

## COMMENTS ON BILL TO AMEND REFUGEES ACT, 2000

### Introduction

Since the enactment of the Refugees Act, 2000, much work has been undertaken to establish fair and efficient procedures for the determination of applications for refugee status. The Office of the Refugee Commissioner, established in 2002, has had to deal with a huge caseload from the very first days of its operation, yet has always strived to determine applications as thoroughly and efficiently as possible and to achieve the highest possible standards with very limited resources.

Moreover, services were put in place, to provide for the basic needs of persons seeking protection in Malta, in particularly difficult circumstances resulting from the sharp increase in the number of undocumented migrants arriving in Malta by boat.

While the government's efforts to deal with the challenges posed by this new phenomenon are acknowledged and the difficulties faced appreciated, there are a number of issues of concern which need to be addressed in order to ensure that the rights of asylum seekers and persons granted protection in Malta are safeguarded and their dignity respected.

Many are a direct result of the fact that the system envisaged by the original Refugees Act was essentially geared towards individual asylum seekers arriving at ports or applying for refugee status once they managed to enter Malta<sup>1</sup>. This is perfectly understandable as, at the time when the Act was drafted, no one would have imagined that we would be receiving an average of 1600 immigrants each year most of whom would apply for asylum.

As a consequence, the Act does not adequately address the current situation, where asylum seekers arrive in large numbers and are immediately placed in detention, with all the restrictions that this imposes, including lack of access to information, problems obtaining documents, inability to communicate with the outside world, and difficulty filing acts on time.

Over time a number of systems and structures were put in place to complement the basic structures established by law and meet the often overwhelming and drastically

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<sup>1</sup> This is clearly indicated by article 8(1), among others.

changed needs on the ground. However, they were often implemented in an *ad hoc* and somewhat piecemeal manner, with the consequence that certain gaps in protection were created that were never adequately addressed.

It is clear that the creation of structures and procedures able to guarantee that all who need protection are recognised and their rights respected is not an end that can realistically be achieved overnight. It is an ongoing process, which requires a firm commitment towards constant evaluation of existing structures and procedures, by the authorities concerned, including the decision-making bodies involved in status determination, and civil society.

The process for the amendment of the Refugees Act, in order to bring it in line with the requirements of the relevant EU Directives, is a good time to evaluate the lessons learnt and make the changes necessary in the light of the changed reality on the ground. Simply transposing the provisions of the Directives into national law is not enough to achieve this goal. It is fundamental that, at this crucial juncture, a serious effort is made to identify gaps in protection and issues that need to be addressed in order to create a refugee protection regime that is relevant to our national context and capable of providing effective protection to those who need it.

In addition to the need to address shortcomings in the existing legal framework regulating the recognition and protection of refugees, it is also necessary to create the policies and structures required to ensure that the law can be effectively implemented in practice<sup>2</sup>. This will ensure that the good work that has been done to date is consolidated and existing structures are strengthened in order to ensure that all who need protection are able to obtain it.

While we understand that there is pressure to transpose the Directive within the shortest possible time, we believe that there needs to be more dialogue with all stakeholders concerned, in order to ensure that the amendments to the Act effectively address existing shortcomings and meet the needs of the asylum seeking population.

### **Outline of most important issues that need to be addressed**

The following is an outline of some of the most significant shortcomings of the existing system that need to be addressed in order to achieve this end:

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<sup>2</sup> For example, although the law makes no distinction between different categories of asylum seekers, in practice there are significant differences between the treatment received by asylum seekers who are never detained and those who are detained. The former would only rarely be granted a per diem allowance or accommodation in Open Centres; as a rule, they would be expected to find and fund their own accommodation and to support themselves throughout the duration of the asylum procedure.

- The lack of any sort of provision for the needs of certain categories of asylum seekers, including asylum seekers who are never detained as well as the most vulnerable categories of asylum seekers;
- The lack of clear procedural rules regulating refugee status determination procedures;
- The lack of any legal rights and significantly less benefits than the regime envisaged by the QD for persons benefiting from subsidiary protection.

Given the manner in which Bill containing the amendments to the Refugees Act was drafted, it is unclear how and to what extent these issues will be addressed by the new Act.

### **JRS Malta's comments on the Bill**

The proposed Bill purports to transpose the Qualification Directive and the Procedures Directive. These two Directives are part of a set of four directives intended to create uniform procedures and standards for the reception of asylum seekers and the recognition and protection of refugees and persons in need of international protection across the EU. In actual fact, however, the Bill transposes only very few of the provisions of the Directives, whether wholly or in part, simply providing an extremely basic legal framework for the recognition of refugee status and subsidiary protection.

In line with the provisions of the Qualification Directive, the Bill does make some improvements to the protection regime previously in place, considerably broadening the category of people who qualify for subsidiary protection<sup>3</sup>. In terms of the Bill, persons who would face a real risk of violations of their right to life (art 2 of the ECHR), or torture or cruel, inhuman and degrading treatment or punishment (Art 3 of the ECHR) if they were to be returned home could qualify for such protection. As a rule, these categories of persons were not afforded any protection in terms of the Refugees Act. Moreover, it is extremely positive that the Bill, as opposed to the Directive, provides broad protection to persons whose life or safety is at risk due to indiscriminate violence in situations of national or international armed conflicts.

However, the Bill also considerably downgrades the protection previously provided to this category of persons, by making a grant of subsidiary protection by the Minister discretionary, as opposed to the mandatory protection previously provided by the Act.

In addition, the Bill, as proposed, raises other serious concerns, as it not only fails to incorporate most, if not all, of the legal guarantees and basic rights contained in the

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<sup>3</sup> Although the Refugees Act, 2000 defined humanitarian protection quite broadly, linking it to the possibility of safe return, in practice this form of protection was provided almost exclusively to persons fleeing indiscriminate violence as a result of armed conflict and to Eritrean rejected asylum seekers, in terms of a UNHCR recommendation of January 2004.

Directives, but it also removes most of the protection previously provided by the Refugees Act.

For example, asylum seekers are no longer provided with explicit protection from *refoulement* pending the final outcome of their asylum application; both the procedural guarantees previously incorporated in the Refugees Act as well as the provisions providing for the protection of the rights of asylum seekers and persons granted protection have been removed and have not been replaced by the corresponding provisions in the Qualification and Procedures Directives; moreover, there is no longer any provision for the protection of unaccompanied minor asylum seekers, which clearly falls short of the requirements of the Reception, Qualification and Procedures Directives.

In addition, not all of the articles transposed by virtue of the Bill were transposed correctly and/or completely.

Some of these are clear instances of incorrect copying; however, the mistakes significantly change the meaning of the provisions concerned and therefore need to be amended.

For example, the definition of “safe country of origin” as transposed implies that only stateless persons, not nationals, may rebut the presumption that a particular country is safe by submitting serious grounds for considering the country not to be a safe country of origin. Similarly, in relation to the “first country of asylum” concept, the phrase “subject to re-admissions to that country” seems to apply only to the cases defined in paragraph (b), when, in terms of the Directive, it applies to both (a) and (b).

In other cases, clauses have been added and parts of provisions omitted, thereby changing the scope of the provisions of the Directive to a greater or lesser extent.

For example, the definition of “unaccompanied minor” simply states that this term refers to a person below the age of 18, who arrives in Malta unaccompanied or is left in Malta unaccompanied by an adult responsible for him. All of the EU Directives on asylum specify that the adult concerned could be responsible for the minor either by law or by custom; this is particularly important in the case of refugee/asylum seeking children, given that often they are accompanied by adult relatives who have not been formally entrusted with their care and custody. In addition, it should be noted that the definition of the same term contained in the Reception of Asylum Seekers (Minimum Standards) Regulations is identical to that in the Reception, Procedures and Qualification Directives.

Also, Article 20 of the Procedures Directive provides for those cases where an application may be considered to be implicitly abandoned or withdrawn. In addition to the fact that the Bill has introduced the concept of implicit withdrawal or abandonment

only in the case of appeals, it fails to include the procedural guarantees provided by the Directive in cases where this concept is applied, making national law considerably more prejudicial than the Directive. These procedural guarantees include an entitlement to request a re-opening of a case which has been discontinued, except in cases of subsequent applications (MS may establish a maximum time limit for re-opening) and protection from *refoulement* in spite of the fact that the case has been discontinued.

The guarantees provided by the Procedures Directive were also omitted in relation to the concept of “safe third country”. The Directive requires that national legislation lays down rules on the connection between the asylum seeker and the country concerned on the basis of which it would be reasonable to expect the asylum seeker to go there, the methodology to be used when applying this concept to a particular case, and the manner in which the asylum seeker concerned can challenge a decision to apply this concept on the grounds that he/she would be subjected to torture, or cruel, inhuman and degrading treatment or punishment.

Another example of less favourable provisions as a result of an incorrect or incomplete transposition is article 7A of the Bill which deals with subsequent applications. This form of application is covered by articles 32-34 of the Procedures Directive. The Bill provides for the possibility of a subsequent application after a final decision has been taken on his/her initial application. In addition to establishing a totally unrealistic time-frame of 15 days from the day on which the applicant obtained such information for the presentation of a subsequent application, the law also provides that “the examination may be conducted on the sole basis of written submissions”. The Directive clearly establishes that the only procedure that can be conducted solely on the basis of written submissions, in the context of a subsequent application, is the preliminary examination to determine whether there are grounds to allow the said application, and not the subsequent application itself. Moreover, it specifically requires that, where a subsequent application is to be allowed, it should be subject to the rules of procedure established by the Directive for asylum application (Chapter 2).

In addition, from the wording of the Bill, it would seem that a subsequent application is only possible in cases where new elements which could make the applicant qualify for refugee status, not for subsidiary protection, arise. This is particularly worrying, in view of the fact that most asylum seekers in Malta are granted this form of protection not refugee status. Moreover, subsidiary protection has been granted in a significant number of cases following a review of the initial decisions to refuse this form of protection. In view of this, it is advisable that the Act formalise this procedure in order to ensure that all who are entitled to protection are indeed able to obtain it.

Over and above, the provisions relating to actors of persecution, actors of protection and internal protection are partly transposed and included in the section of the Bill that deals with subsidiary protection. This implies that these concepts do not apply to the

determination of applications for refugee status for the purposes of national law, as opposed to the Qualification Directive which applies them across the board.

Finally, there are a number of minor errors, which need to be corrected. These include: the reference to article "13" in the definition of the term "refugee" in article 2 of the Act, should read article "12", as article 13 refers not to exclusion but to *refoulement*. The words "or is a person who instigates or otherwise participates in the commission of such crimes" may be deleted from article 16(1)(a) of the Bill, as these same words are repeated in the proviso at the end of paragraph (d) of the same article. Article 19(1) refers to "applications for international protection", which are nowhere defined in the Act. The latter defines "applications for asylum" and adopts a narrower definition than that found in the Qualification Directive for "applications for international protection", as the former includes just applications for refugee status in terms of the 1951 Convention and the latter includes applications for refugee status and subsidiary protection in terms of the Directive.

#### *Transposition through subsidiary legislation*

It is probable that the rest of the provisions of the said directives will be transposed through subsidiary legislation, as has been the case with most other EU Directives to date.

Subsidiary legislation, which is legislation enacted by the executive branch of the state, has come to be regarded as necessary, not to say indispensable, in today's world. Given the complexities of modern government, it has now become common for parliament to enact legislation establishing the parameters within which government is authorised to enact more detailed regulations that allow it to enforce/implement the law in practice.

However, it is clear that matters as fundamental as the protection of basic rights and the provision of sufficient procedural guarantees, essential to ensure that procedures are not only efficient but also fair, cannot and should not be regulated by subsidiary legislation. They are not ancillary matters but an essential part of any legal framework regulating the provision of protection, the foundation upon which any procedure for the recognition and protection of refugees should be constructed. If anything, subsidiary legislation should be used to regulate the manner in which these rights are implemented in practice.

It is a matter of great concern to JRS that legislation on such matters is being left totally in the hands of the government, using a method which, by its very nature, is subject to far less parliamentary and public scrutiny.

#### **Recommendations for improvements to the current refugee protection regime**

From our experience of working with asylum seekers and persons granted protection in Malta, we believe it is essential that any legislation in place to regulate the recognition and protection of refugees provides the following basic guarantees:

*Protection of asylum seekers*

**Guarantees of protection for asylum seekers pending the final outcome of their asylum application, including:**

*Protection from refoulement*

- **An absolute prohibition on *refoulement* until a final decision is taken on an asylum application.**

*Access to basic socio-economic rights*

- **Effective access to all the basic socio-economic rights contained in the Reception Directive, including the right to medical care<sup>4</sup>, for all asylum seekers<sup>5</sup>.**

*Protection of unaccompanied minors*

- **Protection of unaccompanied minor asylum seekers, as defined by the relevant Directives, by ensuring appropriate care arrangements and good quality representation that is subject to regular assessments<sup>6</sup>.**

*Protection of vulnerable asylum seekers*

- **Provision of protection and specialised assistance to other categories of vulnerable asylum seekers, in line with the provisions of the Reception Directive<sup>7</sup>.**

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<sup>4</sup> From the text of the Bill it appears that asylum seekers might not be guaranteed access to medical treatment. Article 10 of the Refugees Act, 2000, which granted asylum seekers free access to state medical care and services, was removed by the Bill and the Reception of Asylum Seekers (Minimum Standards) Regulations does not provide for access to medical care for asylum seekers, as the relevant article of the Reception Directive (Article 15) was not transposed into the said regulations.

<sup>5</sup> It is important that the benefits of the Directive are provided to all asylum seekers; at present, in practice, some asylum seekers (i.e. those who do not form part of the category loosely described as “boat-people”) are provided with little or nothing by way of reception conditions.

In addition, in order to be able to effectively avail themselves of their rights, asylum seekers need to be provided with information about these rights and how to access them, in line with the requirements of Article 5 of the Reception Directive.

Moreover, it is essential that, the requirements of the Reception Directive regarding the withdrawal and/or reduction of reception conditions and for appeals from such decisions are respected in practice.

<sup>6</sup> The Reception of Asylum Seekers (Minimum Standards) Regulations fails to transpose most of those parts of Article 19 of the Reception Directive, which regulate these matters. At the time the Directive was transposed into national legislation, the care and representation of unaccompanied minor asylum seekers was regulated by Article 12 of the Act, however this will be removed by the Bill.

<sup>7</sup> Article 18(2) of the Reception Directive obliges Member States to ensure access to rehabilitation services for minors who have been subjected to any form of neglect, abuse, exploitation, torture or cruel, inhuman and

### *Adequate procedural guarantees*

Clearly established procedural rules that provide adequate guarantees of a fair and impartial hearing, which should include rules regarding:

#### *Information*

- **Timely provision of information to asylum seekers<sup>8</sup>, in order to ensure that asylum seekers are provided with information regarding the procedure to be followed and of their rights and obligations during the procedure and the possible consequences of not complying with such obligations, in a language they understand from as early as possible in the asylum procedure<sup>9</sup>, in line with the requirements of the Procedures Directive.**

#### *Access to procedure – time limits on applications*

- **Realistic time-limits on submission of applications, whether they are initial, appellate or subsequent applications, in view of the particular difficulties faced by asylum seekers, whether they are in detention or on the community. This implies that:**

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degrading treatment or who have suffered as a result of armed conflicts, through provision of appropriate mental health care and qualified counselling. It also provides in Article 20 that persons who have been subjected to torture, rape or other serious acts of violence should receive the necessary treatment of damages caused by these acts. These provisions have not yet been transposed into national legislation and in practice assessment of vulnerability is linked almost exclusively to early release from detention.

<sup>8</sup> Section 8 of the Refugees Act, 2000, which will be removed by the Bill, required the immigration officer coming into contact with an asylum seeker, to inform the asylum seeker of his/her rights. This system was clearly intended to deal with a situation where individual asylum seekers arriving at a port of entry or otherwise apprehended by the immigration authorities request asylum, not with a situation where large groups of immigrants arrive in an irregular manner and only apply for asylum after they have been placed in detention. In such circumstances immigration officers are not best placed to provide information to asylum seekers. A more appropriate authority – possibly the Office of the Refugee Commissioner – should be designated, in order to ensure that asylum seekers are in fact provided with the information to which they are entitled.

<sup>9</sup> At present asylum seekers are only formally informed of their rights immediately before their interview, prior to filling the asylum application.

For asylum seekers in the community this system works reasonably well, as, for this category of asylum applicants, the procedure starts at the moment when they complete the application for refugee status with the assistance of a caseworker and an interpreter if necessary.

However, for detained asylum seekers, the procedure starts much earlier, when they fill out a form called a Preliminary Questionnaire, shortly after their arrival in Malta. This form is supposedly a “request to register a desire to apply for refugee status” however, in practice, the information required is extremely detailed and includes details of arrests or time spent in detention, details regarding military service, information regarding travel routes and reasons for applying for asylum. This form is practically identical to the application form that asylum seekers fill out immediately prior to their interview, with the assistance of an interpreter and a case worker.

As a rule, detained asylum seekers fill this form without assistance, apart from that provided by fellow-detainees, and before they are provided with any information about the asylum procedure. Yet, information provided by asylum seekers in the PQ form is compared to that provided at other stages of the procedure in order to assess credibility.

- (a) **Time-limits should be longer than those currently envisaged, i.e. 2 months for initial applications and 15 days for appeals and subsequent applications, as they are unrealistic in the circumstances;**
- (b) **The adjudicating authority should always have the power to waive the time-limit, particularly when it is clear that the individual concerned did not submit the application within the stipulated time-limit for valid reasons.**

*Single uniform procedure – use of Preliminary Questionnaire*

- **The creation of a single uniform procedure for all categories of asylum applications<sup>10</sup>, where:**
  - (a) **If the PQ form is used it is nothing more than a simple registration procedure aimed at collecting basic bio-data; and**
  - (b) **The application form is filled in with the assistance of a caseworker and, if necessary, an interpreter, after the necessary information has been provided, preferably before the date of the interview.**

*Legal assistance*

- **Facilitated access to legal assistance<sup>11</sup> at all stages of the asylum procedure, which implies that:**

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<sup>10</sup> The procedure followed in cases where asylum seekers are detained is slightly different to that followed in other cases. For detained asylum seekers, the asylum procedure has an additional step: the PQ form, which is a system of registration of asylum applications.

It is clear that this system has certain advantages in the local context, where asylum seekers arrive irregularly in large numbers and are immediately detained pending removal from national territory, as it provides asylum applicants with protection from forced return while allowing the Office of Refugee Commissioner sufficient time to schedule interviews and make the necessary preparations.

However it is equally clear that the way in which the procedure is being applied today impacts negatively on the cases of detained asylum seekers, who already experience significant difficulties because they are detained.

It is essential that the procedure followed is both uniform and fair, and, if anything, seeks to redress the disadvantage faced by detained asylum seekers rather than subjecting their asylum application to additional hurdles.

<sup>11</sup> Although in terms of the Refugees Act (Article 8) asylum seekers are entitled to legal assistance from the moment they apply for refugee status, they are only provided with free legal assistance at appeal stage of the asylum procedure. If they want legal assistance or advice before this point in the asylum procedure or for any other matter, e.g. to challenge their detention, they must obtain the services of a private or NGO lawyer.

In practice, it is extremely difficult for asylum seekers to obtain the assistance of a private lawyer, particularly if they are in detention. This is due to a number of factors including the fact that asylum seekers in detention are extremely isolated and it is very hard for them to obtain information about who can provide legal services as well as the fact that, more often than not, they lack of sufficient funds to pay a private lawyer. The only legal services they are able to obtain, if at all, are those provided by NGOs.

- (a) The term legal assistance is defined as widely as possible<sup>12</sup>, allowing asylum seekers to be assisted by NGO personnel and other persons training in refugee law, as it is very hard for asylum seekers to obtain assistance from qualified lawyers particularly if they are detained;
- (b) The basic requirements necessary for persons to be allowed/accredited to provide such services are regulated by law, in order to ensure that asylum seekers' rights are protected, while guaranteeing access to legal assistance;
- (c) Asylum seekers are provided with information about their right to legal assistance and a list of organizations and individuals providing a service from the moment they express a desire to apply for protection;
- (d) Asylum seekers should not be questioned about, nor should any inference be drawn from, their choice to avail themselves of their legal right to seek legal assistance<sup>13</sup>.

*UNHCR*

- Access to UNHCR and UNHCR access to asylum seekers from the initial stages of the proceedings.

*Interview*

- The right to a personal interview, at all stages of the asylum procedure<sup>14</sup>.

*Gender-sensitive approach*

- The right of female asylum seekers to request to be interviewed by a female interviewer and, if possible, to be assisted by a female interpreter<sup>15</sup>.

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<sup>12</sup> In practice, NGOs are extremely limited and often use the services of non-lawyers, e.g. law students, with basic training in refugee law, as they cannot afford to employ or otherwise pay sufficient numbers of lawyers to meet all the demands for assistance. It is also more difficult to recruit trained lawyers to work on a voluntary basis.

The procedural guidelines issued by the Office of the Refugee Commissioner in 1<sup>st</sup> March 2007 state that asylum seekers only have a right to be assisted by a "state-recognised lawyer", which presumably means a lawyer with a warrant to practice in the superior courts. In practice, it is not a prerequisite for the staff at the Office of the Refugee Commissioner to have a background in law. Representatives of NGOs versed in asylum matters may be granted permission to assist asylum seekers, subject to certain restrictions.

There have been cases where NGO workers were not informed of the date on which the interview was to be held although the Office of the Refugee Commissioner was duly notified of their desire to be present.

<sup>13</sup> On occasion the interviewer has asked the asylum seeker why they chose to avail themselves of legal assistance. This is a matter of concern as, aside from the fact that no one should be questioned about choosing to exercise their rights, it could also give the impression that choosing to be assisted by a lawyer is somewhat negatively viewed.

<sup>14</sup> Under the present system, the Office of the Refugee Commissioner conducts a detailed personal interview with each asylum seeker, however the Refugee Appeals Board only conducts interviews on rare occasions.

- **RefCom’s duty to provide good quality interpretation from the initial stages of the asylum procedure, which implies that:**
  - (a) The basic requirements<sup>16</sup> for persons to provide such services are regulated by law and the training/accreditation programmes necessary to ensure professional service are established;**
  - (b) Only interpreters who have the necessary language skills and who have received at least basic professional training/accreditation are employed/contracted by RefCom<sup>17</sup>;**
  - (c) No information other than the most basic bio-data for registration purposes is collected from asylum seekers without the assistance of a suitably qualified interpreter.**
  
- **Asylum seekers’ right to refuse the services of the interpreter provided by RefCom<sup>18</sup>, which implies that:**
  - (a) Asylum seekers are given the possibility to consent freely to the use of the interpreter provided<sup>19</sup>;**
  - (b) Where there is a valid objection to the use of the interpreter provided by RefCom, the asylum seeker would be allowed to provide their own interpreter; if necessary this could be subject to their agreeing to sign a waiver discharging RefCom from its responsibility to provide the service of a qualified interpreter.**

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<sup>15</sup> In the present circumstances this will probably not be possible, given the lack of female interpreters, however, if and when possible they should be able to request it.

<sup>16</sup> As a basic minimum these should include objectively assessed linguistic competence, basic knowledge of ethical principles and basic rules of legal interpreting.

<sup>17</sup> Many of the interpreters currently used have no training in interpreting in a legal context and many do not speak English particularly fluently. This could naturally affect the quality of the service provided and significantly influence the outcome of the case, as it could lead to a distortion of the asylum seekers’ testimony.

<sup>18</sup> The fact that most interpreters are recruited from the immigrant community, which is a small, closed community where everyone knows each other, could give rise to conflicts of interest and heightened fears regarding breaches of confidentiality. Unless asylum seekers feel comfortable disclosing certain information during their interview, the aim of the entire procedure is defeated. It is therefore fundamental that asylum seekers are given the opportunity to refuse the services of the interpreter provided, where there is good reason for doing so, provided they can bring their own interpreter.

<sup>19</sup> At present asylum seekers are asked whether they consent to the use of a particular interpreter at the start of the interview, in the presence of the said interpreter who often has to translate. This could pressure the asylum seeker concerned to consent, in spite of possible reservations which might hinder full disclosure of relevant facts. Moreover, in the past, a refusal to consent to the use of the interpreter selected by RefCom led to considerable delays in the determination of the individual’s asylum claim as well considerable pressure being exerted on the asylum seeker concerned to consent to the use of the interpreter selected by RefCom.

*Integrity of interview record*

- **The assurances necessary to guarantee the integrity of the interview record, which is central to the status determination procedure as all decisions taken will be based on the said record. This necessarily implies that, in addition to good quality interpretation, asylum seekers are allowed to:**
  - (a) **Approve the contents of the interview record<sup>20</sup>;**
  - (b) **Listen to tape-recording of the interview, without hindrance or unnecessary limitations, in the presence of his/her legal advisor and the interpreter of his/her choice<sup>21</sup>.**

*Access to information in case file*

- **Asylum seekers' access to the information contained in their case file<sup>22</sup>, which is necessary both to ensure that their claim is adequately substantiated and to prepare submissions in support of their claim. This must include the possibility of prompt and effective access to the PQ form, the full transcript of the interview record and any evidence obtained from sources other than the asylum seeker him/herself. This information should be readily available to both the asylum seeker and his/her legal representative at all stages of the asylum procedure and even after, if necessary, without the need to provide a justification.**

*Decisions*

- **The form and content of decisions issued by adjudicating authorities, which, as a basic minimum, should be properly motivated, including all the reasons in law and in fact for the said decision<sup>23</sup>.**

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<sup>20</sup> At present, as a general rule, asylum seekers are not provided with the possibility to review the record of their interview. They may request a copy of the interview notes, but they are not always made aware of this possibility. Moreover, this does not really constitute a right to review the interview record and make the necessary amendments or clarifications.

<sup>21</sup> The possibility to listen to the tape recording of the interview has been granted only in very few cases and is often subject to a number of restrictions including: the possibility to bring only one person – either one's legal advisor or an interpreter, or the presence of a member of RefCom staff who oversees the procedure and refuses to allow either rewinding or pausing in order to take notes.

<sup>22</sup> The information in an asylum seeker's file is currently neither completely nor easily available to the asylum seeker concerned or his/her legal representative. It is however provided to the Refugee Appeals Board.

<sup>23</sup> Decisions issued by the Office of the Refugee Commission usually contain an outline of the basic reasons for the decision, however the asylum seeker and his/her legal representative are not given access to the full decision, which is however passed on to the Appeals Board. The decisions of the appellate bodies within the RSD procedures are usually insufficiently motivated, containing at most a very brief mention of the reasons for which the decision was taken.

- **The adjudicators' obligation to inform the asylum seeker of the time-span within which a decision will be taken, and to give reasons for any delay.**

*Appeals*

- **The manner in which appeals should be filed and adequate guarantees for detained asylum seekers to be able to file appeals on time<sup>24</sup>.**
- **The conduct of procedures at appeals stage for the determination of applications for refugee status, which should guarantee a full review of the decision taken by RefCom. The said rules should guarantee that:**
  - (a) **Asylum seekers and their legal advisors should have access to all the documentation and information available to the Appeals Board, including the full reasons for the rejection of the asylum application<sup>25</sup>;**
  - (b) **Board hearings are held in the presence of the asylum seeker concerned and his/her legal representative/s<sup>26</sup>;**
  - (c) **Where the Board deems that a hearing in the presence of the appellant is not required, they must give the appellant reasons in writing for their decision, which he/she should be given the opportunity to contest<sup>27</sup>;**
  - (d) **The asylum seeker and/or his/her lawyer are always afforded the opportunity to make detailed submissions before the Board takes a decision on the case<sup>28</sup>;**

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<sup>24</sup> Asylum seekers in detention are not given clear instructions on how to file appeals, nor are they effectively able to ensure that their appeal reaches the Refugee Appeals Board within the 2 week time limit stipulated by law. As they are detained they have no choice but to hand their application to DS or NGO personnel, who must therefore assume responsibility for the delivery of the said documents. On more than one occasion, asylum seekers were denied their right to appeal because appeal applications were not delivered on time to the Refugee Appeals Board by the persons to whom asylum seekers handed them for delivery. The Appeals Board has always refused to consider appeals handed in late, supposedly to prevent abuse, even where the person who delivered the appeals explained that the delay was in no way attributable to the asylum seeker concerned. This effectively means that, not only are asylum seekers denied the right to a review of the initial decision to reject their application, but also that asylum seekers are effectively condemned to a further 6 months in detention.

<sup>25</sup> As was previously explained, asylum seekers and their legal representatives are not given the full RefCom report on their case, nor are they given the full interview record or any documentation/information obtained from sources other than the asylum seekers him/herself. They are, however, all available to the Appeals Board.

<sup>26</sup> Asylum seekers are rarely present for the Board sitting regarding their case – in most cases the board decides cases on the basis of the information contained in the file and the written submissions prepared by the appellant's lawyer, which are always compared on the basis of far less information than that available to the Board.

<sup>27</sup> Hearings in the presence of the appellant are only held in very few cases, in fact it is true to say that, as a rule, appellants are not present for hearings held at appeal stage.

<sup>28</sup> If an asylum seeker is not represented he/she is not usually provided the possibility to make detailed submissions – the case is simply decided on the basis of the information contained in the file.

- (e) **The procedural rules are identical for all lawyers working within the said procedure<sup>29</sup>.**

*Confidentiality and impartiality*

- **Guarantees of confidentiality of all information relating to asylum applications at all stages of the procedure, including the fact that a particular individual has applied for asylum<sup>30</sup>, and guarantees of impartiality of decision-making authorities and all involved in the asylum determination procedures<sup>31</sup>.**

*Subsidiary protection*

**With specific reference to applications for subsidiary protection, we recommend that the new Act provides:**

*Mandatory protection*

- **An obligation to grant subsidiary protection in cases where the applicant is found to fulfil the criteria for such protection<sup>32</sup>.**

*Subsidiary protection as a stand-alone form of protection*

- **The possibility to apply for subsidiary protection only, in case where it is clear that an asylum seeker does not qualify for refugee status<sup>33</sup>.**

*Subsequent applications for subsidiary protection*

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<sup>29</sup> There seems to exist some discrepancy between private/NGO and legal aid lawyers: in practice, legal aid lawyers are allowed considerably more freedom than private/NGO lawyers assisting appellants..

<sup>30</sup> This is possibly the single most important protection, previously guaranteed by Article 8 of the Refugees Act, which has been removed by the Bill.

<sup>31</sup> This implies that persons involved in status determination proceedings should not be involved in other activities that create a possible conflict of interest, nor publicly express opinions on matters relating directly to their work.

<sup>32</sup> The wording of Article 16 of the Act, as amended, seems to imply that subsidiary protection may only be granted on the basis of a recommendation by the Refugee Commissioner and that there is no obligation to grant such protection, even where the asylum seekers concerned fulfils the criteria to be granted such protection in terms of the Directive. It should be noted that, in terms of Article 18 of the Qualification Directive, Member States are obliged to grant protection to eligible persons.

<sup>33</sup> The Refugees Act, as amended, would seem to exclude this possibility, as it provides that this form of protection shall be provided to asylum seekers “whose application [for refugee status] has been dismissed” and stipulates moreover that “the decision concerning the granting of subsidiary protection shall be given in conjunction with the dismissal ruling relating to the application for refugee status”. To allow asylum seekers to apply exclusively for subsidiary protection could reduce the workload by avoiding the need to examine applications in the light of the refugee definition unnecessarily.

- **The possibility to make a subsequent application for subsidiary protection, in cases where new evidence is obtained or where there is a change in circumstances<sup>34</sup>.**

*Cessation*

- **That an individual decision is taken in cases of cessation of subsidiary protection and reasons are given for this decision<sup>35</sup>;**

*Exclusion*

- **That an individual eligible for subsidiary protection will only be excluded if the crimes committed are serious in nature<sup>36</sup>.**

*Rights of persons granted protection*

**Finally, it is essential that the rights of persons granted refugee status and subsidiary protection, as provided by the Qualification Directive, are listed in our national law regulating the recognition and protection of refugees.**

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<sup>34</sup> Again, this possibility would seem to be excluded by the provisions of the Act, as amended, as Article 16 links the decision regarding subsidiary protection to the dismissal ruling relating to the application for refugee status. Moreover Article 7A provides only for the possibility of making a subsequent application for asylum. In practice there have been a number of cases where humanitarian protection was granted after a request for reconsideration based on new evidence or other reasons. In order to ensure that all who need protection are granted the protection to which they are entitled the Act should guarantee the possibility of making subsequent applications for subsidiary protection.

<sup>35</sup> Article 20 of the Refugees Act, as amended, simply provides that subsidiary protection shall cease if the Minister is satisfied, after consulting the Commissioner, that the circumstances that led to the granting of protection have ceased to exist or changed to such a degree that such protection is no longer required. It does not allow for the possibility of an appeal from such a decision nor does it stipulate that reasons shall be given for the decision in each individual case.

<sup>36</sup> Article 16(2) simply refers to crimes that would have been punishable by imprisonment had they been committed in Malta. This makes the threshold for exclusion unacceptably low – as some relatively minor crimes are subject to a penalty of imprisonment, and denial of protection to a person who could face serious harm if returned would in no way be proportionate to the end achieved by exclusion for a relatively minor offence.