07, Regulation 12.

<sup>4</sup> 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.

<sup>5</sup> Refugees Act, Article 7 (9).

<sup>6</sup> Refugees Act, arts 23 & 24.

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 twelve 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 eighteen months, if removal is not effected within this time, a failed asylum-seeker will be released upon the lapse of eighteen months in detention.<sup>7</sup>

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<sup>7</sup> 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 :

- Are specific time limits laid down in law for asylum-seekers to lodge their application?  
 Yes       No
- If so, and if available specify
  - o the time limit at the border:      N/A
  - o the time limit on the territory:      60 days
  - o the time limit in detention:      N/A

The authority responsible for registering asylum applications in Malta is the Refugee Commissioner. The Refugee Commissioner is also the authority responsible for taking decisions at first instance on asylum applications.<sup>8</sup> An asylum application shall not be valid unless made within 60 days 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.<sup>9</sup> An application that is filed after the lapse of 60 days may also be considered to be manifestly unfounded by the Refugee Commissioner, by virtue of which an accelerated procedure to examine the application is applied.<sup>10</sup> Whether a late application is to be considered invalid or manifestly unfounded is at the discretion of the Refugee Commissioner. With respect to asylum-seekers who arrive undocumented by boat, the registration of their asylum application is relatively unhindered since these are almost immediately intercepted, registered and channelled into the detention system wherein 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.

### 2. Regular procedure

#### General (scope, time limits)

#### Indicators:

- Time limit set in law for the determining authority to make a decision on the asylum application at first instance (in months): N/A
- Are detailed reasons for the rejection at first instance of an asylum application shared with the applicant in writing?       Yes       No
- As of 31<sup>st</sup> December 2012, the number of cases for which no final decision (including at first appeal) was taken one year after the asylum application was registered: N/A

As such there is no time limit set in law for the Refugee Commissioner 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 request, information on the time frame within which the decision is to be expected. However, such information does not

<sup>8</sup> Refugees Act, Article 4 (3).

<sup>9</sup> Procedural Regulations, Regulation 4 (4).

<sup>10</sup> Refugees Act, Article 2.

constitute an obligation for the Commissioner to take a decision within that time frame.<sup>11</sup> Most of the decisions taken by the Refugee Commissioner are, in practice, taken before the lapse of 6 months. The Refugee Commissioner is a specialized authority in the field of asylum. However, it falls under the Ministry responsible also for Police, Immigration, Asylum, Local Government, Correctional Services and also National Security. Precise information as to the average length of the asylum procedure is not available as this also largely depends on the number of arrivals at any given time. According to information obtained from the Refugee Commissioner, out of the 1366 applications that were concluded at first instance as of 31<sup>st</sup> December 2012, 34 were decided after 6 months for special and valid reasons.<sup>12</sup> Information as to whether there are any cases for which a decision at appeal stage has not been taken more than one year after the registration of the claim is not available.

As a matter of practice, certain caseloads are prioritised by the Refugee Commissioner. The types of cases which are prioritised include cases involving particular vulnerable persons who, on a *prima facie* basis, are likely to be given protection, cases involving persons who are in closed centres over those who are in open centres and, in the case of mass influx, preference is given to those coming from countries whose nationals are, *prima facie*, more liable to be given protection.<sup>13</sup> Since the majority of asylum-seekers in Malta are detained, the consequence of this prioritisation is a shorter time period in detention for the asylum-seeker whose application is prioritised. For instance, vulnerable asylum-seekers must have their vulnerability assessed in order to determine whether they should be released to open centres pending the examination of their asylum application. Unfortunately, this assessment often takes many months to conclude. Thus, having their cases prioritised by the Refugee Commissioner means that they could be released from detention with protection before they are recommended for release on vulnerability grounds. Nevertheless, negative consequences of this prioritisation arises with respect to those asylum-seekers who come from countries whose nationals are, *prima facie*, not considered to be in need of protection but who, on the basis of their individual claim, are, in fact, in need of such protection. As a result, such asylum-seekers have to spend an amount of time in detention which is longer than the amount of time they would actually have spent had their application been examined in order of registration. For asylum-seekers with a genuine need of protection and that are not kept in detention, the actual consequences of prioritisation for them relate mostly to the fact that they have considerably less rights than persons with some form of protection status. Thus, the ability to access certain basic services in Malta are effectively hindered pending a final decision on their asylum application.

## Appeal

### Indicators:

- Does the law provide for an appeal against the first instance decision in the regular procedure:
  - Yes       No
  - if yes, is the appeal       judicial  administrative
  - If yes, is it suspensive       Yes  No
- Average delay for the appeal body to make a decision:      N/A

An appeal mechanism of the first instance decision is available before a board known as the Refugee Appeals Board. It is an administrative review and involves the assessment of facts and points of law. An asylum-seeker has two weeks in which to appeal and these two weeks start to run from the day on

<sup>11</sup> Procedural Regulations, Regulation 8.

<sup>12</sup> Communication from Refugee Commissioner to Dr Neil Falzon of aditus foundation (2013).

<sup>13</sup> *Ibid.*

which the asylum-seeker receives the written negative decision of the Refugee Commissioner.<sup>14</sup> 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, information as to the average time it takes for the appeal body to take a decision is not available.

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.<sup>15</sup> As a result, asylum-seekers can be heard in practice at the appeal stage but only in very limited and discretionary circumstances. Hearings of the Refugee Appeals Board are not public and its decisions are communicated only to the applicant concerned, their legal representative, if known, the Refugee Commissioner, the Minister concerned and the High Commissioner (UNHCR).<sup>16</sup> 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.<sup>17</sup> 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.

### Personal Interview

#### Indicators:

- Is a personal interview of the asylum-seeker systematically conducted in practice in the regular procedure?  Yes  No
- If so, are interpreters available in practice, for interviews?  Yes  No
- In the regular procedure, is the interview conducted by the authority responsible for taking the decision?  Yes  No
- Are interviews ever conducted through video conferencing?  Yes  No

National law does not provide for the systematic personal interview of asylum applicants, as there are cases in which the said interview can be omitted.<sup>18</sup> The grounds for omitting a personal interview are the

<sup>14</sup> Refugees Act, Article 7.

<sup>15</sup> Refugee Appeals Board (Procedures) Regulations, 2001, Regulation 5 (1) (h).

<sup>16</sup> *Ibid.*, Regulation 5 (1) (n); High Commissioner means the United Nations High Commissioner for Refugees or his representative.

<sup>17</sup> These include: Court of Appeal (Civil, Superior), *Washimba Paul vs. Bord Ta' L-Appelli Dwar ir-Rifugjati Et*, Reference No. 65/2008/1, Judgment of 28th September 2012; Civil Court First Hall, *Gebremariam Teshome Tensea K/a Teshome Baerhanu Asbu vs. Bord Ta' L-Appelli Dwar ir-Rifugjati Et*, Reference No. 65/2010, Judgment of the 10th July 2012; Civil Court First Hall, *Saed Salem Saed vs. Bord Ta' L-Appelli Dwar ir-Rifugjati Et*, Reference No. 1/2008, Judgment of 3 November 2009.

<sup>18</sup> Procedural Regulations, Regulation 5 (3).

same as those contained in the Procedures Directive.<sup>19</sup> In practice, however, all asylum-seekers are interviewed. The interviews are conducted by the Refugee Commissioner 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.<sup>20</sup> 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, however, this is not automatic, and requests to this end have to be made either by the applicant themselves or by their 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.<sup>21</sup> 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. 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.<sup>22</sup> The applicant is usually granted a copy of the Interview Notes of the interview 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 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.

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<sup>19</sup> Council Directive 2005/85/EC of 1<sup>st</sup> December 2005 on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status, Official Journal L 326/13, 13.12.2005 ('Asylum Procedures Directive'), Article 12 (2) and (3).

<sup>20</sup> Procedural Regulations, Regulation 4 (2) (c) and 5 (3).

<sup>21</sup> *Ibid.*, Regulation 6.

<sup>22</sup> Communication from Refugee Commissioner to Dr Neil Falzon of Aditus Foundation (2013).



## Legal assistance

### Indicators:

- Do asylum-seekers have access to free legal assistance at first instance in the regular procedure in practice?  
 Yes       not always/with difficulty       No
- Do asylum-seekers have access to free legal assistance in the appeal procedure against a negative decision?  
 Yes       not always/with difficulty       No
- In the first instance procedure, does free legal assistance cover:  
 representation during the personal interview     legal advice     both     Not applicable
- In the appeal against a negative decision, does free legal assistance cover  
 representation in courts       legal advice       both       Not applicable

National legislation states that at first instance an applicant is allowed to consult a legal adviser at their 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.<sup>23</sup> 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.<sup>24</sup> 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.<sup>25</sup> In practice, the appeal forms the applicants fill in and submit to the Refugee Appeals Board contain a request for legal aid. Unless, an 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.<sup>26</sup>

The only free legal assistance available to asylum-seekers at first instance is that provided by lawyers working with NGOs. 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.<sup>27</sup> 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.

<sup>23</sup> Procedural Regulations, Regulation 7 (1) & (2).

<sup>24</sup> The Judiciary Malta, [FAQs](#).

<sup>25</sup> Communication from Julian Micallef (Assistant Director – Third Country Nationals, Ministry of Home Affairs) to JRS Malta.

<sup>26</sup> *Ibid.*

<sup>27</sup> Procedural Regulations, Regulation 7 (4).

Legal assistance at the appeal stage is not restricted by any 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.<sup>28</sup> Moreover, access to the applicants by the legal advisors/lawyers can be subject to limitations necessary for the security, public order or administrative management of the area in which the applicants are kept.<sup>29</sup> 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 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.<sup>30</sup> 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 their client in detention. According to the legal aid lawyer, they sometimes had to speak to their clients in 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.<sup>31</sup>

### 3. Dublin

#### *Indicators:*

- Number of outgoing requests in the previous year: 15
- Number of incoming requests in the previous year: 1,003
- Number of outgoing transfers carried out effectively in the previous year: 2
- Number of incoming transfers carried out effectively in the previous year: 186

<sup>28</sup> Procedural Regulations, Regulation 7 (2).

<sup>29</sup> *Ibid.*, Regulation 7 (3).

<sup>30</sup> Seventy (70) euro per appeal.

<sup>31</sup> Correspondence between local legal aid lawyer and JRS Malta.

## Procedure

### Indicator:

- If another EU Member State accepts responsibility for the asylum applicant, how long does it take in practice (on average) before the applicant is transferred to the responsible Member State? If no appeal is filed, a couple of days. If an 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 Immigration authorities to be fingerprinted and photographed immediately after their desire to apply for asylum is registered.

In registering their desire to apply for international protection, asylum-seekers are first asked to fill in a 'Dublin II 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 II 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.

There is no specific legislative instrument that transposes the provisions of the Dublin II 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.

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.

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.

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 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 PQ 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.<sup>32</sup>

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<sup>32</sup> Information obtained by email from Immigration Police on April 4, 2013.

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 asylum application has been implicitly withdrawn leaving him susceptible to return by the Immigration authorities.

The applicants may ask for a reopening of their case, considered as a subsequent application, if they provide reasons considered justifiable by the Refugee Commissioner. In the interim they may however be removed to their countries of origin. The time taken by the Refugee Commissioner to decide on whether to readmit the individual into the asylum procedure is entirely discretionary, with the decision to accept to examine an individual's application at times taking several months. A number of individuals in this situation waited for months in detention pending an answer on their request. It is clear that during these months their legal status rendered them vulnerable to removal. Moreover, as these individuals are in most cases detained, communication with the Refugee Commissioner is even more limited and primarily facilitated through the provision of services of NGOs regularly present in detention centres.<sup>33</sup>

### Appeal

#### Indicators:

- Does the law provide for an appeal against the decision in the Dublin procedure:  
 Yes  No
  - o if yes, is the appeal  judicial  administrative
  - o If yes, is it suspensive  Yes  No
- Average delay for the appeal body to make a decision: N/A

Appeals from the 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 widened the Board's jurisdiction to deal with appeals from decisions taken within the Dublin II framework.<sup>34</sup> The provisions of the Immigration Act indicate that the appeal must be filed within three working days from when the individual is notified with the decision.<sup>35</sup>

### Personal Interview

#### Indicators:

- Is a personal interview of the asylum-seeker systematically conducted in practice in the Dublin procedure?  Yes  No
- If so, are interpreters available in practice, for interviews?  Yes  No

There is no requirement for an interview with the asylum-seeker who is within the Dublin procedure. Notwithstanding, upon notification that an asylum-seeker might be eligible for a Dublin transfer he will be called by the immigration police operating the Dublin Unit to verify the information previously given to

<sup>33</sup> Information provided by lawyer working with JRS Malta.

<sup>34</sup> Immigration Appeals Board (Additional Jurisdiction) Regulations, Subsidiary Legislation 217.16, Regulation 3.

<sup>35</sup> Immigration Act, Chapter 217 of the Laws of Malta, Article 25A.

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 mediators 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.

### Legal assistance

#### Indicators:

- Do asylum-seekers have access to free legal assistance at the first instance in the Dublin procedure in practice?  Yes  not always/with difficulty  No
- Do asylum-seekers have access to free legal assistance in the appeal procedure against a Dublin decision?  Yes  always/with difficulty  No

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 they can seek the services of a lawyer at their 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.

### Suspension of transfers

#### Indicator:

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

Following the *M.S.S.* European Court of Human Rights judgment, 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.

## 4. Admissibility procedures

### General (scope, criteria, time limits)

Article 24 of the Refugees Act provides for “inadmissible applications” under Part V of the Act, in the provisions related to the Accelerated procedures. The Refugees Act adds to the grounds laid down by the Procedures Directive, as follows: the first subparagraph adds:

- “[another Member State] is obliged to examine the particular application for asylum in terms of Council Regulation (EC) 343/03 of 18 February 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”;

- “recognized in a country which is not a member state as a refugee and can still avail himself of that protection or otherwise enjoys sufficient protection in that country, including benefiting from the principle of non-refoulement, and such person can be re-admitted to that country”;
- an application from a national of a safe country of origin as listed in the Schedule<sup>36</sup> is also inadmissible.

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<sup>37</sup>. According to the Office of the Refugee Commissioner, all asylum applications are processed in the regular asylum procedure.

### Appeal

#### Indicators:

- Does the law provide for an appeal against the decision in the admissibility procedure:  
 Yes       No

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 three working days.<sup>38</sup> In practice, the three day time limit hinders any legal assistance, particularly in a detention context. No appeal is allowed.

### Personal Interview

#### Indicators:

- Is a personal interview of the asylum-seeker systematically conducted in practice in the admissibility procedure?       Yes       No
- If so, are interpreters available in practice, for interviews?       Yes       No
- Are personal interviews ever conducted through video conferencing?       Yes       No

According to Regulation 5(5) of the Procedural Regulations, the interview may be omitted if the application is unfounded. However, the Office of the Refugee Commissioner systematically interviews all asylum-seekers. The same regular procedures therefore apply for inadmissible applications.<sup>39</sup>

<sup>36</sup> Australia, Benin, Botswana, Brazil, Canada, Cape Verde, Chile, Croatia, Costa Rica, Gabon, Ghana, Iceland, India, Jamaica, Japan, Liechtenstein, New Zealand, Norway, Senegal, Switzerland, USA, Uruguay, Member States of the EU and the EEA.

<sup>37</sup> Court of Appeal, *Paul Washimba v. Bord tal-Appelli dwar ir-Rifugjati*, 28 September 2012.

<sup>38</sup> Refugees Act, Article 23(3).

<sup>39</sup> Article 5(5) of S.L. 420.07.

## Legal assistance

### Indicators:

- Do asylum-seekers have access to free legal assistance at first instance in the admissibility procedure in practice?  Yes  not always/with difficulty  No
- Do asylum-seekers have access to free legal assistance in the appeal procedure against an admissibility decision?  Yes  not always/with difficulty  No

Article 23(6) of the Refugees Act stipulates to 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 normal procedure.

## 5. Border procedure (border and transit zones)

### General (scope, time-limits)

### Indicators:

- Do border authorities receive written instructions on the referral of asylum-seekers to the competent authorities?  Yes  No
- Are there any substantiated reports of refoulement at the border (based on NGO reports, media, testimonies, etc.)?  Yes  No
- Can an application made at the border be examined in substance during a border procedure?  Yes  No

There is no specific border procedure in national legislation. The specificity of migration in Malta coupled with the fact that Malta is an island implies a strong “access” component. The right to seek asylum is not taken into account during maritime rescue operations, dealt with by the Armed Forces of Malta (AFM) who decide upon disembarkation of migrants and asylum-seekers in accordance with Malta’s interpretation of its international maritime law obligations.

If the request to seek asylum is made at a point of entry such as an airport or maritime port, the immigration authorities will first decide on the applicant’s immigration status and then inform the Office of the Refugee Commissioner of the application. After entry, when the Principal Immigration Officer considers the asylum-seeker as a ‘prohibited immigrant’, detention is ordered together with a removal order.<sup>40</sup>

### Appeal

N/A

### Personal Interview

N/A

### Legal assistance

N/A

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<sup>40</sup> Articles 10 (in relation to detention) and Article 14 Immigration Act (in relation to removal orders).

## 6. Accelerated procedures

### *General (scope, grounds for accelerated procedures, time limits)*

Article 23 of the Refugees Act provides that applications should be examined under accelerated procedures if they are manifestly unfounded, if the applicant could have found or could have found safe protection elsewhere under the Geneva Convention or the asylum Directives, or if the applicant holds a travel document from a safe third country. An application is considered to be manifestly unfounded when it is:

- not related to refugee grounds as defined in the Convention;
- or which is totally lacking in substance and the applicant provides no indications that he would be exposed to fear of persecution in his own country or his story contains no circumstantial or personal details;
- or in relation to which the applicant gives clearly insufficient details or evidence to substantiate his claim and his story is inconsistent, contradictory or fundamentally improbable;
- or in relation to which the applicant bases his application on a false identity or on forged or counterfeit documents that he maintains as genuine when questioned about them;
- or in relation to which the applicant deliberately made false representations of a substantial nature;
- or in relation to which the applicant, 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;
- or in relation to which the applicant deliberately failed to reveal that he had previously lodged an application for asylum in another country;
- or in relation to which the applicant, having had ample earlier opportunity to submit an asylum application, 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;
- or in relation to which the applicant has flagrantly failed to comply with the substantive obligations imposed by Malta's legal provisions relating to asylum procedures;
- or prior to which the applicant had made an application for recognition as a refugee in a country party to the Convention, and the Commissioner is satisfied that his application was properly considered and rejected in that country and the applicant has failed to show a material change of these circumstances;
- or when the applicant for asylum comes from a safe country of origin.

Article 23 (2) provides that if the Refugee Commissioner is of the opinion that an application is manifestly unfounded, he shall examine the application within three working days and his recommendation shall immediately be referred to the Refugee Appeals Board, to then also examine within three working days. In practice the Office of the Refugee Commissioner does not consider *prima facie* applications and examines all applications under the normal procedure.

According to information by the Office of the Refugee Commissioner, the Office has prioritised the examination of applications lodged by particular vulnerable persons who *prima facie* show that these are likely to be given protection. It also prioritised those who are in the closed centres over those who are in the open ones, and in the case of mass influx or sudden considerable numbers it also gave preference to those coming from countries which *prima facie* are more liable to be given protection.

According to the Office of the Refugee Commissioner, in 2012 no applications were processed under the accelerated procedure.



## Appeal

### Indicators:

- Does the law provide for an appeal against a decision taken in an accelerated procedure?  
 Yes       No

Article 23 (2) provides that if the Refugee Commissioner is of the opinion that an application is manifestly unfounded, he shall examine the application within three working days and refer his recommendations immediately to the Refugee Appeals board, which in turn is provided as well three 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 they are able to show that return would subject them to torture, cruel, inhuman or degrading treatment or punishment.

As with the regular procedure, access to legal assistance is difficult primarily since the detention of asylum-seekers renders problematic all contact and communication with lawyers. Free legal assistance is not provided in the accelerated procedure, resulting in asylum-seekers depending on severely limited NGO-provided legal aid.

## Personal Interview

### Indicators:

- Is a personal interview of the asylum-seeker systematically conducted in practice in an accelerated procedure?       Yes       No
- If so, are interpreters available in practice, for interviews?       Yes       No
- Are personal interviews ever conducted through video conferencing?       Yes       No

The Office of the Refugee Commissioner does not consider *prima facie* manifestly unfounded application and therefore examined all applications under the normal procedure.

## Legal assistance

### Indicators:

- Do asylum-seekers have access to free legal assistance at first instance in accelerated procedures in practice?       Yes       not always/with difficulty       No
- Do asylum-seekers have access to free legal assistance in the appeal procedure against a decision taken under an accelerated procedure?       Yes       not always/with difficulty       No

As per the regular procedure, free legal assistance is only provided at the appeal stage. The modalities and obstacles referred to for 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:

- Is sufficient information provided to asylum-seekers on the procedures in practice?  Yes  not always/with difficulty  No
- Is sufficient information provided to asylum-seekers on their rights and obligations in practice?  Yes  not always/with difficulty  No
- Do asylum-seekers located at the border have effective access to NGOs and UNHCR if they wish so in practice?  Yes  not always/with difficulty  No
- Do asylum-seekers in detention centres have effective access to NGOs and UNHCR if they wish so in practice?  Yes  not always/with difficulty  No
- 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?  Yes  not always/with difficulty  No  N/A

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.<sup>41</sup> 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 of 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 same 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 only in English. On the other hand, the information provided by the personnel working in the Refugee Commissioner's office is communicated within one or two 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 eleven languages of the asylum population (i.e. Amharic, Tigrinya, Arabic, English, Djoula, French, Hawsa, Oromo, Russian, Somali and Swahili, with further languages to be added, according to the exigencies of the applicants)<sup>42</sup> and a booklet that contains a transcript of the audio-visual presentation, also available in the said eleven different languages. 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. Alternative sources of information are available in practice mostly through NGOs. For instance, staff of the Jesuit Refugee Service Malta ('JRS Malta') visits 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.

<sup>41</sup> Asylum Procedures (Application for a Declaration) Regulations, 2001 and Procedural Regulations.

<sup>42</sup> Communication from the Refugee Commissioner to Dr Neil Falzon of aditus foundation (2013).

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.

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 with respect to this law 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.

National legislation provides that UNHCR shall have access to asylum applicants, including those in detention and in airport or port transit zones.<sup>43</sup> Moreover, the law also states that a person seeking asylum in Malta shall be informed of his right to contact UNHCR.<sup>44</sup> 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.<sup>45</sup> 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:*

- Does the legislation provide for a specific procedure for subsequent applications?  Yes  No
- Is a removal order suspended during the examination of a first subsequent application?  Yes  No
- Is a removal order suspended during the examination of a second, third, subsequent application?  Yes  No

An asylum-seeker whose claim has been rejected may submit a subsequent application to the Refugee Commissioner.<sup>46</sup> A person may apply for a subsequent application, if they 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

<sup>43</sup> Procedural Regulations, Regulation 16 (a).

<sup>44</sup> Asylum Procedures (Application for a Declaration) Regulations 2001, Regulation 3 (3) (c).

<sup>45</sup> Procedural Regulations, Regulation 7 (3).

<sup>46</sup> Refugees Act, Articles 7A and 4.

submitted before. Such new elements need to be presented within fifteen 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 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.

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 not accepted, there is the possibility of appealing<sup>47</sup> this decision to the Refugee Appeals Board<sup>48</sup> (RAB), in the same way as with the regular procedure. The time limit within which to appeal is fifteen days.

In case the subsequent application is rejected, the applicant is informed of the possibility to appeal<sup>49</sup> to the RAB, once again within fifteen days. There is no limit as to the number of subsequent applications lodged, as long as new evidence is presented every time.

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 the Jesuit Refugee Service, (JRS) which is the main NGO offering a free legal service in the field of asylum. Second, third and other subsequent applications are generally treated in the same manner.

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

### 1. Special Procedural guarantees

#### Indicators:

- Is there a specific identification mechanism in place to systematically identify vulnerable asylum-seekers?  Yes  No  Yes, but only for some categories
- Are there special procedural arrangements/guarantees for vulnerable people?  Yes  No  Yes, but only for some categories

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). Although an asylum-seeker will be released from detention if he 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.

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<sup>47</sup> *Ibid.*, Article 7

<sup>48</sup> *Ibid.*, Article 5

<sup>49</sup> *Ibid.*, Article 7.

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 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.

## 2. Use of medical reports

### *Indicators:*

- Does the legislation provide for the possibility of a medical report in support of the applicant's statements regarding past persecution or serious harm?  
 Yes       Yes, but not in all cases       No

The law does not mention the presentation of medical reports in support of an asylum-seeker's claim. When these are presented, the Office of 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.<sup>50</sup>

## 3. Age assessment and legal representation of unaccompanied children

### *Indicators:*

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

<sup>50</sup> Information obtained via email from Refugee Commissioner.

Unaccompanied asylum-seekers who declare that they are below the age of eighteen upon arrival or during the filling in of the PQ are referred to the Agency for the Welfare of Asylum-seekers (AWAS) for age assessment. The Age Assessment Procedure is not set out in law. In practice, age assessment is carried out through an interview with AWAS staff members who decide, following an interview, whether to accept the asylum-seeker's claim to be an unaccompanied minor. Should the interview prove inconclusive the individual is referred for wrist x-ray, in what is referred to as Further Age Verification (FAV). Once the individual is accepted as an unaccompanied minor a Care Order is issued in terms of Maltese law whereby the minor is taken into the care of the state.<sup>51</sup> Release from detention then follows and the Refugee Commissioner is informed by AWAS that age assessment is concluded so that the asylum procedure may continue.

All unaccompanied minors are then assigned a legal guardian: an AWAS staff member usually a social worker although there is no such specific requirement set out in law. The Procedural Regulations set out that the legal representative shall inform the unaccompanied minor about the meaning and consequences of the personal interview and prepare the minor 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 minor, information and advice regarding the asylum procedure is provided by NGOs upon referral by the minors' guardians.

## F. The safe country concepts (if applicable)

### Indicators:

- Does national legislation allow for the use of safe country of origin concept in the asylum procedure?  Yes  No
- Does national legislation allow for the use of safe third country concept in the asylum procedure?  Yes  No
- Does national legislation allow for the use of first country of asylum concept in the asylum procedure?  Yes  No
- Is there a list of safe countries of origin?  Yes  No
- Is the safe country of origin concept used in practice?  Yes  No
- Is the safe third country concept used in practice?  Yes  No

The Refugees Act defines the notions of safe country of origin and safe third country. According to the Act, a safe country of origin means is one 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. A safe third country means a country of which the applicant is not a national or citizen and where:

- life and liberty are not threatened on account of race, religion, nationality, membership of a particular social group or political opinion;
- the principle of non-refoulement in accordance with the Convention is respected;
- 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;
- the possibility exists to request refugee status and, if found to be a refugee, to receive protection in accordance with the Convention;

<sup>51</sup> In terms of the Children and Young Persons (Care Orders) Act, Chapter 285 of the Laws of Malta.

- the applicant had resided in the safe country of origin for a meaningful period of time prior to his entry into Malta.

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. The last amendment to the list is dated 2005. 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.

In 2012, 6 cases (one from Benin, one from Senegal and 4 from India) were considered inadmissible after examination by the Office of the Refugee Commissioner.

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. 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.

In practice, it is noted that the above-mentioned 6 cases relied on the safe country of origin concept, however, data is lacking as to its application. Also, observed practice does not seem to follow clear guidelines and seems to be erratic. Detailed information on practice, and on emerging trends is quite difficult to obtain, rendering any assessment problematic.

## **G. Treatment of specific nationalities**

The Office of the Refugee Commissioner gives preference to those coming from countries that *prima facie* are more liable to be given protection in the case of mass influx or sudden increase of certain groups of asylum-seekers. In these cases, the Office of the Refugee Commissioner is likely to use a "Provisional Humanitarian Protection" pending a final decision for nationals from countries under political or humanitarian crisis until a recommendation on protection or return from UNHCR is issued.

## Reception Conditions

### A. Access and forms of reception conditions

#### 1. Criteria and restrictions to access reception conditions

##### Indicators:

- Are asylum-seekers entitled to material reception conditions according to national legislation :
  - o During the accelerated procedure?  
 Yes                       Yes, but limited to reduced material conditions                       No
  - o During admissibility procedures:  
 Yes                       Yes, but limited to reduced material conditions                       No
  - o During the regular procedure:  
 Yes                       Yes, but limited to reduced material conditions                       No
  - o during the Dublin procedure:  
 Yes                       Yes, but limited to reduced material conditions                       No
  - o During the appeal procedure (first appeal and onward appeal):  
 Yes                       Yes, but limited to reduced material conditions                       No
  - o In case of a subsequent application:  
 Yes                       Yes, but limited to reduced material conditions                       No
- 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. In terms of the Reception Regulations, reduction in reception conditions is possible where an asylum-seeker abandons the determined place of residence, fails to comply with established reporting duties, fails to appear for the asylum interview, or has financial resources rendering them ineligible for material conditions. Furthermore, an asylum-seeker who fails to show that the asylum application was made in accordance with the Refugees Act may be denied reception conditions.

Asylum-seekers who do have access to personal financial resources may be determined to be ineligible 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, although 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.



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 – the vast majority of asylum-seekers – are detained in closed centres where the quality of material reception conditions could not meet the appropriate standards.<sup>52</sup> Furthermore, asylum-seekers who are not detained but offered accommodation in Open Centres also face practical challenges in accessing reception conditions due to the difficult living conditions in some of these centres, as also reported in the above-referenced reports.

## 2. Forms and levels of material reception conditions

### *Indicators:*

- Amount of the financial allowance/vouchers granted to asylum-seekers on 31/12/2012 (per month, in original currency and in euros): €130.44 (per diem of €4.66)

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.*” 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 does neither require 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 €4.66 per day as food and transport allowance, free access to state health services, in cases of minors, 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.

AWAS provides different amounts of daily allowance, associated with the asylum-seeker’s status: €4.66 for asylum-seekers, persons returned under Dublin II 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.

<sup>52</sup> See Human Rights Watch, ‘[Boat Ride to Detention](#)’, 2012; Council of Europe’s Commissioner for Human Rights, ‘[Report by Thomas Hammarberg following his visit to Malta from 23 to 25 March 2011](#)’, 2011, Council of Europe’s European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), ‘[Report to the Maltese Government on the visit to Malta carried by the CPT from 19 to 26 May 2008](#)’, 2011; International Commission of Jurists, ‘[Malta: not here to stay](#)’, 2012; Médecins sans Frontières, ‘[Not Criminals](#)’, 2009. Also Jesuit Refugee Service (Malta), ‘[Becoming Vulnerable in Detention: National Report Malta](#)’, 2007.

Asylum-seekers remain in detention until either of the following occur: if they are unaccompanied minors, until their age is confirmed to be below 18 and they are issued with relevant documentation; if they are vulnerable adults, until Agency for the Welfare of Asylum-seekers (AWAS) assesses them and confirms their vulnerability and they are issued with relevant documentation; if they remain within the asylum procedure, at any instance, for up to twelve months, they are released upon the expiry of the twelve months; their asylum procedure is positively concluded.

If they are 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 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 four-month periods, following assessments by AWAS staff members.

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.

### 3. Types of accommodation

#### Indicators:

- Number of places in all the reception centres (both permanent and for first arrivals): Not available
- Number of places in private accommodation: 0
- Number of reception centres: 8
- Are there any problems of overcrowding in the reception centres?  Yes  No
- What is, if available, the average length of stay of asylum-seekers in the reception centres? Months, until their status is determined, then they are allowed to remain, as described above.
- Are unaccompanied children ever accommodated with adults in practice?  Yes  No

The number of available places in reception centres is not available, as these figures were not provided by Agency for the Welfare of Asylum-seekers (AWAS). 8 reception centres are being utilised, 6 of which are run by AWAS and the remaining 2 by NGOs. The latter do, however, fall within AWAS' overall reception system. Over-crowding becomes a problem at various times of the year, owing primarily to increased releases from detention & failure of residents of leave the Open Centres. 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, alternative venue are utilised as for example shelters for homeless persons. Persons applying at the airport are generally transferred to the main Open Centres.

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

Unaccompanied minors 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 minors aged 16 years or over may be accommodated with adult asylum-seekers, and has happened in practice.

#### 4. Reduction or withdrawal of reception conditions

*Indicators:*

- Does the legislation provide for the possibility to reduce material reception conditions?  
 Yes       No
- 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; where the asylum-seeker does not comply with reporting duties; where the asylum-seeker fails to appear for the asylum interview; or where the asylum-seeker has concealed financial resources.<sup>53</sup>

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. Asylum-seekers may appeal these decisions before the Immigration Appeals Board, in accordance with the Immigration Act.

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.

#### 5. Access to reception centres by third parties

*Indicators:*

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

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. .

Access to Open Centres is regulated by Agency for the Welfare of Asylum-seekers, 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.

#### 6. Addressing special reception needs of vulnerable persons

*Indicators:*

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

<sup>53</sup> Regulation 13 Reception Regulations.

The Reception Regulations state that individual evaluations will be conducted to assess the special needs of vulnerable persons.<sup>54</sup> The Regulations provide an indicative and therefore non-exhaustive list of vulnerable persons: minors, unaccompanied minors 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.

Beyond the general principle, specific measures provided by law for vulnerable persons are as follows: maintenance of family unity where possible (Regulation 7); particular, yet undefined, attention to ensure that material reception conditions are such to ensure an adequate standard of living (Regulation 11(2)). In practice, persons identified as vulnerable by Agency for the Welfare of Asylum-seekers (AWAS) are released from detention centres when they are identified as such, and necessary release formalities are finalised. Unaccompanied minors 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.

## **7. Provision of information**

The Reception Regulations requires 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.<sup>55</sup>

In the detention centres, all persons are provided with the document entitled 'Your Entitlements, Responsibilities and Obligations while in Detention' a publication of the former Ministry for Justice and Home Affairs.<sup>56</sup> 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.

## **8. Freedom of movement**

Asylum-seekers not in detention enjoy freedom of movement around the island(s). If living in an Open Centre, a number of reporting obligations do exist for eligibility for the above-mentioned *per diem* and to ensure a continued right to reside in the Centre.

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<sup>54</sup> Regulation 14 Reception Regulations.

<sup>55</sup> Regulation 4 Reception Regulations.

<sup>56</sup> The document is not currently available online, but is extensively referred to in the above-mentioned reports. Reference is also made to it in Professor Henry J. Frendo, '[National Report on the Implementation of the Directive on Reception Conditions for Asylum-seekers in Malta](#)'. The report's [full text](#) is may be seen 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.

## B. Employment and education

### 1. Access to the labour market

#### Indicators:

- Does the legislation allow for access to the labour market for asylum-seekers?  Yes  No
- If applicable, what is the time limit after which asylum-seekers can access the labour market 12 months.
- Are there restrictions to access 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. 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.

In practice, most asylum-seekers are detained and are therefore unable to access the labour market. 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.

### 2. Access to education

#### Indicators:

- Does the legislation provide for access to education for asylum seeking children?  Yes  No
- 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*” (proviso to Regulation 9(2)).

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

The practical difficulties faced by asylum-seekers’ 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. Access to state schools is free of charge. These rules apply for primary and secondary education.

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.<sup>57</sup> Vocational training courses offered by the Employment and Training Corporation are also accessible to asylum-seekers.

<sup>57</sup> In terms of Ministry of Education and Employment, ‘[Policy on Exemptions from Fees at State Educational Institutions](#)’, September 2012.

## C. Health care

### Indicators:

- Is access to emergency health care for asylum-seekers guaranteed in national legislation?  
 Yes       No
- In practice, do asylum-seekers have adequate access to health care?  
 Yes       with limitations       No
- Is specialised treatment for victims of torture or traumatised asylum-seekers available in practice?       Yes       No

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. 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.

Asylum-seekers who are not detained may access the state health services, with the main obstacles being mainly linked to language difficulties.

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 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.

## Detention of Asylum-seekers

### A. General

#### Indicators:

- Number of asylum-seekers who entered detention in the previous year: 0<sup>58</sup>
- Number of asylum-seekers detained or an estimation at the end of the previous year (specify if it is an estimation): 497<sup>59</sup>
- Number of detention centres: 3, only 2 of which are currently in use.
- Total capacity: Not available.

There are currently 4 immigration detention facilities in use, 3 in Safi Barracks – Warehouse 1, Warehouse 2 and B Block – and 1 in Lyster Barracks – Hermes Block. All of these facilities are used to detain both asylum-seekers and immigrants awaiting removal. At the end of 2012, there were a total of 497 detainees.

It should be noted that 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.

In 2011, out of a total of 1886 asylum-seekers, 85% applied for asylum after they had been apprehended and placed in detention in terms of the Immigration Act. Of these, 98% (1579 persons) were so-called 'boat-arrivals', while 2% [31 persons] were apprehended by the immigration authorities for illegal entry or stay.<sup>60</sup>

As explained in greater detail below and in references provided above, conditions in these centres are basic at best and, at times of peak arrivals, the centres can be overcrowded. The Médecins Sans Frontières report 'Not Criminals' (April 2009), documents the situation in the immigration detention centres in use in February 2009. The table on page 10 clearly indicates that some centres were extremely crowded at the time<sup>61</sup>: this is due to the fact that there were large numbers of new arrivals in the first quarter of the year<sup>62</sup>.

<sup>58</sup> The Police specified that nobody entered detention as an asylum-seeker, as they sought asylum upon entering.

<sup>59</sup> This figure includes asylum-seekers and also failed asylum-seekers as the authorities are unable to provide disaggregated figures.

<sup>60</sup> UNHCR Statistics, [2011 Non-Boat Arrivals](#), 27 March 2012.

<sup>61</sup> [Not Criminals](#), MSF, April 2009.

<sup>62</sup> See report carried in Malta Today on July 5, 2009, [Immigration 'so calm it's unnatural' says UNHCR](#), which reports that in January and February of 2009 Malta received 5 boats of 921 migrants.

## B. Grounds for detention

### Indicators:

- In practice, are asylum-seekers automatically detained
  - o on the territory:  Yes  No
  - o at the border:  Yes  No
- Are asylum-seekers detained in practice during the Dublin procedure?  Yes  No
- Are asylum-seekers ever detained during a regular procedure?  Yes  No
- Are unaccompanied asylum-seeking children ever detained?
  - Yes  Yes, but only in border/transit zones  No
- Are asylum-seeking children in families ever detained?
  - Yes  Yes, but rarely  No
- What is the maximum detention period set in the legislation (inc extensions): 12 months
- In practice, how long in average are asylum-seekers detained? 6-8 months

### Law, policy and practice on detention

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 said 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 they are removed from Malta (Article 14(3)).

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 national policy document entitled 'Refugees, Irregular Immigrants and Integration': *"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"*<sup>63</sup>.

The only exception are vulnerable asylum-seekers; these 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 Agency for the Welfare of Asylum-seekers (AWAS) an alternative non-custodial placement is identified.

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.

*Policy on detention of vulnerable asylum-seekers* In terms of the above-cited government policy document "irregular immigrants who, by virtue of their age and/or physical condition, are considered to

<sup>63</sup> MJHA and MFSS, January 2005, at p. 11.



*be vulnerable are exempt from detention and are accommodated in alternative centres*".<sup>64</sup> 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*".<sup>65</sup>

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 Vulnerable Adults Assessment Procedure. Both of these procedures are implemented by AWAS. Although AWAS has not specifically and legally been assigned responsibility for assessing vulnerability,<sup>66</sup> in practice, the said agency 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 one or two weeks of arrival in Malta.

Where vulnerability is less evident, e.g. in the case of unaccompanied minors 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 noted 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.

### *The Age Assessment Procedure*

This procedure was developed and implemented with a view to assessing claims of minors. 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 minors and age assessment, the policy document referred to above states that, in order to avoid abuse by individuals who make false claims about their age to benefit from the protection provided to minors 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*".<sup>67</sup>

In practice, from the information available, it appears that the Age Assessment Procedure consists of a number of different phases.

Individuals are referred to AWAS by the Immigration Police (where they declare to be minors on arrival), by the Refugee Commissioner or by other entities working in detention, e.g. Detention Service staff, UNHCR, NGOs, etc. (where they declare to be minors in their PQ).

Following referral, an initial interview is conducted by one member of AWAS staff. Where this interview is inconclusive, a second interview is conducted by a panel of 3 persons known as the Age Assessment Team (AAT). Where the panel is convinced that the individual concerned is not a minor, the minority age claim is rejected. Where a doubt remains, they are referred for a Further Age Verification (FAV) test, which essentially consists of a wrist X-ray. Although the AAT is not bound by the results of the test, in practice, it would appear that in most cases where it is resorted to the result determines the outcome of the assessment.

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<sup>64</sup> *Ibid*, at p. 11.

<sup>65</sup> *Ibid*, at p. 13.

<sup>66</sup> The functions of the Agency are set out in Regulation 6 of the Agency for the Welfare of Asylum-seekers Regulations – S.L. 271.11.

<sup>67</sup> MJHA and MFSS, January 2005, at p. 13.

If the individual is found to be a minor, a Care Order is issued, the individual is released from detention and placed in an appropriate non-custodial residential facility, and a legal guardian is appointed to represent the minor. Once a guardian is appointed the asylum interview is carried out, and during the said interview the minor is assisted by a legal guardian.

The Age Assessment Procedure has often been criticized, as it is plagued by delays and by a lack of adequate procedural guarantees, including lack of information about the procedure and the possibility of appeal. No reasons are ever given for decisions and there is no real possibility to challenge the decision taken by the AAT. In addition, migrants undergoing Age Assessment Procedures are detained throughout the procedures, usually in centres with adults without any special consideration for the fact that they are minors.<sup>68</sup> It should be stated however that Article 15 of the Reception Regulations concedes that “*an unaccompanied minor aged sixteen years or over may be placed in accommodation centres for adult asylum-seekers*”.

#### *The Vulnerable Adults Assessment Procedure (VAAP)*

The VAAP is also administered by AWAS; the organization 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.

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 AAP, 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 2008 CPT report on their visit to Malta, conditions are extremely harsh.<sup>69</sup>

#### *Alternatives to detention*

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

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<sup>68</sup> [Boat ride to Detention: Adult and Child Migrants in Malta](#), HRW, 2012, p. 38 *et seq.*

<sup>69</sup> CPT [report](#) on their 2008 visit to Malta, para 170, p. 57.

The above-mentioned 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*”.<sup>70</sup>

Moreover, Regulation 11(8) of the Returns Regulations,<sup>71</sup> 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.

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, 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 they 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.

#### *Authority responsible*

As was explained above, 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.

#### *Length of detention*

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

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

The maximum duration for the detention of asylum-seekers is set at 12 months. This was introduced following the enactment of the Reception Regulations, which transposed the Reception 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.<sup>72</sup>

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.

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<sup>70</sup> MJHA and MFSS, January 2005, at p. 11.

<sup>71</sup> S.L.217.12

<sup>72</sup> Regulation 10 of the Reception of Asylum-seekers (Minimum Standards) Regulations (Legal Notice 320 of 2005), which echoes the provisions of Article 11 of the Reception Directive (Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum-seekers.

## C. Detention conditions

### Indicators:

- Does the law allow to detain asylum-seekers in prisons for the purpose of the asylum procedure (i.e. not as a result of criminal charges)?  Yes  No
- If so, are asylum-seekers ever detained in practice in prisons for the purpose of the asylum procedures?  Yes  No
- Do detainees have access to health care in practice?  Yes  No
- Is access to detention centres allowed to
  - o Lawyers:  Yes  Yes, but with some limitations  No
  - o NGOs:  Yes  Yes, but with some limitations  No
  - o UNHCR:  Yes  Yes, but with some limitations  No

Pursuant to the Immigration Act, anyone who enters the territory without the necessary documents is detained, either until their removal is possible, or, in the case of asylum-seekers, until their asylum application has been decided, and they have been granted international protection.<sup>73</sup> Asylum-seekers and other third country nationals, who have over-stayed their visa, are detained in military barracks, which are overcrowded, offer inadequate sanitation and hygiene facilities, and allow no privacy for the detainees. 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 cultural 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.<sup>74</sup>

Detainees are given daily access to a yard from late morning to late afternoon, however in one particular centre, access to the yard is limited to only one hour and a half per day.<sup>75</sup> There are no recreational or educational activities provided. The asylum-seekers have one television set per centre, and are given a football for the men and a volleyball for the women. None of the centres or facilities are fully accessible to people with disabilities.<sup>76</sup>

Men and detained separately from women, as are families and couples. Unaccompanied minors awaiting their assessment however, at times waiting for more than three months before being released, are detained with unrelated adults.<sup>77</sup> Some minors have also reported to NGOs that it is common to be bullied by the adults. There are no educational or non-educational activities organised for minors, and they are subjected to the same conditions as the other detainees.

<sup>73</sup> International Commission of Jurists, "[Not Here to Stay: Report of the International Commission of Jurists on its Visit to Malta on 26-30 September, 2011](#)," May 2012.

<sup>74</sup> Médecins Sans Frontières, "[Not Criminals: Médecins Sans Frontières Exposes Conditions for Undocumented Migrants and Asylum-seekers in Maltese Detention Centers](#)," April 2009.

<sup>75</sup> The detention centre is Hermes Block at Lyster Barracks, accommodating men, women and couples, which when at maximum capacity houses 450 detainees.

<sup>76</sup> Human Rights Watch, "[Boat Ride to Detention : Adult and Child Migrants in Malta](#)," July 2012.

<sup>77</sup> *Ibid.*, p. 38.

Once released from detention, children and unaccompanied minors are entitled to free state education. Upon their release from detention, families and unaccompanied minors are accommodated in small open centres, where they are followed by either a community worker, or a social worker.

JRS and UNHCR are the two main organisations visiting 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, unlimited 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.

## D. Judicial Review of the detention order

### Indicators:

- Is there an automatic review of the lawfulness of detention?  Yes  No

Detention is effectively authorised by an administrative authority, as it is the automatic consequence of a decision taken by the Principal Immigration Officer. It is not subject to automatic judicial review. Although there are a number of remedies available to detainees to challenge their detention, in *Louled Massoud vs. Malta*, the European Court of Human Rights (ECtHR) clearly stated that three of these remedies do not qualify as “speedy, judicial remedies” in terms of Art 5(4) of the European Convention on Human Rights (ECHR).

### *Human rights action before the national courts*

This remedy, which allows a detainee to challenge the lawfulness of their detention in terms of the ECHR and the Constitution of Malta, failed the test as, although it is clearly judicial, it is far from speedy. In addition to the length of time for delivery of judgements, Constitutional proceedings are virtually inaccessible to detainees as in practice most asylum-seekers do not have access to a lawyer who could 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.

### *Application in terms of Article 469A of the Criminal Code*

This remedy too allows a detainee to challenge the lawfulness of their detention before the Court of Magistrates. 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 of the ECHR.

### *Application in terms of Article 25A of the Immigration Act*

In terms of Article 25A of the Immigration Act, the Immigration Appeals Board is competent to “*hear 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 grants 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 nationality, has yet to be verified, in particular where they have destroyed their 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.

#### *Application in terms of Regulation 10(11) of the Common Standards and Procedures for Returning Illegally Staying Third Country Nationals Regulations*

Since the transposition of the Return 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’.

## E. Legal assistance

### Indicators:

- Does the law provide for access to free legal assistance for the review of detention?  
 Yes       No
- 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 it.

Regulation 11(5) of the Common Standards and Procedures for Returning Illegally Staying Third Country Nationals Regulations provides that within the context of an application to the Board to review decisions related to return, a legal advisor 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.