

RECEPTION OF ASYLUM SEEKERS IN MALTA

Policy Recommendations

February 3, 2005



*to help them to do more than survive –
to help them to live as free men and women.*

Br William Yoemans S.J.

These policy recommendations were published by the Jesuit Refugee Service, Malta (JRS) on the occasion of the National Conference on Irregular Immigration organized by the Maltese Ministry for Justice and Home Affairs and held in February, 2005.

This document was presented to all participants of the conference.

© JRS Malta

CONTENTS PAGE

INTRODUCTION

ASYLUM SEEKERS IN MALTA: AN OVERVIEW

1. ASYLUM SEEKERS IN THE COMMUNITY

1.1 Current policy on reception

1.2 Major concerns

1.3 Recommendations

2. ASYLUM SEEKERS IN DETENTION

2.1 Current policy on detention

2.2 Major concerns

2.2.1 Detention policy

(i) The legitimacy of long-term detention as a policy of reception

(ii) The length of detention

(iii) Review or challenge of detention

(iv) Vulnerable groups

2.2.2 Conditions of detention

2.2.3 The cost of detention

2.3 Recommendations

3. PROCEDURES FOR THE DETERMINATION OF APPLICATIONS FOR PROTECTION

3.1 Current legal framework, policy and practice

3.1 Major concerns

(i) Access to procedures

(ii) Information provided to asylum seekers

(iii) Access to legal aid

(iv) Mechanism for filing appeals

(v) Procedure followed to hear and determine appeals

(vi) Scope of humanitarian protection

3.3 Recommendations

INTRODUCTION

On January 13, 2005 some 84 immigrants detained at Safi Barracks held a peaceful demonstration. The events that followed have been at the centre of public debate over the past weeks and are now the subject of a judicial inquiry.

In all of this, little attention is being devoted to the reason why these immigrants, many of them asylum seekers, decided to stage a protest in the first place.

Their central request was simple and strikes at the very heart of the ongoing debate about Malta's policies on reception of asylum seekers: "*all we are saying, is give us freedom*" - a direct challenge to the current government policy of long-term and more or less indiscriminate detention of asylum seekers pending the determination of their applications for protection. The asylum seekers also wanted to voice their concerns about issues relating to procedures for the determination of their applications for protection, particularly at appeals stage.

JRS believes that most, if not all, of these concerns are more than justified and that they should be at the centre of the debate regarding Malta's immigration policy at the upcoming national conference on immigration on February 7th and 8th.

This is primarily because the consequences of government policy on the lives of immigrants and asylum seekers must be paramount in any debate on the development of a national immigration policy. In addition we believe that asylum seekers can give a unique and extremely valuable contribution to this debate as, through their personal experience, they are able to highlight areas where very real difficulties are being encountered in the implementation of the law, no matter how perfect it may seem on paper.

JRS Malta has identified the situation of asylum seekers, i.e. immigrants pending the determination of an application for protection (be it under the Refugees Act or some other law), as an area of major concern and, possibly, the one where the greatest changes are required. Our work, particularly legal assistance and social work services, brings us into constant contact with asylum seekers' very pressing needs and the huge problems they face, whether they are in detention or in the community.

This document, which was prepared in view of the national conference on immigration policy, will therefore focus on the situation of asylum seekers. For the purposes of this document, asylum seekers are loosely defined as people seeking protection from forced repatriation. This category includes not only those who are awaiting the outcome of an application for protection in terms of the Refugees Act, but also those who seek protection from forced repatriation for other reasons and under other legal instruments.

The paper focuses on Malta's policy and practice in the area of reception of asylum seekers and the structures which need to be set up to ensure effective implementation of this policy; it is here that asylum seekers' experiences assume particular relevance.

The aim of this document is therefore to put forward asylum seekers' requests and concerns, within the context of legal norms governing the reception, recognition and protection of refugees and developments which have taken place in recent months, in the hope that they will serve to shape and inform the debate on Malta's policy for the reception of asylum seekers.

The document is divided into three parts, one relating to the reception of asylum seekers in the community, the second to asylum seekers in detention and the third to procedures for the determination of applications for protection. Each part starts with an outline of policy

and practice to date and then goes on to highlight JRS' major concerns in this area. Each section concludes with recommendations for action.

ASYLUM SEEKERS IN MALTA: AN OVERVIEW

The Refugees Act, 2000 defines an asylum seeker as a person who has made an application for refugee status in terms of Article 8 of the said Act¹.

Since 2002 most people who applied for refugee protection in Malta were detained until their application for protection was finally determined. This is primarily due to the fact that they applied for asylum after they were apprehended by the immigration authorities and either refused admission into Malta or refused permission to stay here. The vast majority of asylum seekers within this category were so-called 'klandestini'², who arrived in Malta by boat, insufficiently documented or undocumented, having traveled in an irregular manner. Today there are 620 immigrants in detention³, the vast majority of whom are asylum seekers⁴.

However, it is important to remember that, at any given time, there are also a significant number of asylum seekers living in the community. This population is largely invisible and, in fact, is not even mentioned in the Policy Document. Although the problems and concerns of asylum seekers living in the community are totally different from those faced by asylum seekers deprived of their liberty, they merit serious attention nonetheless. In our experience we believe it is true to say that these people are among the most disadvantaged in terms of access to material or financial assistance and professional or other services.

This category of asylum seekers is far from homogenous and includes: those who enter Malta legally and apply for refugee status and those who manage to apply for refugee status before they are apprehended by the immigration authorities for illegal entry or stay, and are therefore never detained; those who are released from detention after a period of eighteen months and are still awaiting the outcome of their appeal to the Refugee Appeals Board.

JRS was unable to obtain exact statistics of the total number of asylum seekers currently living in the community and their nationalities, or of the percentage of asylum seekers who have been accommodated in the community pending the determination of their application for protection over the past three years, since the setting up of national structures for the determination of applications for refugee status.

There is a category of forced migrants seeking protection in Malta, who cannot be said to qualify as asylum seekers in the strict legal sense of the word. These people claim that they need protection from forced return yet, for some reason, they are unable to obtain protection under the Refugees Act. Included within this class are people who are entitled to protection in terms of some human rights instrument to which Malta is a party, such as the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) or the 1948 UN Convention for the Prevention of Torture and Other Forms of Cruel Inhuman and Degrading Treatment (CAT). For the purposes of this document these people too will be described as 'asylum seekers'. As with asylum seekers *stricto sensu*, forced migrants within this category may be found either in detention or in the community.

¹ Section 2 of the Refugees Act, 2000 (Act XX of 2004), Chap 420 of the Laws of Malta

² This term meaning 'hidden' is often used colloquially to describe both the manner in which the migrants travel and, by extension, the migrants themselves.

³ Source: di-ve.com, reporting on the response to a Parliamentary Question given by the Hon Tonio Borg MP on January 31, 2005.

⁴ Exact statistics regarding the proportion of detainees who are awaiting the outcome of an application for protection are unavailable. However as of last week there were approximately 330 detained asylum seekers awaiting their initial interview with the Office of the Refugee Commissioner. In addition to this, there is a considerable number of asylum seekers awaiting the outcome of an appeal to the Refugee Appeals Board.

1. ASYLUM SEEKERS IN THE COMMUNITY

I stayed in detention for one year eight months. After my release I was sent to live at Lyster Barracks. For the first 3 weeks Fr Philip gave us Lm 7 each week, and then after that nothing. After searching I managed to find a job. The problem is that most jobs we find are very temporary – after two or three weeks the work is finished. Since my release I have done five jobs, all for a short time. The biggest obstacle to finding a job is that we cannot get a work permit. Two of my employers really wanted to help me and they tried to apply so I could work legally and pay taxes like a good citizen, but it was impossible, they could not get one.

So now how can I be myself? How can I get my independence? Without money from the government, no work permit, no travel document... what should I do? I have to stay here but I cannot work, so how should I live? Should I steal, should I corrupt, hijack, do bad things... No. But if these things happen, who would be to blame? I want to be able to live, to have a future, to live as a human being, but like this I cannot.

Comment from an asylum seeker released from detention after eighteen months

1.1 Current policy on reception

National law makes no provision for the material reception conditions of asylum seekers, apart from an entitlement to state education⁵ and medical services free of charge⁶. The EU Council Directive which lays down the minimum standards for the reception of asylum seekers (Reception Directive) defines 'material reception conditions' as "the reception conditions that include housing, food and clothing, provided in kind, or as financial allowances or in vouchers, and a daily expenses allowances"⁷.

In practice, however, asylum seekers who are released from detention after 18 months are provided with a number of benefits, which, although minimal, are more than those granted to asylum seekers who are never detained. This in spite of the fact that the Refugees Act makes no absolutely no distinction between different categories of asylum seekers in the provisions relating to the socio-economic rights of these people.

Following their release from detention, asylum seekers are housed in one of two government-run 'Open Centres'. Although accommodation in these centres, particularly the one at Lyster Barracks, is far from ideal, residents are provided with basic shelter and food. Moreover, in the first weeks after their release, the Emigrants' Commission provides each individual with a small allowance to cover personal expenses such as transport. Once this temporary financial assistance runs out, they are bereft of support, apart from material help provided at the centre.

Asylum seekers who live in the community throughout proceedings for the determination of their application for protection receive absolutely no assistance from the state, whether in terms of accommodation or financial or other assistance.

On one occasion JRS requested the police authorities, who were responsible for the administration of Hal Far Open Centre at the time, to provide accommodation at the Open Centre for a family of eight asylum seekers who were living in the community. This family, which included two minor children, was wholly dependent on charity for survival and had no money to pay their rent. Not only was the request refused, but we were verbally informed that if the family did not have sufficient means to support themselves,

⁵ It would seem that this entitlement to free education does not include tertiary education.

⁶ Section 10(1) of the Refugees Act, 2000

⁷ Article 2(j), Council Directive 2003/9/EC of January 23, 2003 laying down the minimum standards of reception of asylum seekers

then they were prohibited immigrants in terms of the Immigration Act⁸ and could therefore be detained.

It is not clear whether such would be the case today, now that the Centre is administered by a different authority. However, even now, there are no asylum seekers who were never detained who are provided with accommodation in Open Centres.

Almost all asylum seekers who live in the community throughout the procedures for the determination of their application for protection face huge difficulties to ensure that their basic needs, such as shelter, food and clothing are met. Some, the luckier ones, at times manage to find accommodation and a measure of social support in one of a number of hostels for homeless people run by NGOs. However these are often unable to accommodate families, as they usually cater either for women and children or for men. The rest must live in rented accommodation, which is extremely expensive as a rule.

Asylum seekers are not allowed to work without the permission of the Minister⁹, which so far, to our knowledge, has not been forthcoming. Most asylum seekers identify this as the single greatest obstacle they face in their quest to live with dignity.

If asylum seekers do manage to find a job, which is not always easy as employers are becoming increasingly reluctant to employ people in an irregular manner, it is often short-term or seasonal, usually characterized by long hours, low pay and hard work. Many, particularly those with a family to support, hardly earn enough to make ends meet.

The difficulties are accentuated in the case of vulnerable asylum seekers, such as those who suffer from mental health problems, because of the particular difficulties caused by their condition, or where asylum seekers are accompanied by children. The uncertainty about their future and that of their children, coupled with their inability to provide for their children's basic needs, be they nutritional, sanitary, educational or otherwise, places a great emotional and financial strain on asylum seekers, many of whom are often destitute.

This has often led asylum seekers to do what they would never have wanted to and to take decisions that cause further pain and suffering, such as splitting the family, to seek to ensure that at least their children are able to obtain the basic care that they need.

1.2 Major concerns

The government of Malta has clear legal obligations towards all asylum seekers in terms of both the Reception Directive and the Refugees Act and it is imperative that any policy on immigration and asylum regulates the treatment to which all asylum seekers, including those in the community, are entitled.

The Reception Directive stipulates that "Member states shall ensure that material reception conditions are available to applicants when they make their application for asylum"¹⁰. It goes on to state that "Member States shall make provisions on material reception conditions to ensure a standard of living adequate for the health of applicants and capable of ensuring their subsistence."¹¹

In view of this, the fact that there is quite simply no policy for the reception of asylum seekers in the community and the Policy Document makes no reference to them is, in itself, a cause of concern.

⁸ Section 5(2)(a) of the Immigration Act (Act IX of 1970), Chap 217 of the Laws of Malta

⁹ Section 10(2) of the Refugees Act, 2000

¹⁰ Article 13(1)

¹¹ Article 13(2)

More often than not, when asylum seekers arrive in Malta they are in dire need of assistance and support, particularly shelter and provision of basic needs.

In addition, as was mentioned earlier in the brief report on current government policy in this area, the single greatest difficulty faced by asylum seekers living in the community is the fact that they cannot work legally. At present, as they are not entitled to any state financial or material assistance (apart from accommodation and food in the case of those released from detention), they must either depend on charity to survive or resort to working illegally, which leaves them extremely vulnerable to exploitation and abuse.

Without government support or access to the labour market asylum seekers are condemned to a difficult existence, living from hand to mouth, forever worrying where next month's rent will come from or how they will put food on the table. This situation subsists throughout the proceedings for the determination of their application for protection, which in practice may take quite long – well over a year, in view of the considerable backlog particularly at appeals stage.

This inability to work legally is not only a problem in itself, but it is often the cause of other, often extremely serious problems. One example is that of asylum seekers employed in an irregular manner who are injured at the workplace, which is unfortunately far from rare. The problems that are inevitably caused when one suffers an injury are compounded and magnified by the fact that they are employed without the necessary permits.

The Reception Directive will hopefully prompt the introduction of a less restrictive approach in the area of employment¹² however the extent of the improvement which will be brought about by the implementation of the Directive remains to be seen. It is clear that if asylum seekers are not to be allowed to work or if they are unable to find employment, some form of assistance must be provided by the state throughout the proceedings for the determination of their application for refugee status.

1.3 Recommendations

The government has an obligation to make provision for reception conditions that ensure a basic standard of living for all asylum seekers in Malta. It is both morally and legally unacceptable that asylum seekers in the community are left to their own devices, without any form of assistance or support.

JRS calls upon the government to ensure that asylum seekers are provided with the means to live with dignity. This implies that they are granted as a basic minimum, in addition to the provision of health care and education:

- **Some form of accommodation, possibly in one of the Open Centres, if they cannot make their own arrangements.**
- **Access to the labour market as soon as possible after they apply for refugee status.**
- **Adequate financial assistance, in the case of asylum seekers who cannot work.**

The rights and benefits to which asylum seekers living in the community are entitled should be clearly stipulated, and asylum seekers should be informed of their rights and the benefits to which they are entitled, in a language they understand, as soon as they apply for refugee status.

¹² See particularly Article 11 of the Reception Directive.

2. ASYLUM SEEKERS IN DETENTION

**“This is a terrible place for a man
an hour is like a day
a day is like a month
a month is like a year”**

Written on the wall inside the detention centre at Safi Barracks

2.1 Current policy on detention

The government has chosen to adopt a policy of detention of all asylum seekers who apply for protection after apprehension by the immigration authorities.

Detention is indiscriminate: little more than an administrative slip of the pen imposed upon all without distinction, without conducting even a basic evaluation to determine whether detention is indeed necessary, reasonable and justified in the individual circumstances of each case.

Until relatively recently detention was indefinite, lasting as long as it took for an application to be examined in the case of asylum seekers granted some form of protection, or until repatriation or removal could be effected in the case of rejected asylum seekers. Since December 2003 the government started releasing all irregular migrants, including asylum seekers, who had been in detention for more or less eighteen months¹³. It should be stated that this eighteen month time-limit on detention was not prescribed by law nor, until now, was there a clear policy statement to this effect by the government. All releases were purely discretionary, and the eighteen month time-limit was applied loosely and somewhat arbitrarily.

All irregular migrants are detained on arrival, including pregnant women, children (whether accompanied or unaccompanied) and other vulnerable persons. However, in recent months, thanks to the intervention of the Ministry for the Family and Social Solidarity, there has been some improvement in the treatment of certain categories of vulnerable asylum seekers.

The most notable improvement is, without a shadow of doubt, the relatively short period for which **families arriving in Malta with minor children** are now held in detention.

As the releases seem to have been negotiated on a case-by-case or group basis, rather than as part of an official government policy, it is difficult to identify hard and fast rules or patterns¹⁴. However it is fair to say that during the past months, generally speaking, families with children were only held in detention until routine medical examinations, required by public health regulations currently in force, were carried out and accommodation for the individuals concerned was found in an open centre, which can take weeks.

While we firmly believe that the detention of children, even for one day, is inherently unacceptable, we recognize that in comparison to the situation on the ground until June

¹³ The eighteen month time limit was not applied strictly and groups of migrants were released after spending differing lengths of time in detention – e.g. the group of immigrants that arrived in Malta on July 27, 2002 (02AA) were released on December 23, 2003, after they had spent 17 months in detention; a group of immigrants from Sudan who arrived in Malta even earlier, on November 3, 2001 were released in April 2004 having spent approximately 28 months in detention; yet another group, which arrived in Malta on October 28, 2002 (02KK), were released on June 19, 2004, after almost 20 months in detention.

¹⁴ Some families were released from detention a few days after their arrival, even before medical tests were carried out, whereas others were released after weeks or months in detention, awaiting the outcome of medical tests and accommodation in the community.

2004¹⁵, when children accompanied by their parents (or another adult carer) were detained indefinitely, the present situation constitutes a significant improvement.

With reference to **women who have just given birth**, in particular, it should be said that there seems to be an unwritten policy that such women will be released from detention once they have given birth.

Unaccompanied minors are held in detention until the procedures for the issue of a care order have been completed. This process, which necessarily involves the verification not only of the identity but also of the age of the minor concerned, may, and in fact often does, take a considerable amount of time. The various authorities involved in this process are currently encountering a number of difficulties, which are serving to further complicate and lengthen the procedures for the issue of a care order. These difficulties include the lack of space in the various residential facilities set up to accommodate unaccompanied minors and the fact that, possibly in view of the preferential treatment given to unaccompanied minors (primarily relatively speedy release from detention), the system is currently inundated with applications from applicants who had initially claimed to be over eighteen years of age.

As a response to this phenomenon, the authorities concerned have made a number of changes in the processes set up to establish the age of people claiming to be minors. These include the transfer of responsibility for age assessment from the MFSS to the Police and the proposed adoption of methods such as wrist X-rays to determine age.

To date **pregnant women**, including those in later stages of pregnancy, are detained¹⁶. In recent months, the Office of the Refugee Commissioner has adopted a clear policy prioritizing applications from pregnant asylum seekers. While in many cases this has effectively meant that pregnant asylum seekers spent a relatively short period of time in detention, this is only true of those cases where the applicant is granted some sort of protection. Pregnant asylum seekers whose application is rejected are not released, even though they are pregnant. They are however released to live in the community once they have given birth.

It is therefore clear that under government policy to date (which was unwritten and had to be deduced from an examination of the circumstances on the ground) there is no prohibition of the detention of pregnant women.

As with pregnant women, there is currently no clear policy regarding **other vulnerable categories** of migrants, which according to the policy document include: **elderly persons** and **persons with a disability**. All are detained on arrival and held until their application is finally determined. In some cases the Office of the Refugee Commissioner has prioritized applications from people within these categories, usually upon production of a medical certificate requesting that the applicant's interview is brought forward as detention is causing undue suffering as a result of the applicant's medical condition or as detention is causing the applicant's health to deteriorate.

“Detention is so hard. You don’t recognize the person you have become”

Comment from an asylum seeker released after 18 months in detention

¹⁵ In December 2003, the government released a number of families with children, all of whom had been in detention for at least 17 months. Some had actually been detention for almost 22 months. In June 2004 the last minor to be held in detention for a considerable period of time, a seventeen-year-old Armenian boy, was released from detention. He had been held in detention together with his nineteen-year-old sister from January 2003.

¹⁶ On January 31, 2005 there were at least 7 pregnant women in detention.

The physical conditions in the various detention centres currently in use have been extensively documented in a number of reports, published by both local and international organizations¹⁷, as well as in media reports on the subject. It is beyond the scope of this brief report to provide a detailed description of the prevailing conditions in any or all of these centres. Suffice it to say they fall way below recognized international standards on the treatment of people in detention and that during the past two years they have attracted harsh criticism.

In spite of negative feedback, over the past two years little has changed. Detention centres are without exception over-crowded and squalid. Most facilities currently in use were not designed for the long-term detention of people. In one centre asylum seekers are actually housed in structures that were never even intended for human habitation. People live in tents erected on stony ground throughout the coldest months of the year, with only three blankets to keep warm at night, without electricity or heating. Sanitary facilities are totally insufficient and inadequate for the number of people using them, and detainees often have to make do with cold water.

In addition to the suffering caused by confinement in such miserable conditions for long periods of time, asylum seekers in detention are almost totally isolated from the outside world. This makes it very difficult for them to obtain the necessary information regarding their rights, obligations and the conduct of proceedings for the determination of their application for protection. They have huge difficulties accessing even the most basic services, such as legal aid and medical assistance, and they are not provided with the opportunity to occupy their time with any form of gainful or constructive activity.

2.2 Major concerns

2.2.1 Detention policy¹⁸

Detention is legitimized by reference to the provisions of the Immigration Act, which authorizes the detention of prohibited immigrants against whom a removal order has been issued and of immigrants refused admission into Malta¹⁹. The government has consistently insisted that, in terms of this law, they have no choice but to detain irregular migrants refused admission into Malta or those against whom a removal order has been issued, whether or not they make an application for asylum²⁰.

However it is amply clear that the use of detention as a policy of reception is not simply an obligation imposed by the mandatory nature of the provisions of the Immigration Act – it is a deliberate choice made in “the national interest, and more specifically, for reasons concerning employment, accommodation and the maintenance of public order”²¹ to

¹⁷ See the following reports: Report by Council of Europe Human Rights Commissioner Alvaro Gil Robles, published on December 18, 2003; *Locking up foreigners, deterring refugees: controlling migratory flows in Malta*, published by the International Federation for Human Rights (FIDH) in September 2004; Amnesty International Annual Report on Malta, 2004; JRS Malta's *Report on the living conditions in Floriana detention centre*, published in July 2003; Reports published by the Ombudsman on May 24, 2002, June 8, 2000 and January 14, 2004. See also the report on the UNHCR press conference carried in the Times of Malta of January 19, 2005.

¹⁸ See JRS Malta report *Detention of asylum seekers in Malta: a human rights perspective*, July 2003, for a more detailed description of JRS concerns on this policy.

¹⁹ Sections 10 and 14 of the Immigration Act.

²⁰ See for example: “Asylum seekers call off hunger strike”, Times of Malta, Saturday May 10, 2003, where Minister Borg is quoted as saying that: “... the Immigration Act made it illegal for asylum seekers to be set free”.

²¹ Page 6, Introduction, Irregular Immigrants, Refugees and Integration, Policy Document published by the MJHA and the MFSS

deprive asylum seekers of their liberty “until their identity is established and their application for asylum processed”²².

The policy document also indicates that, detention of asylum seekers who enter or are otherwise present in Malta illegally is to be the rule, rather than the exception. Even in the case of vulnerable people, the policy document simply states that where appropriate they shall not be detained, however “monitoring is to be conducted on particular cases to confirm whether detention remains admissible”. This stand is contrary to the recommendations contained in the UNHCR Guidelines Applicable Criteria and Standards relating to the Detention of Asylum Seekers²³, which state that detention of asylum seekers should only be resorted to in exceptional circumstances.

First and foremost it should be stated that references to the need to detain all, including vulnerable people where this is “admissible”, “for reasons concerning employment, accommodation and the maintenance of public order” are highly questionable. This is especially so when one considers that the vast majority of asylum seekers, including those whose application was rejected, were eventually released after eighteen months anyway.

Moreover, considering the length of time it takes for an application for asylum to be processed and finally determined (over a year and a half in most cases) and the inestimable harm that detention inflicts upon people who have already suffered so much, this policy decision raises serious human rights concerns. The very choice of long-term detention as a blanket policy of reception for asylum seekers with irregular immigration status is in itself a cause for concern. In addition, the manner in which this policy is implemented does not offer sufficient guarantees against arbitrariness, and this too could lead to possible human rights violations. Unfortunately, it is far from clear whether the policy document will make a significant difference in this regard.

(i) The legitimacy of long-term detention as a policy of reception

“We are not criminals”

Slogan painted on a banner used during the asylum seekers’ peaceful protest on January 13, 2005

Human liberty is sacred and human rights law makes it amply clear that no one may be deprived of their liberty save in exceptional circumstances. So-called ‘immigration detention’ is permitted only in order to prevent a person from effecting “unauthorized entry into the country”, or to in the case of people “against whom action is being taken with a view to deportation or extradition”²⁴. No mention is made of detention for the purposes of examining an asylum application.

In terms of the Refugees Act asylum seekers have a right to “enter and remain” in Malta until their application for protection in terms of the Act is examined, and during this time no proceedings may be taken by the immigration authorities to remove the person from the territory. It is therefore difficult to understand how detention of asylum seekers until their claim is processed is justifiable in terms of the provisions of Article 5.

Moreover, recognizing that it is often impossible for asylum seekers to travel with valid documents, Article 31 of the 1951 Convention on the Status of Refugees clearly states that:

²² Page 11, Section 5 (Closed Reception Centres), Irregular Immigrants, Refugees and Integration, MJHA & MFSS

²³ The Guidelines stress that the detention of asylum seekers is inherently undesirable and should be resorted to only in exceptional circumstances.

²⁴ Article 5 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

“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 authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence”.

The UNHCR Guidelines stress that the detention of asylum seekers is ‘inherently undesirable’ and should be resorted to only in exceptional circumstances, where it is necessary in the light of the individual circumstances of the case and where the detaining authorities can demonstrate that non-custodial measures have proved ineffective. In the same vein, the Human Rights Committee, in *A v Australia*²⁵, when determining whether the detention of A, an asylum seeker, was arbitrary stated that detention “could be considered arbitrary if it is not necessary in all the circumstances of the case”.

Moreover, the UN Working Group on Arbitrary Detention has declared that: “Article 14 of the Universal Declaration of Human Rights guarantees the right to seek and enjoy on other countries asylum from persecution. If the detention in the asylum country results from exercising this right, such detention might be arbitrary.”

In this light, Malta's choice to detain all except the most vulnerable, without any evaluation as to whether detention is indeed necessary, is highly questionable. It is however clear that in the absence of realistic alternatives detention will continue to be the rule.

(ii) The length of detention

“18 months hafna!”

Slogan on a bracelet hand-made by immigrants in detention

As was previously stated, until relatively recently detention was indefinite. The Policy Document may therefore be considered something of an improvement as it states unequivocally that: “No immigrant shall ... be held in detention for longer than 18 months.”

However, it should be stated that this time-limit on the duration of detention for asylum seekers was established somewhat arbitrarily by the government. It has no basis in law, and is in fact questionable in the light of the dictates of international human rights law.

It is clear that human rights law does not lay down one time-limit applicable in all cases beyond which detention is always arbitrary, and the individual circumstances of each case must be examined in order to arrive at a conclusion in this regard. In a highly controversial decision, the House of Lords stated that while it could be acceptable to detain an asylum seeker for a short time²⁶, in decent conditions, in order to expedite the examination of an asylum application, the period of detention imposed “must be reasonable in all circumstances”.

The court in this case went on to state that: “This does not mean that the Secretary of State can detain without any limits as long as no examination has taken place or no 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 judgments dealing with the detention of those who are 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

²⁵ Human Rights Committee, April 30, 1997, CCPR/C/59/D/560/1993, at para 9.2

²⁶ The applicants in this case were contesting a 7-10 day period of detention.

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.'²⁷

The Policy Document acknowledges this requirement, stating that no one "will be detained for longer than administratively necessary", but seems to state, by implication, that a period of eighteen months of detention is "administratively necessary".

It is not clear why eighteen months of detention are "administratively necessary", but one would presume that this period of time is required in order to examine the detainee's asylum application or to carry out the proceedings necessary for deportation.

From an examination of the facts on the ground it is immediately obvious that the procedures for the examination of an asylum application usually take so long, not because of the complex nature of the case concerned or, as is implied in the Policy Document²⁸, because of lack of cooperation on the part of the applicant, but because of the considerable back-log that exists both at first instance and at Appeal Stage. This is due to many factors, which will be examined in greater detail in the next section. Suffice it to say at this juncture that more often than not the asylum seeker has little or nothing to do with this delay, which is due in large part to lack of resources and the absence of the administrative structures necessary in order to ensure a speedy determination of asylum applications.

While it is true that, in comparison to other jurisdictions, asylum claims in Malta are decided reasonably efficiently, it is important to remember that here asylum seekers are being deprived of their liberty while they await the outcome of their application for protection.

In the light of this it becomes increasingly difficult, not to say impossible, to justify an eighteen-month timescale as necessary or even remotely acceptable.

(iii) Review or challenge of detention

"This detention is illegal"

Slogan painted on a banner used during the asylum seekers' peaceful protest on January 13, 2005

Detention is an administrative measure imposed on all without distinction and without any examination as to whether it is indeed necessary or justifiable in the individual circumstances of each case. Once in detention, in practice an asylum seeker has very limited possibilities to have this decision reviewed.

In *Amuur v France*²⁹ the European Court of Human Rights held that although detention must initially be authorized by administrative authorities, in order to protect individual from arbitrariness "its prolongation requires speedy review by the courts, the traditional guardians of personal liberties".

Article 5(4) of the ECHR, which is part of our domestic legislation, requires that: "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."

²⁷ Secretary of State for the Home Department *Ex Parte Saadi (Fc) and others (Fc)*, House of Lords, October 31, 2002, [2002] UKHL 41.

²⁸ Page 11, Section 5 (Closed Reception Centres)

²⁹ Application Number 19776/92, June 25, 1996

In interpreting this section, the European Court of Human Rights has stated that “the detained person is entitled to a review of his detention in the light not only of the requirements of domestic law but also of the text of the Convention and the aim of the restrictions permitted by Article 5 para 1.”³⁰

The law does not allow for an automatic, regular, independent review of the necessity of prolonging an individual's detention. An asylum seeker in detention may however challenge the lawfulness of his/her detention by means of an application to the Magistrates' Court, in terms of Section 409A of the Criminal Code. This section has twice been used by asylum seekers to challenge their detention, and in both cases the court decided that the detention was lawful.

In one of these cases³¹, however, the Criminal Court stated that, in interpreting the notion of lawfulness under this section, the Magistrates' Court may not examine whether or not the applicant's detention is lawful in terms of Article 5 of the ECHR, but may only look at the provisions of the Immigration Act.

Thus under the current system, the only way in which an asylum seeker may have the lawfulness of his/her detention examined in terms of Article 5(4) is by means of an application to the Constitutional Court, which is far from speedy. In addition, given the huge difficulties asylum seekers face when seeking to obtain the assistance of a lawyer, the possibility of instituting legal proceedings in court is, at best, remote. It is therefore clear that these remedies fall short of the standards laid down in Article 5(4) of the ECHR.

As from February 1, 2005 asylum seekers may also apply to the Immigration Appeals Board to challenge the reasonableness of their continued detention. Neither the Refugees Act, which is the law providing this remedy, nor the Policy Document give any indication of the criteria which will be used to determine if detention is reasonable.

Given, as was already mentioned, the lack of effective access to legal assistance, it remains to be seen whether this amendment to the Refugees Act will make a significant difference in practice. What is amply clear is that this remedy too, with its focus on reasonableness rather than lawfulness, falls short of the standard of protection required by Article 5(4) of the ECHR.

(iv) Vulnerable groups

The Policy Document mentions a number of groups that are considered vulnerable “by virtue of their age and/or physical condition”: unaccompanied minors, persons with disability, families, pregnant women, elderly persons, and lactating mothers. It is unclear from the document whether this list is exhaustive or whether other vulnerable asylum seekers, such as victims of trauma and torture, or asylum seekers suffering from serious medical conditions or psychological or mental health problems, would qualify for the same treatment as the other categories.

The document makes it clear that special treatment is to be accorded to these persons, but there is some inconsistency where it outlines the treatment to which they are entitled. At one point the document states that: “Irregular migrants who, by virtue of their age and/or physical condition, are considered to be vulnerable are exempt from detention and are accommodated in alternative centres”³². However, the same document also states later on that “Vulnerable persons... shall where appropriate not be kept in detention but will be provided with alternative accommodation. Monitoring is to be conducted on

³⁰ Chahal v UK, Application Number 22414/93, November 15, 1996

³¹ Barboush v Commissioner of Police, decided by the Criminal Court on November 4, 2004

³² Page 11, Section 4 (Detention of Asylum Seekers)

particular cases to confirm whether detention remains admissible.³³ The latter formulation is somewhat diluted and falls far short of an exemption from detention.

Another issue of concern which the policy fails to tackle is the procedure which will be followed in order to identify these 'vulnerable people' – i.e. the criteria which will be used to determine whether they are indeed vulnerable and, perhaps even more importantly, the authority which will be responsible to receive and determine requests to be considered as vulnerable.

This is particularly worrying in the case of unaccompanied minors, as they are perhaps the group where identification is most difficult because of the difficulties inherent in assessing whether they are in fact minors. However, elderly persons could also meet similar problems, as the category is undefined and the criteria on the basis of which one would be assessed as elderly are unclear.

With particular reference to **unaccompanied minors**, while it is clear that the system being adopted previously was leading to a situation which was rapidly becoming unmanageable, it is equally clear that the alternative proposed is totally unacceptable. The rather weak instructions contained in the policy document, to the effect that "interviews are to be carried [out] in a 'child friendly' manner"³⁴, do not provide sufficient guarantees of protection, particularly if it is the Police who are going to be conducting the interviews. Possibly due to their regular exposure to the more unsavory aspects of human nature, police officials tend to be suspicious and are often more than ready to assume that people are acting in bad faith until the opposite is proven.

In addition, the use of supposedly 'scientific' methods such as wrist X-rays is highly questionable in view of the unacceptably high margin of error – one year more or less than that established by the test. It should be pointed out that this test was not created to establish age, but to assess the growth rate in a given individual over a period of time. If such tests are to be used, it should be clearly stipulated that a doubt must be construed in favour of the applicant.

To ensure that all minors in need of care are identified and granted the protection they need, it is essential that proper age assessment procedures are put in place and the people charged with carrying out this delicate task are given the necessary training to do it well. It is also fundamental that these people are independent and impartial. This necessarily implies that they should not be involved either in the immigration process or in the provision of care to immigrants, asylum seekers or to those who are eventually found to be minors.

The same applies to any individual or authority charged with determining whether an asylum seeker may be considered as vulnerable – the establishment of clear procedures and criteria are completely indispensable in order to ensure that all who need protection are able to effectively access the protection they need.

³³ Page 11, Section 5 (Closed Reception Centres)

³⁴ Page 13, Section 6 (Special cases – *Unaccompanied Minors*)

2.2.2 Conditions of detention

“Look how we have become – we are like animals in cage”

Comment of a detainee as he stood watching fellow detainees fighting to get their hands on clothes the soldiers were throwing over the fence

The conditions in which asylum seekers are detained have long been an issue of major concern. Possibly the greatest concern is the fact that in the two years since the ‘emergency’ created by the large number of arrivals in 2002, little or nothing has changed.

It is clear that if the government is choosing to detain, then it must ensure that it does so in conditions that respect human dignity.

The current conditions fail to guarantee asylum seekers even the most basic standard of living and as such are totally unacceptable. Moreover while in detention asylum seekers face huge difficulties to access the services to which they are entitled, especially legal assistance. Long-term detention in these conditions not only causes unnecessary hardship but also leads to increased frustration and despair.

It is little wonder then that asylum seekers, whose repeated appeals to be treated with dignity fall on deaf ears, resort to protests and demonstrations in order to make their voice heard.

In addition to improving the physical conditions of detention, it is also necessary that clear standards and procedures are established, which outline the treatment detainees can and should expect as well as what is expected of them. They should include rules regarding the basic entitlements of detainees, such as the right of access to a lawyer at all times and the manner in which detainees’ property should be handled. The Policy Document makes reference to these standards when it states that detainees should be informed of “their detention rights and obligations”³⁵, however to date, to our knowledge these standards have not been laid down clearly and in writing.

It is fundamental that such standards are drawn up as soon as possible, as the lack of clear criteria and standards creates a number of obstacles in practice when detainees come to access their rights, even the most basic, which only serves to make life even more difficult. Moreover, in the absence of clear rules, serious problems may, and often do, arise for both detainees and detaining authorities when disciplinary measures are implemented, or sanctions meted out, for actual or perceived wrongdoings on the part of detainees.

It is a matter of concern that the daily care of detainees is being carried out by people who are neither adequately prepared nor, it would seem³⁶, particularly willing to do it. As was stressed by the CPT in its 7th General Report³⁷ it is imperative that the people entrusted with the task of caring for detained migrants are properly trained. It is becoming increasingly clear that members of the security forces are not the ideal people to carry out this job. However, if they are going to be expected to do it then they should be given all the necessary resources, including training and ongoing support, to be able to do it well. It is grossly unfair to expect anyone to carry out such a difficult task without the necessary assistance and support.

³⁵ Page 12, Section 5 (Closed Reception Centres)

³⁶ Reference is made to a number of articles carried in the local media in recent weeks, particularly in the Maltese language newspapers I-Orizzont and it-Torca, which highlight the dissatisfaction among AFM ranks because they are charged with the responsibility of caring for irregular immigrants in detention.

³⁷ [CPT/Inf (97) 10]

2.2.3 The cost of detention

More often than not public debate on the issue of detention tends to focus on the 'burden' that would be placed on the shoulders of Maltese society, were immigrants to be released to live in the community. There is a general perception that Malta, being small, cannot afford to take on these immigrants.

This assumption, which seems to be based more on fear and insecurity than on scientific data, ignores two basic realities. One is the fact that most long-term detainees are released to live in the community anyway after a year and a half in detention. The other is the proven fact that institutional, custodial facilities, such as detention centres, are far more costly to run than community-based alternatives, and this is the primary reason why many countries do not resort to long-term detention of all irregular immigrants.

Although there are no accurate statistics on the real cost of long-term immigration detention, there are a number of indicators, which point to the phenomenal cost this policy choice implies. Among them is the simple fact that to keep one immigrant in hospital guarded round the clock, the government must pay the daily salary of 4 police-men – almost as much as it would cost to keep a police-station open.

In the light of this reality, the apparent reluctance on the part of state authorities to learn from the experience of other countries, which have long been receiving large immigrant flows, and examine the possibility of creating alternatives to detention a matter of concern.

Another reality which is often overlooked in the current immigration debate is the human cost of detention. Credible research has shown that detention causes irreparable psychological harm to people who have already suffered so much. Although there are no proper statistics regarding the number of asylum seekers who faced mental health problems because of their detention, JRS personnel can bear witness to the gradual deterioration which confinement brings about in the physical and psychological well-being of detainees. It is a matter of grave concern to JRS that over the years a significant number of asylum seekers have needed to receive medical treatment, including in-patient care, for mental health problems which developed while they were in detention, and that one detainee actually committed suicide while awaiting deportation in a detention centre.

Finally, it is becoming increasingly clear that detention imposes another, often hidden, cost on our society. Detention criminalizes immigrants, it gives the impression that they are bad and dangerous – otherwise why would they be detained? The unfortunate consequence of the choice to detain has been an increase in mistrust and hostility towards immigrants among the population at large, a fact which was noted by a number of refugees who have lived in Malta for some time.

When I say I'm foreign, people think I'm a tourist, but when I explain that I am a refugee their faces change and they no longer want to be friendly with me. Not all Maltese are like that, but many are. It makes me feel so bad.

Comment from an asylum seeker living in the community

The 2001 Durban Conference on Racism identified racism and xenophobia towards asylum seekers and refugees as one of the greatest threats of our time. It is therefore fundamental to invest in concrete measures that reverse this negative and worrying trend among the Maltese population, traditionally known for its generosity and hospitality.

2.3 Recommendations

DETENTION POLICY

JRS believes that asylum seekers should not be detained, and that it is possible to create non-custodial alternatives for the reception of asylum seekers.

In the light of the above, JRS calls upon the government to engage in serious, on-going dialogue with all interested parties, including NGOs and asylum seekers, in order to identify and implement non-custodial alternatives to detention for asylum seekers who are found to be in breach of the provisions of the Immigration Act.

If, however, the government chooses to detain, JRS calls upon the government to ensure that any policy adopted is in line with the standards laid down in the various human rights instruments to which Malta is a party.

This implies that, as a basic minimum, the policy document should include clear rules regulating detention which ensure that:

- Detention is resorted to only as an initial response to the arrival of large numbers of asylum seekers traveling in an irregular manner, until their identity is determined – i.e. they are registered – they are allowed to make an application for refugee status, and basic health screening can be carried out, in accordance with national health regulations.
- Detention of asylum seekers is resorted to only for minimal periods and, in any case, for not longer than 2 months, unless the authorities can demonstrate that non-custodial measures have proved ineffective in the individual case and that detention is therefore necessary and justified.
- This maximum period beyond which no asylum seeker may be detained is clearly prescribed by law.
- Asylum seekers who are detained are given an effective remedy as required by Article 5(4) of the European Convention for the Protection of Human Rights and Fundamental Freedoms. This implies an opportunity to be heard promptly by a judicial authority, authorized to assess and speedily decide whether detention is lawful in the individual circumstances of the case, both in terms of national law and Article 5 of the said Convention, and to order release if it is not.
- Given the practical impossibility of obtaining legal assistance, detention which is prolonged beyond 2 months is subject to an automatic, independent, periodical review by a judicial authority, authorized to order release if the prolongation of detention is deemed unnecessary in the individual circumstances of each case, as required by various international standards.

VULNERABLE GROUPS

With particular reference to vulnerable asylum seekers and immigrants, JRS recommends that:

- The policy clearly states that vulnerable immigrants and asylum seekers are exempt from detention, and all reference to “detention where it remains admissible” is removed.
- The definition of people “who are considered to be vulnerable by virtue of their age and/or physical condition” is clarified, and certain categories which will always be considered vulnerable should be clearly identified in the policy document. These should include: pregnant and lactating mothers, families accompanied by minor children, unaccompanied minors, persons with disability, elderly persons, victims of trauma and torture, people with serious or chronic medical problems and people with serious mental health problems. Any such list should never be exhaustive.
- The procedures to be followed in order to determine whether or not a person is indeed vulnerable are clearly established, and the authority/ies responsible to

receive and determine requests for special treatment on the grounds of vulnerability are identified in the policy document.

- The authority/ies charged with this task are independent, in the sense that they are not involved either in the implementation of the immigration process or in the provision of care to immigrants and asylum seekers, because of possible conflicts of interest.
- Anyone charged with carrying out such assessments receives appropriate training, to be able to carry out the task well.
- The criteria and standards which the competent authority/ies will apply to determine whether or not a person is indeed vulnerable are clearly laid down in the policy document, especially where the vulnerability is related to age.

Regarding procedures for age assessment in the case of unaccompanied minors, JRS recommends that:

- Age is not determined solely on the basis of supposedly scientific age assessment tests, in view of the unacceptably large margin of error inherent in all such tests.
- Such tests are only carried out with the express consent of the minor concerned after the consequences have been clearly explained to him/her.
- The results of such tests alone should never be a ground for exclusion from possible benefits and, in view of the large margin of error, any doubt should always be construed in favour of the individual concerned.

JRS urges the government to set up the structures necessary to ensure that vulnerable people are identified as soon as possible after arrival in order to ensure that they are released from detention as soon as possible and granted the protection they need.

CONDITIONS

JRS welcomes the declaration by Minister Tonio Borg that the government intends to improve the material conditions in detention centres. We urge the authorities to take decisive action and to implement drastic and much needed reforms as soon as possible, in line with recommendations of the various organizations which have inspected the centres in the past two years.

In addition to improvements in the material conditions, JRS calls upon the government to draw up basic standards applicable to all detention centres, stipulating the rights and obligations of detainees, rules regarding confidentiality and data protection, as well as the manner in which detention centres will be administered and discipline maintained. Such rules should be communicated to detainees in writing as soon as they enter the detention centre.

Once again, JRS urges the authorities to ensure that all personnel involved in the care of the detainees are provided with the training necessary to be able to carry out this delicate task.

PUBLIC AWARENESS AND EDUCATION

The increased incidence of intolerance and prejudice towards immigrants and the ever-present spectre of racism is a cause for growing concern. JRS therefore urges the authorities to refrain from making statements that incite prejudice and fear and to commit themselves to undertake actions that foster solidarity and promote respect for all human beings independent of their race or creed.

3. PROCEDURES FOR THE DETERMINATION OF APPLICATIONS FOR PROTECTION

We were requesting a shorter period of detention, more transparency in the asylum process, especially the appeals, and dignified conditions of detention.

*Comment from a detained asylum seeker,
explaining the reasons for the peaceful protest at Safi Barracks on January 13, 2005*

3.1 Current legal framework, policy and practice

The national structures for the determination of applications for refugee status have been functioning for just over three years, since October 2001.

The Office of the Refugee Commissioner (RefCom) receives and determines applications for protection in terms of the Refugees Act. The Act provides for two forms of protection: refugee status, which is granted to people fulfilling the criteria of the definition contained in the 1951 Geneva Convention on the Status of Refugees, and humanitarian protection, usually granted to people fleeing a country where there is war. Appeals from negative decisions are decided by the Refugee Appeals Board.

Since these structures were established in 2001, significant progress has been achieved, particularly by RefCom, which now employs nine persons including clerical or support staff. However, there are a number of areas where little or no improvement has been noted over the past three years.

One such area is that of information provided to asylum seekers throughout the proceedings for the examination of their application. When they are applying for protection, i.e. filling the Preliminary Questionnaire, asylum seekers are still provided with little or no information regarding their rights and obligations and the procedures that will be followed for the determination of their. This in spite of the fact that the Refugees Act 2000 places an obligation upon the immigration officer to inform each person who intends to apply for asylum of his/her rights.

It is only at the initial interview with the Refugee Commissioner, months after filling the Preliminary Questionnaire, that asylum seekers are briefly informed of their rights and obligations throughout the procedures. They are provided with a written list of such rights and obligations, which is available in English and a number of other languages. Where the applicant speaks another language, the interpreter explains the content of the document to in a language the asylum seeker understands.

When an application is rejected, asylum seekers are provided with information regarding the manner in which they can file appeal if they wish to do so. However this is only provided in writing, which presents difficulties for many asylum seekers.

Another area of concern is the considerable time it takes for an application to be finally determined – well over a year in many cases. This is due to a number of factors, among them the fact that there is still a significant waiting period between the initial application and the first interview with RefCom, e.g. they are now interviewing applicants who arrived in Malta some five months ago. Given that asylum seekers are interviewed according to the date of their arrival in Malta and hundreds of people arrived in the space of a few weeks, the waiting period is likely to increase over the coming weeks.

If an application is rejected and the asylum seeker appeals the waiting period for a final decision is likely to be even longer. This is not only due to the backlog of cases at appeals stage, but also to the fact that in many cases asylum seekers are unable to obtain the services of a legal aid lawyer. One particular group of asylum seekers entered an appeal from the decision of the Refugee Commissioner in January 2004 and asked for the services of

a legal aid lawyer. Until their release from detention in January 2005 they had not seen their legal aid lawyer even once.

Initially this problem was due to the fact that asylum seekers were expected to access the service set up to cater for Maltese nationals requiring legal assistance in the context of non-criminal proceedings. This did not work out, primarily because no proper procedure was established to enable detained asylum seekers to access the system. Now a couple of legal aid lawyers have been appointed specifically to provide legal aid to asylum seekers at appeal stage of the proceedings, and they started visiting the detention centres during the past few weeks.

In addition to the problems with access to legal assistance, it should be stated in fairness that the Appeals Board lacks sufficient resources to be able to carry out its functions. In practice this serves to make the Board somewhat inaccessible, as there is never a time when the office of the Board is open to the public, for asylum seekers to be able to ensure that their appeals are handed in on time, check the conduct of their cases, etc.

This aura of inaccessibility, coupled with the manner in which appeal proceedings are conducted, does little to inspire confidence in the proceedings for the determination of appeals. To date, to our knowledge, the Refugee Appeals Board has accepted one appeal and interviewed two appellants. The procedures in the vast majority of cases, i.e. all except these two, are conducted behind closed doors and no one, not even the appellant and his legal advisor attend the sittings where the cases are discussed. No reasons are given for the rejection of most applications, apart from a reference to the fact that the appeal is "manifestly unfounded according to law".

It should be stated that lack of resources is not a problem faced exclusively by the Appeals Board, but exists at all levels of the proceedings for the determination of applications for protection. There are, quite simply, not enough trained people employed to carry out the various tasks required in order to ensure that procedures for the determination of applications for refugee status are carried out in accordance with the dictates of the law, whether to provide information to asylum seekers, translation services, legal assistance, etc.

There are a number of areas specifically linked to protection where, in our view, not only has there not been any improvement but there has been a significant lowering of the standards of protection, through the introduction of amendments to the Refugees Act. These amendments restrict or limit an asylum seekers right to apply for protection. One such amendment, found in Section 8(A) of the Act, provides that applications made after a person has been in Malta for two months will not be valid. The other, in Section 18A(1) states that applications from nationals of 'so-called' safe countries will not be admissible. In our view both of these amendments are very worrying as they could effectively exclude refugees from the scope of the protection provided by the law.

3.2 Major concerns

(i) Access to procedures

The most sophisticated status determination proceedings are utterly useless if asylum seekers are denied access to them.

Denial of access to procedures could take place not only as a result of the operation of legal provisions barring certain categories of applications from the system, but also by refusing admission to asylum seekers and removing them from the territory without allowing them to apply for protection. In the light of this, we find the references to return to Libya contained in the Policy Document³⁸ extremely worrying.

³⁸ Page 32, Para 24 (Dialogue with Libya)

We believe that it is fundamental to ensure that, before any return is carried out asylum seekers are granted effective access to proceedings for the determination of their application for refugee status. Moreover, no one should be returned to a country which has not signed the 1951 Convention and does not offer sufficient guarantees of protection from *refoulement*, i.e. forced return to a country where the asylum seekers will face persecution.

(ii) Information provided to asylum seekers

Many asylum seekers are not familiar with our relatively sophisticated methods of examining applications for status. Moreover, a number of them come from countries where they have very good reason to mistrust people in authority and governmental institutions.

It is therefore important to explain to asylum seekers, not only that they have a right to apply for refugee status, but also what such application implies in practice: the procedures to be followed, the legal framework within which such application will be examined, and other relevant information. They also need to be assured of the absolute confidentiality with which all the information they submit to the adjudicating authorities will be treated. They should be given this information as soon as possible after their arrival in Malta.

Asylum seekers should also be able to obtain information about the progress of their applications throughout the procedures. At present, it is practically impossible for them to obtain such information, particularly if they are detained, unless it is through the assistance of an NGO.

Once their application is determined, they need to be informed of their legal position whatever the decision of the Refugee Commissioner. Persons recognised as refugees or granted humanitarian protection should be informed of their position at law, and of the rights, if any, which the status confers upon them.

Those persons whose application is rejected too should be informed of the reasons for the rejection of their application, the procedural rules for filing an appeal and obtaining legal aid in a language they understand.

Even where their application has been finally rejected, they should be given proper information about their legal position, to have the opportunity to evaluate the options available to them in the circumstances and take decisions about their future, if it is possible for them to do so. Rejected asylum seekers may not be refugees, but they are people nonetheless. As such they should be treated with dignity and allowed to assume some form of control over their lives and their future, to the extent that this is possible.

The Policy Document recognises that asylum seekers should be provided with such information³⁹, however it fails to establish the structures for the provision of this service or to identify the authorities who will be responsible for carrying out this task.

It is clear that the current system is not working and this is creating a lot of totally unnecessary frustration among asylum seekers. In fairness to the Immigration authorities, it has to be admitted that where large numbers of asylum seekers arrive in Malta within a short span of time it is totally unrealistic to expect the immigration officers to provide the necessary information to all of them given their resources. The provision of information is a time-consuming task which requires lots of patience, at least basic training, and considerable resources in terms of time and personnel.

Information is a basic right. It is therefore a matter of concern that, to date, there has been

³⁹ Page 14, Para 7 (Assistance and Information to Asylum Seekers)

no significant investment in the creation of the necessary structures to provide the required information to asylum seekers.

(iii) Access to legal aid

The issue of access to legal aid has been a major problem for asylum seekers during the past three years.

Although the appointment of two legal aid lawyers to assist asylum seekers is very welcome and will hopefully improve the situation, it is clear that this measure alone will not solve the problem in the long term. In order to ensure that asylum seekers are provided with assistance within a reasonable time it is necessary to set up a structure/system, equipped with trained professionals, which will guarantee continuity and quality assistance.

(iv) Mechanism for filing appeals

Asylum seekers whose initial application is rejected are informed in writing that they must submit an appeal from the recommendation of the Commissioner in writing, within two weeks from the notification of the negative decision, preferably by means of a registered letter.

Detained asylum seekers are not able to deliver their appeal personally or to post it themselves. Appeals are usually handed to the officer on duty who then delivers them. The appellant has no guarantee that the appeal will be delivered on time. On more than one occasion JRS personnel encountered cases of asylum seekers who insisted that they had handed their written submissions to the officer on duty well before the time limit established by law for the filing of an appeal had expired. However, there was no record of their appeal being delivered to office of the Appeals Board. In other cases appeals were delivered late, through no fault of the appellant. Such appeals are rejected outright, with little or no consideration for the huge difficulties faced by detained asylum seekers to deliver their appeal within the time limit prescribed by law.

This situation is a matter of grave concern, which we believe needs to be rectified as soon as possible.

It should be stated that, in our view, it is unfair to burden the detaining authorities with the responsibility of ensuring that appeals are delivered on time, particularly in view of their limited resources. NGOs too, with their even more limited resources, cannot be present in the centres all the time and they are therefore cannot be expected to assume this responsibility.

On the other hand, it is clear that failure to hand in an appeal on time could have extremely negative consequences for the asylum seeker concerned. It is therefore fundamental that a system is set up which places asylum seekers in a position to ensure that their appeals are handed in on time.

(v) Procedure followed to hear and determine appeals

The Refugees Appeals Board (Procedures) Regulations, 2001 (LN 252 of 2001) state that the board will hold an oral hearing 'where appropriate'.

As was pointed out earlier however, in actual fact, as far as we could verify, since it started functioning in October 2001 the board has only held two oral hearings. To our knowledge, only one negative recommendation reached by the Refugee Commissioner has been overturned. When appeals are rejected no reasons are given.

This does not mean the appeal procedures are necessarily flawed, however the fact that

they are shrouded in secrecy does little to inspire asylum seekers' confidence in them.

Moreover, this method of examining asylum claims, coupled with the fact that no reasons were given for the rejection of every single appeal that has been filed to date, raises serious questions about the adequacy of the appeal procedure and whether or not each case is indeed being thoroughly reviewed.

Since the decision of the Refugee Appeals Board is final and binding and no appeal may be made from such decision to any court of law, greater transparency is necessary, in order to ensure that the appellant's rights are safeguarded.

Otherwise, given this reality, there is very little that the staff in detention centres can do to "seek to promote among detained immigrants a degree of confidence in the... legal process of their application for asylum"⁴⁰.

(vi) Scope of humanitarian protection

There is widespread recognition of the fact that there exists a category of persons who, though falling outside the scope of the legal definition of the term 'refugee', are still in need of protection.

In fact, the Refugees Act, 2000, recognising this reality, allows for the granting of humanitarian protection to people who, in the opinion of the Commissioner, cannot return safely to their country. The scope of this form of protection is however not defined in the said Act, which leaves the granting of such protection totally within the discretion of the Refugee Commissioner.

So far this form of protection has been extended only to people coming from countries torn apart by violent conflict or where repatriation is a practical impossibility. At various times during the past three years this form of protection has been granted to people from Somalia, Liberia, Ivory Coast, and Congo.

Since the UNHCR recommendation of January 2004 regarding rejected asylum seekers from Eritrea, this form of protection has also been granted to asylum seekers from this country. However it is not normally granted to others who would face serious violations of their human rights if they were to be returned home or who otherwise need protection from forced return on humanitarian grounds.

It has long been clear that there are other categories of asylum seekers, i.e. people in search of protection, who are in need of protection and should not be returned to their country. In fact the Policy Document makes reference to these people in the section on 'Repatriation of Irregular Immigrants', stating that:

"Irregular immigrants who are not eligible for refugee status or humanitarian protection status shall be required to leave Malta. However... forced removal will only take place so long as there is no well-founded fear that any deportee moved faces serious danger to his life or liberty, or be subjected to persecution on reaching his destination."

Examples of such people would include for example deserters or draft evaders and other persons who would face a real risk of treatment contrary to Article 3 if returned to their country and Victims of trafficking, particularly in view of the increased risk of re-trafficking and reprisal.

There are also a number of people who need protection from forced return for compelling humanitarian reasons. Examples include:

⁴⁰ Page 11, Para 4 (Detention of asylum seekers)

- Persons who are suffering from serious medical conditions or disabilities for which they are receiving treatment in Malta, and which is not available in their country of origin. Examples of such cases would include: persons with a serious disability or parents with disabled children, who would have little or no possibility of living with dignity in their country of origin and persons already receiving treatment for HIV/AIDS, coming from countries where such treatment is unavailable and where withdrawal of such treatment would mean certain and swift death, particularly where such persons are solely responsible for one or more minor children;
- Persons who cannot be removed from Malta, as there is no country will accept them, due to *de jure* or *de facto* statelessness. This situation could also arise in cases where the country of nationality refuses or fails to issue the necessary travel documents to allow repatriation.
- Vulnerable young adults, particularly those who arrive in Malta as minors, unaccompanied by any members of their immediate family, at least until they reach the age of 21.

For those people who are entitled to legal protection in terms of the ECHR, the only way for them to obtain this protection is to file a constitutional application. Especially if they are detained it is extremely difficult for them to obtain effective assistance to a lawyer to file the necessary action. Moreover in practice it will take years for the applicant to get any sort of decision on his status.

To date a number of individuals in this category have been allowed to remain in Malta at the discretion of the Minister. All of them have been allowed to remain in Malta for very different reasons, all of which may be loosely described as 'humanitarian reasons'. However they all have one thing in common: they are effectively deprived of any formal legal status, and they share a rightless existence on the fringes of our society.

This makes their life here very difficult and in practice implies that they must remain almost totally dependent on charity for their survival. Moreover they often experience serious difficulties when trying to access essential services, such as medical assistance or education.

In addition many of them have to live with the instability and uncertainty induced by the knowledge that their permit to remain in Malta may not be extended by the immigration authorities at the end of the current term. As a result the quality of life which such persons enjoy in Malta extremely poor and the protection offered is tenuous at best, even where Malta has a legal obligation to provide protection⁴¹.

The situation of these people would be vastly improved if their application for protection were to be examined in a single procedure, thus removing the necessity of applying to the courts for protection and ensuring that all in need of protection are able to effectively access the protection they need in a timely manner.

3.3 Recommendations

The asylum process is possibly the area where greatest investment is needed, in order to create the structures necessary to ensure that asylum seekers' rights are adequately protected.

JRS is convinced that unless such structures are set up, the Policy Document will remain little more than a wish list and the situation of asylum seekers will not improve in practice.

We therefore urge the government demonstrate its commitment to provide protection to all those who need it by ensuring that the necessary systems and structures are put in place as soon as possible.

⁴¹ These would include among others cases where the person concerned faces a real risk of treatment contrary to article 3 of the European Convention on Human Rights, or the Convention against Torture.

ACCESS TO PROCEDURES

JRS believes that there should be no restriction or limitation on an asylum seeker's right to apply for protection.

We re-affirm the fundamental importance of allowing every person, who is within the effective jurisdiction of the Maltese government and who claims to need protection, to apply for asylum. To fail to do so would be a breach of Malta's international obligations, and could have fatal consequences for the individual concerned.

INFORMATION PROVIDED TO ASYLUM SEEKERS

JRS recommends that the necessary structures are set up and manned by trained personnel in order to ensure that:

- From the outset, asylum seekers receive information about their rights and obligations, about the procedure that will be followed to examine and determine their application for refugee status, and the manner in which any information that they submit will be treated.
- Asylum seekers are provided with information about the progress of their applications throughout the procedures.
- Asylum seekers are provided with clear, practical instructions on how to exercise their rights.

We recommend that the authorities assign trained professionals, preferably social workers, to handle the cases of these persons on an individual basis. These professionals would be responsible for providing the necessary information to asylum seekers from the moment of their asylum application to the moment their application is determined, whatever the outcome. They would also be in a position to assist the asylum seeker to exercise his legal rights effectively.

ACCESS TO LEGAL AID

JRS calls upon the government to do all within its power to ensure that asylum seekers are granted access to legal assistance at appeal stage, as is their right.

In addition, JRS recommends that, rather than simply appointing lawyers to assist asylum seekers on an *ad hoc* basis, an effort is made to start setting up a structure/system, equipped with trained professionals, to provide legal aid to asylum seekers. This will guarantee continuity of service and the provision of quality assistance to asylum seekers within a reasonable time.

MECHANISM FOR FILING OF APPEALS

JRS recommends that specific provision is made for the filing of appeals by persons in detention, as the existing procedures do not provide adequate safeguards.

We suggest that if possible officers at the detention centres are authorised to receive appeals on behalf of the Refugee Appeals Board, so that the moment an appellant hands his appeal to the official on duty at the centre it is deemed to have been received by the Board. This would allow the applicant to ensure that his appeal is indeed filed and filed on time.

PROCEDURES FOLLOWED TO HEAR AND DETERMINE APPEALS

JRS believes that a greater degree of transparency must be introduced in the procedures for hearing and determining appeals. This in order to ensure that not only is justice done but it is also be seen to be done, and asylum seekers may have confidence in the procedures for the determination of their applications for protection.

We recommend that:

- The appellant and his legal advisor are always allowed to attend the Board sitting where the appellant's case is discussed.
- In those cases where there is new evidence or where it is otherwise deemed necessary,

the appellant is allowed to present evidence to the Refugee Appeals Board or to testify during the sitting.

- Where the appellant is not allowed to give further evidence, he should at least be allowed to make submissions regarding the points raised during the sitting, whether they are related to the facts of his case or to points of law.
- The decision of the Board states in some detail the reasons for the acceptance or rejection of the appeal, and indicates the sources of information, particularly regarding the country of origin, upon which such decision is based.

SCOPE OF HUMANITARIAN PROTECTION

JRS recommends that the scope of humanitarian protection is broadened to include people who would face serious violations of their human rights in terms of the various human rights instruments to which Malta a party, such as the ECHR or the CAT, and people who cannot be returned for compelling humanitarian reasons.

We also recommend the implementation of a single procedure to examine all applications for protection. This would imply that the Office of the Refugee Commissioner examines applications not only in the light of the provisions of the Refugees Act, but also in the light of all other applicable human rights instruments. This would eliminate the necessity of resorting to lengthy and costly proceedings, and would go a long way to ensuring that all in need of protection are identified and granted the protection they need.