Detention of asylum seekers in Malta: a human rights perspective

Policy Recommendations

Malta

July 2003
This document was prepared by Dr Katrine Camilleri LL.D. for the Jesuit Refugee Service – Malta (JRS).

JRS acknowledges with thanks the contribution of Dr Nikki Camilleri LL.D., Susan Saliba and Dr Edward Warrington who read and commented on the initial draft of this report.
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Executive Summary

The problem of irregular migration is a cause of great concern for most governments in today’s world. It is a clearly established principle of international law that states have a sovereign right to protect their borders and to impose measures to control irregular migration within their jurisdiction. This includes the right to impose measures such as detention, to prevent the unauthorised entry of migrants into national territory or to remove migrants found to have entered or stayed in the territory illegally.

However, it is equally clear that this sovereign right is not absolute, but must be exercised in accordance with the provisions contained in the various human rights conventions to which that state is a party.

This paper examines current policy on the detention of asylum seekers who apply for asylum after they are caught entering or staying in Malta in an irregular manner in the light of these principles and standards.

It concludes that the current policy of blanket and indefinite detention of asylum seekers, though in accordance with the provisions of the Immigration Act, raises a number of serious human rights concerns.

JRS therefore makes a number of recommendations to the authorities aimed at limiting the use of detention to cases where it is absolutely necessary, and bringing government policy on detention of asylum seekers in line with international laws and standards.

JRS recommends that clear rules are drawn up, addressing the above-mentioned human rights concerns, and establishing beyond doubt the circumstances in which detention of asylum seekers may be resorted, in order to ensure that asylum seekers actually receive the protection to which they are entitled.

JRS also urges the authorities to commit themselves to a serious process aimed at identifying and implementing non-custodial alternatives to detention for asylum seekers who apply for refugee status after they are found to be in breach of the provisions of the Immigration Act. It is clear that if there are no concrete alternatives available, in practice all talk of limiting the use of detention is vain.

Finally, JRS calls upon the authorities to ensure that where detention is resorted to, it is in conditions that respect basic human dignity and makes recommendations for the improvement of the conditions in which asylum seekers are presently detained.
Introduction

The dramatic increase in the number of irregular migrants arriving in Malta by boat over the past months has led to a totally unprecedented rise in the number of persons detained for breaching the provisions of the Immigration Act.

These persons, the vast majority of whom have applied for asylum in Malta, are detained indefinitely, for long periods of time, in conditions that are a cause of grave concern to JRS. Among the detainees are a number of vulnerable people, such as children, people suffering from mental health problems, pregnant women, lactating mothers and until recently, unaccompanied minors.

It is a matter of concern to JRS that public debate on the subject has focussed almost exclusively on justification of the present policy, with little or no emphasis on identification of alternatives to detention.

The authorities have repeatedly stated that, in the circumstances, they have no choice but to detain these people, and cite various reasons including, among others, the provisions of our Immigration Act, security concerns, Malta’s limited resources and the need to deter future arrivals to justify this policy.

JRS believes that, in the light of the various international instruments to which Malta is a party, not only does the government have the authority to choose alternative methods of dealing with asylum seekers, but that it has the obligation to do so.

Moreover, if the authorities choose to detain people, then they have the obligation to ensure that such detention is line with basic international standards. It is clear that measures which may have been justifiable in the initial stages, in what was essentially an emergency situation, are much harder to justify fifteen months on.

This paper aims to widen the scope of the present discussion on the subject, inviting the authorities to move beyond crisis management to a more holistic approach, based on the principles contained in the various human rights instruments to which Malta is a party.

It starts with a brief description of the situation on the ground, and then proceeds to examine the legal basis of such detention in domestic law, followed by an outline of the main international legal principles and standards regarding detention. Current policy is then examined in the light of these principles and, in conclusion, a number of recommendations are put forward.

This paper is being published by the Jesuit Refugee Service (JRS), an international, Catholic, non-governmental organization, with a mission to accompany serve and defend refugees and forcibly displaced persons. It is intended primarily for presentation to the authorities who play a significant role in the creation of policies and practices for the treatment of asylum seekers and other detainees in Malta.
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1. Background

Over the past nineteen months Malta experienced a sharp and totally unprecedented increase in the number of irregular or undocumented migrants arriving in Malta by boat. In November 2001, Malta experienced the first, relatively large, recent arrival of such migrants, when a boat carrying 57 immigrants, most of them from Sudan, landed on our shores. Throughout the period from November 2001 up to December 2002, when the last such arrivals to date arrived in Malta, a total of 1743\(^1\) immigrants travelling in an irregular or ‘clandestine’ manner arrived in Malta.

All those caught entering, or seeking to enter Malta in this manner were immediately detained. As a result over the same period numbers of detainees peaked at their highest ever\(^2\).

Today the number of detainees has decreased considerably, current figures stand at around 350\(^3\). The main reasons for the reduction in the numbers of detainees are: the fact that there were no further arrivals of large groups of irregular migrants following December 2002; the repatriation of a significant number of detainees, who had either not applied for refugee status, or whose applications were withdrawn or rejected; the release of a number of persons\(^4\) granted refugee status or humanitarian or temporary protection in Malta.

2. Legal status of immigration detainees

The migrants in detention are, without exception, prohibited immigrants in terms of Section 5(1) of the Immigration Act. Some among them were refused entry into Malta\(^5\) and others were found to have entered or stayed in Malta without the necessary authorisation\(^6\).

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\(^1\) A total of 1686 irregular migrants traveling by boat arrived in Malta in 2002. One group of 57 people arrived in November 2001, bringing the total throughout this period (November 2001 – December 2002) to 1743. By comparison 24 immigrants traveling in this manner arrived in Malta in 2000.

\(^2\) Exact statistics unavailable, although we requested them from the competent authorities.

\(^3\) This figure is approximate as we could not obtain exact statistics at the moment of going to press. This estimate was arrived at with reference to a statement made by Minister Tonio Borg and quoted in “Number of Illegal Immigrants at 12-month low”, Times of Malta, Tuesday, June 24, 2003, where he stated that there were 560 immigrants in detention at that point in time. Since then a further 186 people granted refugee status or humanitarian protection were released from detention, bringing the number down further to approximately 350.

\(^4\) Exact statistics are not publicly available, however 367 persons were granted refugee status or humanitarian protection in the period between October 2001 and May 2003. In addition to this approximately 130 Iraqis were granted temporary protection. The vast majority of these asylum seekers were detained.

\(^5\) These would include persons refused entry at border points of entry and migrants traveling in an irregular manner, who were rescued in international waters by the Maltese Armed Forces after their boat met with difficulties.

\(^6\) This category includes persons apprehended after they entered Malta in an irregular manner and persons who enter legally, but remain after their authorization to stay in the country has expired.
The majority of the persons currently in detention applied for refugee status in Malta and, as such, may therefore be described as asylum seekers. This general categorisation, however, should not be taken to imply that the legal position of all the detainees is identical or that their protection needs are the same.

In actual fact, an examination of the detainee population will reveal several distinct categories of asylum seekers.

2.1 Asylum seekers awaiting initial interview

Currently 186 cases, involving 239 asylum seekers, are awaiting their interview with the Office of the Refugee Commissioner, having completed a Preliminary Questionnaire (PQ), indicating their intention to apply for refugee status in Malta. In terms of the Refugees Act, these completed forms are forwarded to the Office of the Refugee Commissioner who “shall require the applicant to attend an interview within one week”.

In spite of the fact that the law lays down a specific time limit, within which the procedures for the examination of an individual’s application for asylum should commence, most of these asylum seekers have now been waiting for their initial interview for periods ranging from six to eight months.

Until today they do not know when their interview will be held, as they are not given a date for their hearing when they apply. As applications are examined in chronological order, according to the date when the person concerned arrived in Malta, the asylum seekers who arrived last December, six months ago, will probably have to wait for a further three or four months until their initial interview is held.

The asylum seekers have been detained since their arrival in Malta six months ago, or more, in facilities where living conditions are inadequate and, in our view, fall short of those recommended in international standards on detention. Among these detainees are asylum seekers with a prima facie well-founded claim to protection and vulnerable asylum seekers.

It should be stated that once the Refugee Commissioner actually starts processing an application, the proceedings are conducted efficiently, and a decision is normally granted within a short time. The time-lapse between the submission of the Preliminary Recommendation and the interview is in fact due almost solely to the fact that the Office of the Refugee Commissioner lacks the resources to deal with the existing case load more efficiently.

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7 All the statistics in this section were obtained from the Office of the Refugee Commissioner, for period up to May 30, 2003. These statistics refer to all asylum seekers, not only those who are detained. Although exact statistics regarding the number of asylum seekers in detention are not available, it is clear that currently the vast majority of asylum seekers in Malta are detained.

8 Section 8(2)

9 Reference is made to the UN Standard Minimum Rules for the Treatment of Prisoners, the UN Body of Principles for the Protection of all Persons under any form of Detention or Imprisonment, and the basic standards recommended by the European Committee for the Prevention of Torture.

10 These would include asylum seekers from countries torn apart by conflict, such as Somalia, who are almost always granted some form of protection.

11 Among the detained asylum seekers awaiting their initial interview are a number of single or unaccompanied women and female-headed households with minor children.

12 See “Asylum seekers on hunger strike over detention”, Times of Malta, Friday, May 9, 2003.
2.2 Asylum seekers pending conclusion of the proceedings for the determination of their initial application

Once the initial interview is carried out, the Refugee Commissioner may either decide the case on the basis of the information supplied during the interview, or, where necessary, he will grant the asylum seeker time to bring documents or further information in support of his claims.

On May 30, 2003 there were 69 cases involving 77 asylum seekers at this stage of the proceedings, awaiting documents or other evidence to substantiate their claims.

2.3 Asylum seekers pending the outcome of an appeal application

Out of 471 applications for refugee status involving 665 asylum seekers concluded by the Office of the Refugee Commissioner up to the end of May 2003, 236 cases involving 287 asylum seekers were rejected. The majority of these asylum seekers entered an appeal against the recommendation of the Commissioner before the Refugee Appeals Board\textsuperscript{13}.

2.4 Asylum seekers whose appeals were rejected

To date, every single appeal considered by the Refugee Appeals Board has been rejected, and this category of detainees is fast becoming the largest among those identified herein\textsuperscript{14}.

Some\textsuperscript{15} among them would like to return home but, as many of them arrive without documents, repatriation often proves to be a problem. At this point, such people can no longer strictly speaking be considered ‘asylum seekers’, as they are no longer seeking protection from forced return. However, in spite of the fact that they are quite willing to return, some ‘rejected asylum seekers’ have spent months in detention waiting for their national authorities to issue them with the travel documents necessary for them to be able to make the voyage home.

A number of rejected asylum seekers refuse to return home, and insist that they would face serious harm if they were to be returned to their country in spite of the fact that both their initial applications for refugee status and subsequent appeals were rejected\textsuperscript{16}.

\textsuperscript{13} Exact statistics not available.
\textsuperscript{14} There are no publicly available statistics regarding the exact number of rejected asylum seekers in detention.
\textsuperscript{15} Exact statistics are not publicly available.
\textsuperscript{16} Among these are a group of nine Sudanese nationals, mostly from the Nuba region of Sudan, who refuse to return to their country as they claim that they would face serious violations of their fundamental human rights if they were to do so. These men arrived in Malta with a group of 57 asylum seekers in November 2001. Their initial applications for refugee status and subsequent appeals were rejected. They have been detained since their arrival in Malta. Another group of 47 Eritrean asylum seekers is presently awaiting the outcome of a court case where the applicants are asking the court to prevent their forced return to Eritrea. They are claiming, among other things, that they would suffer serious violations of their fundamental human rights as protected by the
As such they should be considered asylum seekers, even though their applications for refugee status have been rejected.

It should be borne in mind that so-called ‘rejected asylum seekers’ could still be in need of protection. The Refugees Act, 2000 provides for two forms of protection: refugee status and humanitarian protection. Refugee status is granted to those asylum seekers who fulfil the criteria of the definition of the term ‘refugee’ contained in Section 2 of the Refugees Act. Humanitarian protection is not defined by the Act, but in practice it is granted almost exclusively to people fleeing countries torn apart by civil war. It is not extended to people who would face torture, or cruel, inhuman and degrading treatment or punishment, or other serious violations of their fundamental human rights if they were to be returned to their country of origin. Nor is it used to prevent the deportation of people who cannot or should not be returned for compelling humanitarian reasons.

As a result ‘rejected asylum seekers’ could in fact be entitled to some form of protection in terms of other human rights instruments to which Malta is a party, such as the 1984 UN Convention for the Prevention of Torture and Other Forms of Cruel Inhuman and Degrading Treatment or the European Convention for the Protection of Human Rights and Fundamental Freedoms.

### 2.5 Refugees and persons granted some form of protection in Malta

Until very recently there was another, unacceptably large, category of detainees: persons granted some form of protection in Malta. Until the setting up of two open centres in recent weeks, there were approximately 265 such people in detention.

Due to a severe shortage of accommodation in the community, people granted refugee status or humanitarian protection were kept in detention until someone found them a place to live outside the detention centre. In the vast majority of cases the asylum seekers were not informed of the decision of the Refugee Commissioner until the moment of their release from detention, and were thus left agonising unnecessarily over their fate for months.

This situation is largely due to the fact that, until the establishment of the government open centres, all accommodation for refugees and other persons granted protection in Malta was provided by the Emigrants’ Commission, a local, church NGO. Once its resources were exhausted, a bottleneck was created in the system and people were...
detained unnecessarily, as the authorities failed to make timely provision for all those granted some form of protection to be accommodated in the community.

Refugees and people granted humanitarian protection will be now be allowed to live in the open centres until they find independent accommodation in the community, and may come and go more or less as they please, at least during the daytime. This is assuming that they are able to overcome the obstacles posed by the remote location of these centres, which are inadequately serviced by public or other forms of transport.

Residents are provided with food while they live there. No services or resources are however provided to facilitate the process of integration in the community. Financial assistance\textsuperscript{20} to these persons is extremely limited, and they are not provided with social work support to enable them to access essential services or to make the transition to independent living in a new environment.

3. Conditions of detention

It is not within the scope of this paper to examine in detail or to document the physical conditions of detention, however it is pertinent to note that, by and large, immigration detainees in Malta are held in conditions which we believe fall far below internationally recognised minimum standards of detention\textsuperscript{21}.

It should be stated that none of the facilities today used as immigration detention centres were ever intended for the long-term detention of people\textsuperscript{22}. Moreover, as a rule they are over-crowded, and living conditions in most centres are basic at best\textsuperscript{23}.

Sanitary facilities are often extremely limited\textsuperscript{24}, and soap, detergents and toiletries are frequently in short supply. Opportunities for recreation and constructive activity are practically non-existent. In some cases detainees spend most of their time indoors with only one hour a day in the open air. They often complain that their life is a succession of days spent sleeping, eating or staring – and, inevitably, worrying about their future.

While such arrangements could perhaps be acceptable as an initial response to an emergency situation, they are totally unacceptable fifteen months on. What is even more unacceptable is the fact that, during this time, the authorities concerned, i.e. the central government rather than the authorities administering the various centres, have made little or no effort to provide more suitable accommodation for these people.

In addition to the harsh physical conditions, asylum seekers have to live in an extremely restrictive environment. They are not allowed outside the detention centre, and when

\textsuperscript{20} Only recognised refugees are entitled to financial assistance from the government. Persons enjoying other forms of protection are essentially bereft of any regular financial assistance.

\textsuperscript{21} Reference is made to the UN Standard Minimum Rules for the Treatment of Prisoners and the basic standards used by the European Committee for the Prevention of Torture to assess the adequacy or otherwise of detention facilities.

\textsuperscript{22} The only centre purposely set up to detain irregular migrants is the Hal Far Immigration Reception Centre, which has now been converted into an open centre.

\textsuperscript{23} In one centre the authorities had to resort to housing people in tents and a Nissen hut, and in another one hundred and fifty people are housed in three large halls filled with beds.

\textsuperscript{24} In one facility housing one hundred and fifty persons, there are only three showers, two water pipes and six toilets for all the detainees.
they are taken out for some reason, such as to go to hospital for medical treatment, asylum seekers are often handcuffed and at times accompanied by security personnel armed with batons. While, from the perspective of the detaining authorities, these measures may be justifiable for security reasons in order to prevent escape, such treatment is understandably extremely humiliating for the asylum seekers concerned. Moreover in some centres the detainees are kept inside for most of the time, and are only allowed very limited access to the open air.

Being forced to live in close proximity with so many people who are virtual strangers inevitably puts enormous strain on the detainees, as does the total lack of privacy existing in most centres. To this one must also add the countless other, perhaps unintentional, humiliations imposed by the daily reality of life in detention, such as communication difficulties with staff, frequent head-counts, and being constantly expected to obey orders.

Furthermore, within the centres, there is an almost total lack of provision of essential services. NGOs do their best to fill the vacuum by providing basic medical services and legal assistance but, as they are almost totally dependent on volunteers, the services provided are limited at best.

The detainees are not provided with social work support. This implies that they are often left waiting for months before they can effectively exercise their rights, as there is no one to assess their needs and help them to obtain the service or assistance they need. The security officials responsible for the day to day care of the detainees try to make the necessary arrangements, but often they have neither the time nor the training necessary to carry out the necessary assessment and referral. This problem is compounded by the absence of administrative structures, necessary for such a large number of detainees to be able to obtain timely access to essential services, such as legal aid and education.

As if this were not enough, asylum seekers are often given very little information about the conduct of proceedings for the determination of their application for protection, or about the decisions being taken regarding their future by the authorities concerned. This inevitably engenders feelings of powerlessness induced by the almost total loss of all control over one’s life and future.

4. The human cost of detention

Detention, particularly when it is indefinite and prolonged, causes unimaginable suffering and hardship. We should never underestimate the huge personal cost, which is an inevitable consequence of the choice to detain. We must also face the unpalatable truth that it is a cost being exacted from those who, very often, can least afford to pay it.

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25 It should be noted that, while allowing that handcuffs and other instruments of restraint may be used to prevent escape during a transfer (article 33), the UN Minimum Standards stress that “such instruments must not be applied for a longer time than strictly necessary” (article 34).

26 The information contained in this section is based on an unpublished report presented to the Hon Dolores Cristina, Parliamentary Secretary within the Ministry for Social Policy in May 2003. This report was prepared on the personal initiative of Ms Doris Gauci M.Sc. CQSW, a psychiatric social worker, Dr Marvic Sammut M.D. M.Sc, a medical doctor, and Dr Katrine Camilleri LL.D., a lawyer, all of whom offer their professional services to asylum seekers at Lyster Barracks. It is being quoted with permission.
Today, after months in detention, many asylum seekers are manifesting physical symptoms that are clearly of psychosomatic origin. The number of asylum seekers who have had to be prescribed anti-depressant medication to help control their worsening anxiety and/or depression is on the increase. Many have been referred to a psychiatrist and some have had to be admitted to Mount Carmel Hospital. There has also been an increase in the number of detainees, including minor children, who have expressed the desire to put an end to their suffering by committing suicide.

In addition to the risk of suicide, there are also other instances of self-inflicted harm, such as hunger strikes among the asylum seekers. These are clearly the result of the extreme frustration born of long months of waiting and uncertainty, with no end to their incarceration in sight.

These dire predictions about the possible consequences of detention are borne out by credible research carried out among detained asylum seekers in Australia. An 18-month investigation by the Royal Australian and New Zealand College of Physicians revealed that suicide rates in Australia’s detention centres are 10 times higher than those among the general population. They stated unequivocally that the centres have become a hothouse for mental health problems.

A report by the UN Working Group on Arbitrary Detention suggested that the detainees in Australia’s camps are suffering “collective depression syndrome”, a phenomenon we are well on the way to witnessing locally.

It should be recalled that, among the asylum seekers presently detained in Malta, there are a number of people who are particularly vulnerable. These include victims of torture; children; pregnant women; nursing mothers; people suffering from serious medical conditions such as diabetes, who are not receiving an appropriate diet; people suffering from severe mental health problems, such as post-partum depression; and, until recently, unaccompanied minors.

5. Rationale of present government policy

The Minister for Home Affairs, Dr Tonio Borg, has repeatedly stressed that detention of asylum seekers who enter or are otherwise present in Malta in an irregular manner is mandatory in terms of the Immigration Act.

It is clear however that the choice of detention as the sole method of dealing with irregular migrants is not attributable exclusively to the strict provisions of the said Act. The following are some arguments put forward to justify the present government stand on the treatment of irregular migrants.

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27 Fourteen unaccompanied minor asylum seekers between the ages of fifteen and seventeen were released on May 12, 2003. Since that date another four minors were released. All of them had spent between six and fifteen months in detention.

28 See for example “Asylum seekers call off hunger strike”, Times of Malta, Saturday, May 10, 2003, where Dr Borg is quoted as stating that: “…the Immigration Act made it illegal for asylum seekers to be set free”.

29 In fairness it should be stated that the Permanent Secretary at the Ministry for Justice and Home Affairs allowed that alternative provision for vulnerable groups, such as nursing mothers, women and children, is not “anathema”, but to date no such provision has been made.
5.1 Protection or self-preservation

One reason put forward to justify the prolonged and indefinite detention of asylum seekers is the need for protection or self-preservation. The Minister has stated publicly that Malta, due to its small size and limited resources of which there are barely enough to go round, is unable to cope with large numbers of irregular migrants. It is therefore important to detain, in order to be able to deport those who have no claim to protection. Beyond the threat to our resources, these immigrants are also perceived as a security risk.

5.2 Deterrence

Detention is also viewed as having a deterrent effect. The authorities clearly believe that news of the treatment irregular migrants receive here has served to make Malta a less attractive destination for the hordes of would-be asylum seekers attempting to enter Europe and, by extension, Malta.30

Little or no weight is given to the fact that most, if not all, of these migrants never intended to enter Malta in the first place, and that many of them left Libya for Italy many months after the Maltese authorities started detaining large numbers of irregular migrants. It is clear that when they set out these people knew that they could end up in Malta, and that if they did they would be detained, yet they chose to travel anyway.

5.3 Discouragement of fraudulent asylum claims

Perhaps more disturbing is the fact that detention is viewed as a way of deterring false or fraudulent asylum claims. Much has been made of the fact that approximately 150 asylum seekers, who initially alleged that they were Liberian, admitted that they were really from Nigeria and Ghana after some weeks in detention. It has therefore been deemed absolutely necessary to detain all asylum seekers in order to ensure that fraudulent asylum claims are discouraged.

In this context it is useful to note however that of 471 cases involving 665 asylum seekers concluded by the Office of the Refugee Commissioner, in 227 cases involving 367 asylum seekers the Commissioner recommended some form of protection in terms of the Refugees Act.32 Moreover, a considerable number of the 287 asylum seekers (234 cases), whose applications were rejected by the Office of the Refugee Commissioner, are claiming that they still need protection from forced return to their country, and may in fact be entitled to such protection.33

31 Exact statistics are not publicly available.
32 In 41 cases involving 53 asylum seekers the Commissioner recommended that the applicant be recognized as a refugee, and in 186 cases involving 314 asylum seekers the Commissioner recommended humanitarian protection.
33 See paragraph (iv) of the section entitled ‘Legal status of immigration detainees’ above.
Thus the innocent are punished, as all are presumed guilty unless the opposite is proven beyond a shadow of doubt, and those who have already experienced trauma, loss, persecution and torture are subjected to further suffering and humiliation.

6. Legal basis for immigration detention

As was previously stated, the legal provisions most frequently quoted to justify the detention of asylum seekers are those contained in the Immigration Act. It is therefore pertinent to examine briefly the relevant provisions of the said Act at this stage, as well as the provisions of the Refugees Act, 2000, which lay down the treatment to be accorded to asylum seekers.

6.1 Detention of asylum seekers under the Immigration Act

In terms of Section 5(1) of the Immigration Act,

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

The Immigration Act authorises the detention of people refused leave to land in Malta\(^\text{34}\) as well as of those against whom a removal or deportation order has been issued\(^\text{35}\) by the competent authority\(^\text{36}\), until such time as they can be removed from Malta.

The said Act makes no special provision for differential treatment to be accorded to asylum-seekers who are refused admission, or who enter or are otherwise present in Malta in an irregular manner. It would therefore seem that their position in terms of the said Act is identical to that of any other immigrant in the same situation.

6.2 Detention of asylum seekers under the Refugees Act, 2000

From the provisions of the Refugees Act, 2000, it would appear that asylum-seekers are not protected from the consequences of illegal entry or stay in Malta. On the contrary, the Act seems to indicate that an asylum-seeker may in fact be detained in certain circumstances. Section 10(2)(b) of the Refugees Act mentions, in passing, that an asylum-seeker "shall, unless he is in custody, reside and remain in the places which may be indicated by the Minister".

The particular circumstances, which would justify such detention, are not clearly stated. The references to persons “in custody in virtue only of a deportation or removal order”

34 Section 10
35 Section 14(2) and section 22(5)
36 In terms of section 22 and 14 of the Immigration Act a deportation order is issued by the Minister responsible for immigration, while a removal order is issued by the Principal Immigration Officer. Prior to the amendments to the Immigration Act introduced by Act X111of 2002, a removal order was issued by the Court of Magistrates, rather than the Principal Immigration Officer, in terms of Section 14 of the said Act.
found in Sections 7(3) and 11(1) of the Act, however attest to the fact that an asylum-seeker may be detained for breaching the provisions of the Immigration Act.

In fact it has long been the practice, even prior to the enactment of the Refugees Act, to detain asylum seekers who apply for refugee status in Malta after they have been refused admission into Maltese territory or are caught entering or staying in Malta in an irregular manner. As a rule, it is not really the legality of entry or stay which determines whether or not an asylum seeker will be detained, but the timing of that person’s application for protection. There have been a number of cases of asylum seekers who entered or were otherwise present in Malta in an irregular manner, who applied for refugee status before they were apprehended by the immigration authorities, and were not detained.

It is important to note, however, that in terms of the Refugees Act, asylum seekers must be allowed to enter and remain in Malta until their application for protection is finally determined. Section 10 (1) in fact states that:

Notwithstanding the provisions of any other law to the contrary, an asylum seeker shall not be removed from Malta before his application is finally determined in accordance with this Act and such applicant shall be allowed to enter and remain in Malta pending a final determination of his application...

The immigration authorities are therefore effectively unable to deport or otherwise remove asylum seekers whose application has not yet been finally determined\(^{37}\). The authorities however insist that they cannot choose to release asylum seekers from detention, as they are obliged to detain them in terms of the Immigration Act.

We believe that not only does the government have the authority to provide alternatives to detention for asylum seekers, particularly in view of the length of time it takes to have their claims assessed, but also that it has a duty to do so in the light of the various international legal instruments to which Malta is a party.

7. Possibility of challenging legality or otherwise of detention under domestic law

Neither the Immigration Act nor the Refugees Act provides detainees with the possibility of challenging their detention before a court of law.

However, section 409A of the Criminal Code\(^{38}\), states that:

(1) Any person who alleges he is being unlawfully detained under the authority of the Police or of any other public authority not in connection with any offence with which he is charged or accused before a court may at any time apply to the Court of Magistrates, which shall have the same powers which that court has as a court of criminal inquiry, demanding his release from custody.

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\(^{37}\) This is however not true of ‘rejected asylum seekers’ who no longer enjoy the right of protection from forced removal in terms of the Refugees Act.

\(^{38}\) Chapter 9 of the Laws of Malta.
The law goes on to provide that any such application shall be appointed for hearing with urgency, and the date for hearing will be served on all parties concerned on the same day as the application is filed. The Commissioner of Police or other public authority may file a reply by not later than the day of the hearing.

The court is directed by law to hear the parties and to examine any evidence produced in support of their submissions. The said court must then determine whether the continued detention of the applicant is founded upon “any provision of this code or of any other law which authorizes the arrest and detention of the applicant”\(^\text{39}\). If it is not, then the court is directed to accept the application.

The Attorney General may apply for the re-arrest of such person in terms of paragraph 4 of the same article if he is of the opinion that the continued arrest of such person was founded on any provision of this code or of any other law.

This section was used in recent days\(^\text{40}\) by Napoleon Mebrahtu, an Ethiopian national, currently detained in Malta while waiting for the outcome of his application for refugee status. In this case the Magistrates’ Court rejected the applicant’s request to declare his detention illegal.

In its judgement the court stated that it had to determine whether the arrest was illegal in terms of the above-mentioned section of the Criminal Code. The court also held that detention could be illegal if the law on which it is based is not sufficiently clear, or if such law is contrary to the European Convention or the Constitution of Malta. In the view of the court this was not the case, as the detention of the applicant was clearly in line with the Immigration Act, and Section 10(2)\(^\text{41}\) of the Immigration Act had already been scrutinised by the European Court of Human Rights (ECHR) in Aslan v. Malta\(^\text{42}\), and been found to be above reproach.

At this juncture it is useful to note that the case cited by the court, Aslan v. Malta, concerned the 10-hour detention of a Turkish national, refused admission into Malta, at the border point of entry. The case of Napoleon Mebrahtu concerns the 10-month detention of an asylum-seeker, who should, in terms of the Refugees Act “be allowed to enter and remain in Malta pending the final determination of his application”.

Moreover, in determining Napoleon Mebrahtu’s application, the Magistrate’s Court expressed serious doubts as to whether this remedy could be applied in such a case, where the person making the application could leave the island whenever he wanted to and thus obtain release from detention. The court held that this remedy could only be used when the applicant requested to leave the island and was not allowed to do so, but was kept in detention without any reason according to law\(^\text{43}\).

This line of reasoning was refuted by the ECHR in Amur v. France. On that occasion the Court held that the fact that an asylum seeker could choose to leave the territory freely

\(^{39}\) Section 409A(3).

\(^{40}\) Napoleon Mebrahtu filed an application before the Magistrates Court on the basis of this section on June 25, and it was appointed for hearing the following day.

\(^{41}\) This section authorizes the detention of persons refused entry into Malta.

\(^{42}\) For references see list of citations attached.

\(^{43}\) As reported in ‘Court rules that detention is authorized by law’, Times of Malta, Tuesday, July 1, 2003, and ‘Tkompili s-saga ta’ dawk li qeghdin ifittxu l-istatus ta’ refugjat’, Orizzont, Wednesday, July 2, 2003.
“cannot exclude a restriction on liberty”\textsuperscript{44}. In this case, the court found that the asylum seekers in question were in fact detained, although they could choose to leave French territory freely whenever they wanted to, and their detention therefore had to conform to the provisions of article 5.

8. Legal principles applicable to the detention of asylum seekers

It is an established principle of international law that states have an undeniable sovereign right to control aliens’ entry into and residence in their territory, and to make provision for detention as a means of controlling illegal immigration and effecting removal of ‘prohibited immigrants’ from state territory. It is, however, equally clear that states must exercise this sovereign right in accordance with their international legal obligations\textsuperscript{45}.

There are a number of international instruments to which Malta is a party, which limit the absolute discretion of the government to detain asylum seekers indefinitely. The following is a brief description of the most relevant international standards.

These include the European Convention on the Protection of Human Rights and Fundamental Freedoms, which forms part of our domestic law and can therefore be applied by our courts, and the 1951 Convention on the Status of Refugees. Another relevant instrument is the International Covenant on Civil and Political Rights, to which Malta is also a party. Also included hereunder are international instruments which, though not legally binding, lay down clear standards for the treatment of detainees.

8.1 The 1951 Convention on the Status of Refugees and the UNHCR

In terms of the 1951 Convention, states are bound not to restrict the internal freedom of movement of refugees within their territory more than is strictly necessary. Article 26 of the Convention clearly states that:

\begin{quote}
Each Contracting State shall accord to refugees lawfully in its territory the right to choose their place of residence and to move freely within its territory, subject to any regulations applicable to aliens generally in the same circumstances.
\end{quote}

With regard to refugees ‘unlawfully’ present in state territory, which also includes those asylum-seekers whose status has not yet been regularised\textsuperscript{46}, as recognition of refugee status does not make an individual a refugee but simply declares him to be one\textsuperscript{47}, Article 31(2) provides that:

\begin{quote}
Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularised or until they obtain admission into another country.
\end{quote}

\textsuperscript{44} Amuur v. France at para. 48, see also section 8.2.1(i) below.
\textsuperscript{45} Amuur v. France, paras. 41 & 43
\textsuperscript{47} UNHCR Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum Seekers, paragraph 3.
In terms of article 31(1) the term ‘unlawfully’ refers to a person present in state territory without the necessary authorisation. Although article 31(2) does not specify which restrictions would qualify as necessary, when read in conjunction with article 31(1) it emerges clearly that illegal entry into state territory cannot in itself justify the detention of an asylum-seeker\textsuperscript{48}. In fact article 31(1) states that:

\hspace{1cm} \textbf{Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from territory where their life or freedom was threatened in terms of Article 1, enter or are present in their territory without authorisation, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.}

The 1999 UNHCR Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum Seekers clearly state that the expression “coming directly from a territory where their life or freedom was threatened in terms of Article 1” does not refer only to asylum seekers coming directly from their country of origin. Also included are asylum seekers coming from ‘transit’ countries where their safety or freedom could not be assured. No strict time limit applies across the board, each case must be judged on its own merits. Similarly, there is no strict time limit that can be applied to the expression ‘without delay’\textsuperscript{49}.

The Executive Committee of the UNHCR, whose conclusions are adopted by consensus, in Conclusion No. 44 (XXXVII) - 1986, which deals with detention of refugees and asylum-seekers in some depth, states unequivocally that, in view of the hardship it involves, detention should normally avoided. The 1999 UNHCR Guidelines define detention as:

\hspace{1cm} \textbf{“Confinement within a narrowly bounded or restricted location, including prisons, closed camps, detention facilities or airport transit zones, where freedom of movement is substantially curtailed, and where the only opportunity to leave this limited area is to leave the territory.”}\textsuperscript{50}

The said conclusion recommends that detention only be resorted to in order to verify identity; to determine the elements on which the claim to refugee status is based\textsuperscript{51}; to protect national security and public order. Moreover, it stresses that the fact that an asylum-seeker is in possession of false or insufficient documentation should not in itself lead to automatic detention, unless there is a clear intention to mislead the authorities.

The 1999 UNHCR Guidelines are based on the general principle that asylum seekers should not be detained, and that the detention of asylum seekers is inherently undesirable. Moreover, they call to mind the fact, clearly acknowledged by Article 31 of the Convention, that often the only way for asylum seekers to exercise their right to seek asylum from persecution\textsuperscript{52} is by arriving at, or actually entering, a territory illegally.

\textsuperscript{48} Ibid, at para. 19
\textsuperscript{49} UNHCR 1999 Guidelines, Introduction, paragraph 4.
\textsuperscript{50} Ibid., Guideline 1.
\textsuperscript{51} The 1999 UNHCR Guidelines in Guideline 3 (ii) state specifically that this exception cannot be used to justify prolonged or indefinite detention until the merits of the asylum claim are examined and determined, it simply concedes that it may be necessary to detain an asylum seeker for the purpose of conducting a preliminary interview to determine the basis of the asylum claim.
\textsuperscript{52} Article 14 of the Universal Declaration of Human Rights
It is clear from these instruments that detention of asylum seekers should be strictly limited, and the onus is on the detaining authorities to determine why other measures short of detention are insufficient. Moreover, even if an asylum seeker is detained legitimately, such detention should not continue for longer than strictly necessary. In most cases it should not require more than a few days to determine a person’s identity or to determine the elements on which his claim to protection is based.

The UNHCR Guidelines state unequivocally that in order for the detention to be considered lawful or legitimate, it must comply not only with applicable national law, but also with Article 31 of the 1951 Convention and with international law. It must be exercised in a non-discriminatory manner and must be subject to judicial or administrative review to ensure that it continues to be necessary in the circumstances, with the possibility of release where no grounds for its continuance exist.

The said Guidelines stress, in addition, that there should be a presumption against detention, and detention of asylum seekers should only be resorted to as an exceptional measure. Furthermore it should be subject to strict limitations clearly prescribed by national law, which must conform to the norms and principles of international human rights law. Where other alternatives, such as monitoring mechanisms, may be employed, these should be applied first unless there is evidence to suggest that these will not be effective in the individual case. In assessing whether detention is necessary, account should be taken of whether it is reasonable and whether it is proportional to the objectives to be achieved. If judged necessary it should be imposed only for a minimal period.

It is interesting to note that UNHCR explicitly warns against the temptation to use detention as a means of deterring future asylum seekers, or to dissuade those who have commenced their claims from pursuing them. Such policies would clearly be contrary to the norms of refugee law.

8.2 The European Convention for the Protection of Human Rights and Fundamental Freedoms

The provisions of this Convention are particularly relevant, as not only is Malta a party to the Convention, but by virtue of the European Convention Act of August 19, 1987 the Convention became part if Maltese law and may therefore be invoked before the local courts.

Article 5 of the ECHR states that:

\[(1)\] Everyone has the right to liberty and security of person.

No one shall be deprived of this right save in the following cases and in accordance with a procedure prescribed by law:

\[
\begin{align*}
\text{.............}
\end{align*}
\]

\[(f)\] the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.
Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

8.2.1 Article 5(1)

The following principles clearly emerge from an examination of the jurisprudence of the European Court of Human Rights (ECHR) regarding this article:

(i) Deals with deprivation of liberty, not mere restriction

The first step is therefore necessarily to determine whether or not the measures complained of are actually a deprivation of liberty in terms of article 5.

In Amuur v France the ECHR sought to determine whether the detention of the applicants in the transit zone of Paris-Orly Airport was in fact a deprivation of liberty in terms of this article. On this occasion the court held that:

“In order to determine whether someone has been ‘deprived of his liberty’ within the meaning of article 5, the starting point must be his concrete situation, and account must be taken of a whole range of criteria such as the type, duration, effects and manner of implementation of the measure in question. The difference between a deprivation of and a restriction upon liberty is merely one of degree or intensity, and not one of nature or substance (see Guzzardi v Italy judgement of 6 November 1980, Series A no. 39, p. 33, para. 92).”

... The mere fact that it is possible for asylum seekers to leave voluntarily the country where they wish to take refuge cannot exclude a restriction on liberty...”

In other words, just because an asylum seeker can leave the territory freely at any moment, thus obtaining release from detention, it does not mean that, as a result, the restrictions imposed are not detention. They could well be, and as such they must conform to the standards laid down in this article.

(ii) Right to liberty always, ‘save in the following cases’

The Convention clearly states that the only circumstances in which a deprivation of liberty is in accordance with the provisions of this article are those listed therein. In Giulia Manzoni v Italy, the ECHR reiterated that:

“... the list of exceptions to the right to liberty secured in Article 5(1) is an exhaustive one and only a narrow interpretation of those exceptions is consistent with the aim of that provision.”

(iii) Detention must be ‘in accordance with a procedure prescribed by law’

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53 For the references of the cases quoted in this section, see list of citations attached.
54 Amuur v France, at para 42 & 48
55 Giulia Manzoni v Italy, at para 25.
In *Amuur v. France*, the ECHR held that

“In laying down that any deprivation of liberty must be effected ‘in accordance with a procedure prescribed by law’, Article 5 (1) primarily requires any arrest or detention to have a legal basis in domestic law. However, these words...also relate to the quality of the law, requiring it to be compatible with the rule of law, a concept inherent in all the articles of the Convention. ... Quality in this sense implies that where a national law authorises deprivation of liberty – especially in respect of a foreign asylum seeker – it must be sufficiently accessible and precise, in order to avoid all risk of arbitrariness.” 56

In this case the court reviewed the legal instruments dealing with the practice of detaining aliens in the transit zone of the Paris-Orly Airport. The court took into account the fact that “none of these texts allowed the ordinary courts to review the conditions under which aliens were held or, if necessary, to impose a limit in the administrative authorities as regards the length of time for which they were held.” Moreover, they made no clear provision for access to legal, social, and humanitarian assistance. As a result they were deemed to be insufficient to guarantee the applicants’ right to liberty from arbitrary detention.

(iv) Detention must be ‘lawful’

The requirement of ‘lawfulness’ laid down by article 5(1)(f) of the Convention:

“refers essentially to national law and lays down the obligation to conform to the substantive and procedural rules of national law, but it requires in addition that any deprivation of liberty should be in keeping with the purpose of Article 5, namely to protect the individual from arbitrariness.” 57

One factor that is taken as an indicator of possible arbitrariness is the length of time for which an asylum seeker has been detained. In *Chahal v. UK*, the ECHR examined the four year detention of an asylum seeker on the grounds that he represented a threat to national security, and held that, while

“there is no doubt that Mr Chahal’s detention was lawful under national law and was effected ‘in accordance with a procedure prescribed by law’... in view of the extremely long period during which Mr Chahal had been detained, it is necessary to consider whether there existed sufficient guarantees against arbitrariness.” 58

It is clear that there is no one time limit applicable to all cases, beyond which detention is always arbitrary. The circumstances of each individual case must be examined in order to determine whether there were in fact sufficient guarantees against arbitrary detention.

Applying the provisions of article 5(1)(f) to the seven day detention of a number of asylum seekers at Oakington Reception Centre, the House of Lords, in *Secretary of State for the Home Department Ex Parte Saadi (Fc) and Others (Fc)*, stated that the period of

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56 Amuur v France, at para 50
57 Amuur v. France, para. 50; Kemmache v. France, etc.
58 Chahal v. UK, at para 119
detention imposed in order to enable the competent authority to determine the asylum seekers’ claim to refugee status must “be reasonable in all circumstances”.

While allowing that the need for speedy decision making could justify detention for a short period in acceptable physical conditions as being reasonably necessary, the said court held that:

“This does not mean that the Secretary of State can detain without any limits so long as no examination has taken place or decision been arrived at. The Secretary of State must not act in an arbitrary manner... Statutory powers of this kind must be exercised reasonably by government, at any rate in the absence of specific provision laying down particular timescales for administrative acts to be performed. An analogous application of this principle is to be found in judgements dealing with the detention of those who are or may be subject to deportation. Thus in R v Government of Durham Prison, Ex p Hardial Singh [1984] 1 WLR 704 at 706 Woolf J said in relation to the power of deportation:

‘As the power is given in order to enable the machinery of deportation to be carried out, I regard the power of detention as being impliedly limited to a period which is reasonably necessary for that purpose. The period which is reasonable will depend on the circumstances of the particular case.’ ”

In Amuur the ECHR remarked that, in order to ensure protection from arbitrary detention,

“Although by the force of circumstances the decision to order holding must necessarily be taken by the administrative or police authorities, its prolongation requires speedy review by the Courts, the traditional guardians of personal liberties.”\(^{59}\)

(v) **Detainee must be one in respect of whom action is being taken with a view to deportation or extradition**

In Chahal the ECHR held that article 5(1)(f):

“...does not demand that the detention of a person against whom action is being taken with a view to deportation be reasonable considered necessary, for example to prevent his committing an offence or fleeing... Indeed, all that is required under this provision is that ‘action is being taken with a view to deportation’... any deprivation of liberty under article 5(1)(f) will be justified only for as long as deportation proceedings are in progress.”\(^{60}\) (para 112/113).

### 8.2.2 Article 5(4)

In interpreting the provisions of this paragraph the ECHR has held that the following principles flow from this section, which requires that:

\(^{59}\) Amuur v. France at para 43

\(^{60}\) Chahal v. UK, at para 112 & 113
Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

(i) Remedy for review must be sufficiently certain

According to the case law of the ECHR, in order to satisfy the requirements of article 5(4) the remedy available for the review of the lawfulness of detention must be “sufficiently certain, otherwise the requirements of accessibility and effectiveness are not fulfilled”\(^\text{61}\).

(ii) Reviewing court must have power to decide whether detention is lawful and to order release if it is not

It is clear that this article does not guarantee a right to judicial review “of such breadth as to empower the court, on all aspects of the case including questions of pure expediency, to substitute its own discretion for that of the decision-making authority.”\(^\text{62}\) The reviewing court is not expected to have the power to examine whether the underlying decision to expel is justified under national or Convention law, but simply to decide whether the detention is lawful in terms of Article 5 and to order the applicant’s release if the detention is found to be unlawful.

This requirement could be satisfied by the intervention of a single court, including the one that deprived the applicant of its liberty. In fact in Wassink v. Netherlands the court held that:

“…the European Court has consistently held that the intervention of a single body of this kind will satisfy Article 5(4) only on condition that ‘the procedure followed has a judicial character and gives to the individual concerned guarantees appropriate to the kind of deprivation of liberty in question’.”\(^\text{63}\)

Whether or not the proceedings available to the applicant in a particular case will be deemed to satisfy this requirement will depend on an individual assessment of the circumstances of each case.

(iii) A decision must be reached ‘speedily’

There is no one standard benchmark for determining what would qualify as a speedy decision and what would not. From existing case law it would seem however, that by speedy the court understands a couple of days. For example, in Rehbuck v Slovenia, the court decided that a period of 23 days, which was as long as the national court took to decide the applicant’s claim for immediate release was excessive. In Kadem v. Malta, a period of 17 days too was held to be excessive.

\(^{61}\) Sabeur Ben Ali v Malta, para 38
\(^{62}\) Chahal v UK, para 27.
8.3 The International Covenant on Civil and Political Rights

Article 9 of this Covenant, to which Malta is a party, states that:

(1) Everyone has the right to liberty and security of person. No one shall be subject to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law.

(2) Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

(3) Anyone who has been a victim of unlawful arrest or detention shall have an enforceable right to compensation.

The Human Rights Committee, the organ charged with monitoring the implementation of the ICCPR and investigating complaints regarding breaches of its provisions by state parties, in its General Comment on Article 9 made it clear that this article applies to immigration control. In A v. Australia64, the Committee recalled that:

“the notion of ‘arbitrariness’ must not be equated with ‘against the law’ but be interpreted more broadly to include such elements as inappropriateness and injustice. Furthermore, remand in custody could be considered arbitrary if it is not necessary in all the circumstances of the case, for example to prevent flight or interference with evidence: the element of proportionality becomes relevant in this context.”65

The Committee rejected the applicant’s claim that it is ‘per se’ arbitrary to detain individuals requesting asylum, and found no support for the contention that there is a rule of customary international law which renders all such detention arbitrary66. The Committee stressed however that:

“every decision to keep a person in detention should be open to review periodically so that the grounds justifying detention can be assessed. In any event, detention should not continue beyond the period for which the state can provide appropriate justification. For example, the fact of illegal entry may indicate a need for investigation and there may be other factors particular to the individual, such as the likelihood of absconding and lack of cooperation, which may justify detention for a period. Without such factors detention may be considered arbitrary even if entry was illegal.”67

Regarding the requirements of Article 9(4), the Committee held that:

“… Court review of the lawfulness of detention under article 9, paragraph 4, which must include the possibility of ordering release, is not limited to mere compliance of the detention with domestic law. While domestic legal systems

64 For reference see list of citations annexed to this publication.
65 Ibid. at para 9.2
66 Ibid. para 9.3
67 Ibid. para 9.4
may institute differing methods for ensuring court review of administrative detention, what is decisive for the purposes of article 9, paragraph 4, is that such review is, in its effects, real and not merely formal. By stipulating that the court must have the power to order release ‘if the detention is not lawful’, article 9, paragraph 4, requires that the court be empowered to order release, if the detention is incompatible with article 9, paragraph 1, or other provisions of the Covenant.”

8.4 The UN Body of Principles for the Protection of All Persons under any form of Detention or Imprisonment

The Body of Principles was adopted by consensus by the UN General Assembly on December 9, 1988. They apply to all who are subject to any form of detention or imprisonment, and apply to all countries at all times. These principles are not merely advisory, rather they call upon member states to take definite steps to implement and enforce their provisions.

Principle 4 states that:

Any form of detention or imprisonment and all measures affecting the human rights of a person under any form of detention or imprisonment shall be ordered by, or subject to the effective control of, a judicial or other authority.

Principle 11 states moreover that:

1. A person shall not be kept in detention without being given effective opportunity to be heard promptly by a judicial or other authority.

and that:

2. A judicial or other authority shall be empowered to review as appropriate the continuance of detention.

8.5 The UN Working Group on Arbitrary Detention

The UN Working Group on Arbitrary Detention, a body set up by the UN Commission on Human Rights, has declared:

“Article 14 of the Universal Declaration of Human Rights guarantees the right to seek and to enjoy in other countries asylum from persecution. If the detention in the asylum country results from exercising this right, such detention might be arbitrary.”

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68 Ibid. para 9.5
9. Present government policy in the light of international laws and standards

An evaluation of the conditions in which asylum seekers and other immigration detainees are held in the various centres\(^6^9\) can only lead to the conclusion that the measures adopted amount to a deprivation of liberty in terms of Article 5 of the European Convention. Moreover such measures clearly fall within the purview of the UNHCR definition of the term 'detention', as contained in the 1999 UNHCR Guidelines.

As such it is clear that, in order to lawful, such detention must not only be in conformity with the Immigration Act, but also with the provisions of the European Convention and other international legal instruments to which Malta is a party.

To date Malta’s policy of detention of asylum seekers for breaches of the Immigration Act has not been challenged by means of a Constitutional application before the First Hall of the Civil Court, which is vested with jurisdiction to hear and decide applications based on the Constitution of Malta and the European Convention\(^7^0\). However, in a recent decision\(^7^1\) the Court of Magistrates held that the on-going 10-month detention of Napoleon Mebrahtu, an Ethiopian asylum seeker, is lawful.

It should be stated at this juncture, that just because detention was declared lawful in one case, it does not necessarily mean that, by extension, the detention of each and every asylum seeker currently detained is, similarly, lawful. The effects of application of the provisions of the Immigration Act in the individual circumstances of each case must be examined in the light of the provisions of the said Act, the Constitution of Malta, the European Convention\(^7^2\), and other human rights instruments to which Malta is a party, such as the International Covenant on Civil and Political Rights\(^7^3\), in order to arrive at such a determination.

We believe that, in the light of the standards and principles laid down in the international legal instruments outlined in section 8 above, the current government policy and practice regarding the detention of asylum seekers and other persons with irregular migration status gives rise to a number of serious concerns.

The following are those that we consider most pressing:

9.1 Detention of recognised refugees and other persons granted some form of protection

JRS believes that the detention of people granted any form of protection in Malta is completely arbitrary, unlawful, and absolutely impossible to justify even simply in the light of Malta’s national legislation.

\(^6^9\) See section 3 above entitled ‘Conditions of detention’.

\(^7^0\) The only case which examined immigration detention in Malta is \textit{Aslan v. Malta}, declared inadmissible by the ECHR, which examined the 10 hour detention of a Turkish national deemed inadmissible by the local immigration authorities at the border point of entry.

\(^7^1\) See section 7 above for an outline of the decision on the application of Napoleon Mebrahtu, an Ethiopian asylum seeker.

\(^7^2\) See outline of court decision in the case of Napoleon Mebrahtu in section 7 above.

\(^7^3\) See the comments of the Human Rights Committee regarding the requirements of Article 9(4) of the ICCPR in \textit{A v. Australia}, quoted in Section 7.3 above.
With regard to **recognised refugees**, the Refugees Act states unequivocally in Article 11(1) that:

> Notwithstanding the provisions of any other law to the contrary, and notwithstanding and deportation or removal order, a person declared to be a refugee shall be entitled:-

> (a)... if in custody in virtue only of a deportation or removal order to be immediately released.

In the light of this provision it is clear that to detain recognised refugees, once they have been recognised as such by the Refugee Commissioner, is totally unlawful.

Moreover, although the Refugees Act does not make analogous provision with regard to **persons enjoying humanitarian protection**, it should be remembered that Article 2 of the Refugees Act defines humanitarian protection as

> special leave to remain in Malta until such time when the person concerned can safely return to his country of origin or otherwise resettle safely in a third country

This therefore means that the Refugees Act prohibits the deportation or forced removal of persons granted humanitarian protection to their country of origin, until it is safe for them to do so.

Article 5(1)(f) of the European Convention for the Protection of Human Rights and Fundamental Freedoms clearly states that it is only permissible to detain persons “against whom proceedings are being taken with a view to deportation or extradition”.

In our view, therefore, the continued detention of persons granted humanitarian protection, who by definition are entitled to protection from deportation or forced removal, is clearly not justifiable in the light of Article 5(1)(f) of the Convention.

**JRS** believes that this principle applies to persons granted any form of protection, including temporary protection, as they are granted protection from forced return in recognition of the fact that they cannot return home safely.

It would seem that the authorities concerned believed that they were justified in prolonging the detention of these people simply because they had not made any provision to accommodate them in the community.

However, in the light of recognised international standards, we believe that such actions are absolutely unjustifiable and can only be described as completely arbitrary. The fact that many of these people were women, children and other vulnerable people, made the situation even more disturbing.

**JRS** believes that the establishment of the open centres is a very positive step, which will go some way to ensuring that, in future, people granted protection do not suffer unnecessary and arbitrary deprivation of their liberty again.

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However, unless refugees and other people granted some form of protection are assisted to make the transition from the centres to independent living in the community, they will remain forever stuck in the open centre. This will eventually lead to a saturation of resources and a repeat of the situation which existed till very recently, where people granted protection had to remain detained as there was no accommodation available.

It is therefore indispensable that steps are taken to ensure that the open centres are but a temporary step in the process of full inclusion into Maltese society.

JRS therefore urges the government to take measures to ensure that all those granted protection are able to obtain release from detention immediately.

This can only be achieved through the establishment of the necessary structures, including the provision of professional social work services, to facilitate the integration of people granted protection into Maltese society.

JRS calls upon the authorities to draw up a national policy for the integration of refugees and other persons granted protection into Maltese society, aimed at establishing the necessary structures, providing essential services and co-ordinating the efforts of all actors in this field, including NGOs.

9.2 Detention of persons who cannot be removed from Malta pending a final determination of their application for protection

JRS believes that the present government policy regarding detention of asylum seekers pending a final determination of their application for refugee status or some other application for protection, such as a Constitutional application before the First Hall of the Civil Court, raises a number of concerns.

With regard to asylum seekers pending a final decision of their application for refugee status, section 10(1) of the Refugees Act provides that such person “shall be allowed to enter or remain in Malta pending a final decision of his application”.

The immigration authorities are therefore effectively prevented from deporting these persons. In fact, it is safe to say that no proceedings are being taken with a view to deportation or extradition; they are simply being detained pending a final determination of their application for refugee status, presumably in order to ensure that they can be removed if their application is rejected.

It would seem that asylum seekers are therefore being detained solely on account of their illegal entry or presence in Malta, in violation of Article 31(1) of the 1951 Convention.

It should be stated at this juncture that the Refugees Act does not include a provision echoing the prohibition contained in article 31 of the Convention. However, in February 2002 the Maltese government withdrew the reservations it had made to its obligations under Article 31 upon ratification of the 1951 Convention. At the time, Malta made a reservation, stating that Article 31 would apply to Malta “compatibly with its own special problems, its peculiar position and characteristics”.

Following the lifting of this reservation, Malta is obliged to respect the provisions of article 31.
Moreover, in view of the fact that:

- Detention is imposed on all without distinction, and resorted to as a matter of course in the absence of any realistic alternatives, without any investigation as to whether it is indeed necessary, reasonable and justified in the circumstances of each individual case;75

- Detention is indefinite and, largely dependent on the length of time it will take for an asylum seeker’s case to be finally determined;

- Detention is likely to be quite long, in view of the very limited resources allocated to the Office of the Refugee Commissioner and the large backlog of cases both at first instance and at appeal stage76;

- Detention is not subject to an automatic, independent, periodical review by an independent judicial authority,77 as required by various international standards78;

current government policy and practice is highly questionable in the light of Article 5(1)(f) of the Convention and the other international human rights instruments to which Malta is a party. Moreover, it is doubtful whether asylum seekers are provided with sufficient safeguards against arbitrariness.

Many of these considerations apply to ‘rejected asylum seekers’ who are awaiting the final outcome of their application, to the First Hall of the Civil Court, for protection from forced removal to their country of origin in terms of the European Convention on Human Rights.

These persons cannot be deported, as there is a warrant of prohibitory injunction in force, prohibiting their deportation or removal pending the final determination of their human rights application.

Many of them have now been detained for over a year, nineteen months in one particular case, and it could well take many more months for their applications to be finally determined, particularly if either of the parties decides to appeal an unfavourable decision.

In view of the fact that detention causes extreme hardship, particularly to families with minor children, which make up a large part of this particular category, we believe the government should seriously reconsider its decision to keep these people in detention even simply on humanitarian grounds.

75 The Immigration Act, in sections 10(2), 14(2) and 22(5), authorizes the detention of persons who have been refused entry into Malta and persons against whom a deportation or removal order has been issued. The decision to refuse entry or remove a prohibited immigrant is taken by an administrative authority, and detention is automatic, without an investigation into the circumstances of the particular case.

76 Reference is made to the article entitled “Asylum seekers on hunger strike over detention” carried in the Times of Malta on Friday May 9, 2003.

77 As explained in section 7 above, a detainee may however challenge the lawfulness of his detention by means of an application filed in terms of section 409A of the Criminal Code.

78 See for example the position taken by the Human Rights Committee in the case A v. Australia, quoted in section in section 8.3 above: “...every decision to keep a person in detention should be open to review periodically so that the grounds justifying detention can be assessed.”
Finally, with respect to the detention of ‘rejected asylum seekers’ who have not instituted proceedings to prevent their forced repatriation, JRS believes that even with this category of irregular migrants, detention should not be resorted to as a matter of course.

We believe that the indefinite and prolonged detention of such persons pending the completion of procedures necessary in order to effect their repatriation could, in certain circumstances raise human rights concerns. It is therefore important that, in view of the hardship it involves and the length of time repatriation proceedings could take, even in such cases detention is resorted to only where it is deemed absolutely necessary after a detailed examination of the circumstances of each individual case.

JRS therefore urges the authorities to commit themselves to a serious process aimed at identifying and implementing non-custodial alternatives to detention for asylum seekers who apply for refugee status after they are found to be in breach of the provisions of the Immigration Act.

Such measures could include the establishment of open centres, such as those recently established for recognised refugees and other persons granted protection in Malta. Another alternative could be the imposition of reporting requirements for asylum seekers who have independent accommodation in the community whether it is privately funded by the asylum seeker himself, or sponsored by an individual or an NGO.

JRS also recommends that clear rules regulating the detention of asylum seekers be drawn up, addressing the above-mentioned human rights concerns, in line with the recommendations contained in the 1999 UNHCR Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum Seekers.

These rules should establish beyond doubt the circumstances in which detention of asylum seekers may be resorted to and ensure respect for internationally accepted human rights standards, in order to ensure that asylum seekers actually receive the protection to which they are entitled.

As a basic minimum these rules should ensure that:

- There is a clear presumption against detention of asylum seekers;
- Detention is only exceptionally resorted to in individual cases where the authorities can demonstrate that non-custodial measures have proved ineffective;
- Detention is resorted to only for minimal periods and never for longer than absolutely necessary;

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79 Reference is made to one particular case, where a stateless person of Palestinian origin spent six years in detention, as the immigration authorities were unable to execute the removal order issued against him. He was eventually granted a presidential pardon and allowed to remain in Malta. Other cases have been recorded where detainees who wanted to return had to wait for seven or eight months in detention for the necessary travel documents to be issued by their country of origin, in order to enable them to return home.

80 For a detailed discussion on alternatives to detention reference is made to the 1999 UNHCR Guidelines and the paper on Alternatives to Detention published by ECRE in date.
• A maximum period, beyond which no individual may be detained, is clearly established by law;

• Special care is taken to ensure that, as far possible, vulnerable persons such as unaccompanied minors, unaccompanied elderly persons, torture or trauma victims, persons with a mental or physical disability, children accompanied by family members, lactating mothers and women in the final months of pregnancy are not detained;

• Asylum seekers who are detained are given effective opportunity to be heard promptly by a judicial or other authority, authorised to assess and determine whether detention is indeed necessary, reasonable and justified in the circumstances of each individual case, and to order release if it is not;

• Detention is subject to an automatic, independent, periodical review by an judicial authority, authorised to order release if the prolongation of detention is deemed unnecessary in the individual circumstances of the case, as required by various international standards.

Finally, where detention is resorted to, the authorities are obliged to ensure that it is always in conditions that respect the fundamental dignity of the individual.

JRS therefore urges the authorities to take decisive action and to implement drastic and much needed reforms in the physical conditions prevailing in the detention centres presently in use.

JRS moreover calls upon the authorities to set up the required administrative structures and to provide the services necessary to ensure that asylum seekers in detention are able to access basic services, such as medical care, education, and legal aid in an efficient and timely manner.

Moreover, JRS stresses the importance of providing detained asylum seekers with regular and reliable information about the proceedings for the determination of their applications for protection, and other decisions being taken about their future.
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