Joint NGO input on Temporary Humanitarian Protection N

aditus foundation, African Media Association Malta, The Critical Institute, Foundation for Shelter and Support to Migrants, Gender Liberation, Integra Foundation, International Association for Refugees, JRS Malta, KOPIN, Malta Emigrants' Commission, Maltese-Serbian Community, MGRM, Migrant Women Association in Malta, Migrants' Network for Equality, Moroccan Community in Malta, Moviment Graffitti, Organisation for Friendship in Diversity, the People for Change Foundation, the Platform of Human Rights Organisations in Malta, SKOP, Solidarity with Migrants group, SOS Malta, Spark 15, Sudanese Community, Third Country National Support Network

Introduction 2

Background 2

Core Values 2

Comments 3

Introduction 3

Context and Background 3

The existing system: strengths and weaknesses 4

Considerations and applicable legal principles 6

Respect for human dignity and fundamental rights 6

Legal certainty 7

Distinguish between THP and THPN 7

Treatment of THPN holders 8

The 'how' is as important as the 'what' 8

Consider the bigger picture 8

Our recommendations 9

I. Temporary humanitarian protection (THP) 9

II. Current holders of THPN 9

III. Treatment of migrants awaiting return 9

IV. Pathways to regularisation for non-returnable migrants 9

Introduction

Background

This input is being provided in the context of news reported in national media regarding an on-going reform of the Temporary Humanitarian Protection N (THPN) regime.

Although we were not formally advised about this review, much less invited to present our input or otherwise contribute to the discussion, we nonetheless feel it is important to make our concerns and recommendations clear at this stage.

Core Values

Although we all operate within our individual mandates, focus on different aspects of migration/asylum and engage in a broad spectrum of activities, we are nonetheless united and committed to core values that we feel ought to underline Malta's approach to its migration and asylum management.

In this regard, we emphasise the following:

1. Respect, protection and fulfilment of the fundamental human rights of all persons should be at the heart of Malta's migration and asylum strategy. This approach should underline all legal norms, policy instruments and discourse on the matter, in accordance with Malta's relevant obligations and in line with a true spirit of solidarity;

2. With specific reference to failed asylum-seekers, or other persons who might be considered for eligibility to THPN, whilst international refugee law might not apply to their situations, we stress that fundamental human rights norms enshrined in other international and regional instruments remain applicable. In particular, we note the provisions of the:

    2.1. International Covenant on Civil and Political Rights;

    2.2. International Covenant on Economic, Social and Cultural Rights;

    2.3. Convention on the Rights of the Child;

    2.4. Convention on the Elimination of all Forms of Racial Discrimination;

    2.5. European Convention on Human Rights; and

    2.6. EU Charter of Fundamental Freedoms;

3. Effective strategies require on-going review and evaluation processes to be in-built within the same strategies. Particularly in a migration context that is so fluid, regular assessment exercises are necessary to ensure that strategies and implemented practices remain effective and relevant;

4. Vulnerable persons require particular attention in order to ensure their protection and also to guarantee a rehabilitation process that, where possible, leads to their self-reliance and independence;

5. Dialogue and cooperation with NGOs must be truly mainstreamed throughout Government policy-making and implementation, not merely as service-providers for those activities where Government is unwilling or unable to fulfil its obligations, but also as active participants in the formulation and review of legislation, policy and practice protocols.

Comments

Introduction

As we have often stated, in principle we welcome this review as it provides the opportunity for Malta to adopt a more consistent and holistic approach to the treatment of non-returnable migrants and to address a number of serious shortcomings in the existing system. We therefore look forward to the outcome of this review and – once again – reiterate our willingness to be actively involved by sharing our experiences and expertise, in a spirit of transparency and mutual trust.

The following is an outline of the issues, concerns and considerations that inform our recommendations for reviewing and reforming the existing system, listed at the end of the document.

This document applies to 'non-returnable' migrants who are migrants subject to return procedures, who cannot be returned for legal or logistical reasons, due to no fault of their own.

As will be clarified below, the document and our recommendations do not refer to persons who are in Malta in an irregular situation and who consistently attempt to by-pass or avoid immigration authorities. Our emphasis is on persons who, despite their irregular migration situation, comply with reporting and other obligations imposed on them by the immigration authorities, in terms of national law or other norms.

Context and Background

The status known as THPN (Temporary Humanitarian Protection New) was first introduced in 2010, by means of a policy decision of then Ministry for Home Affairs, implemented by the Office of the Refugee Commissioner.

The rules regulating the granting and withdrawal of this status and outlining the benefits attached were contained in a written document entitled 'Administrative Procedure for granting Temporary Humanitarian Protection', which was first published in 2008 and subsequently updated to include THPN.

This document applies to 'non-returnable' migrants who are migrants subject to return procedures, who cannot be returned for legal or logistical reasons, due to no fault of their own.

Although the name suggests otherwise, THPN was essentially conceived as a form of regularisation granted in cases where a *"former applicant for international protection cannot be returned to his/her country of origin due to legal or factual reasons and through no fault of his/her own"*.

According to the Guidelines published as an Annex to the document cited above, in order to qualify *"applicants for Temporary Humanitarian Protection would be required: to have lodged their application for international protection at least 4 years prior to the date of the submission of an application for Temporary Humanitarian Protection under the present procedure; and, to provide evidence that they have been staying in Malta"*.

In addition they would be required *"to provide relevant documentary evidence"* of *"their integration efforts and employment history in Malta"* when renewing their THPN certificate.

In terms of the said document, people granted THPN are granted:

- Permission to remain in Malta with freedom of movement and personal documents, including a one-year residence permit, which shall be renewable;
- Documents enabling him/her to travel, especially when serious humanitarian reasons arise that require his/her presence in another State, with due regard for considerations of national security or public order; and,
- Access to employment, subject to labour market considerations, as well as the provision of accommodation, services and benefits by the Agency for the Welfare of Asylum Seekers, in line with applicable administrative procedures regulating the Agency.

In 2012 the granting of THPN in new cases was suspended, so all asylum-seekers arriving in 2008 or after and whose asylum applications were rejected could no longer benefit from this status, even if they could not be returned through no fault of their own and had made significant integration efforts.

For those already benefiting from THPN, the status continued to be renewed annually upon production of the required documentation. According to statistics obtained from the Office of the Refugee Commissioner in February 2016, there were just under 1,000 people with THPN in 2015. A further 281 enjoyed Temporary Humanitarian Protection (THP).

In 2012 the granting of THPN in new cases was suspended, so all asylum-seekers arriving in 2008 or after and whose asylum applications were rejected could no longer benefit from this status, even if they could not be returned through no fault of their own and had made significant integration efforts.

In November 2016 beneficiaries of THPN applying for a renewal of their status, as per national policy, were informed that the procedure was being reviewed. Moreover, their THPN certificates were withdrawn by the Office of the Refugee Commissioner.

To our knowledge they were not given any other documentation to allow them to renew their residence and work permits, nor were they informed about what they would need to do to obtain a renewal of their documents. No timelines were provided as to when they could expect information or decisions on their statuses.

The people directly impacted by this review have all lived and worked in Malta for years – some for as long as 18 years and all for at least nine (since they arrived before 2007). Most are from West African countries, and among them are a number of families, including many with children born here in Malta.

All have had their asylum applications finally rejected at appeal stage and are still in Malta because the immigration authorities have not been able to return them, through no fault of their own. According to information available, in many cases this is due to the lack of diplomatic relations between Malta and the state of origin and/or lack of cooperation from national authorities in the migrants' state of origin.

As a result of the withdrawal of their documents all are facing problems in their daily lives, including difficulties obtaining medication, inability to cash cheques, and problems maintaining bank accounts. Concern has also been expressed by Maltese employers, wondering how this decision will impact their ability to retain these employees.

The existing system: strengths and weaknesses

The current system, though possibly far from perfect, brought a significant improvement in the lives of beneficiaries, as it gave them a measure of security and access to a number of basic rights and services. It also gave them the possibility to work legally with minimal bureaucratic requirements, whether as employed or self-employed persons, thus protecting them from the worst forms of exploitation and abuse.

We believe that it has also been more broadly beneficial for Malta, as it provided a path to regularisation for non-returnable migrants, promoted integration and encouraged migrants to improve their skills and to seek and maintain employment. A glance at the lives of THPN beneficiaries will reveal an impressive level of social integration, of people getting on with their lives in a stable and regular fashion, supporting the view that benefits of regularisation are not limited to the individuals involved but to the wider host community.

However, the current regime does have a number of shortcomings, namely:

- Since the THPN regime is not regulated by law, but by policy, beneficiaries do not enjoy any actual legal rights but mere concessions.
- The assessment criteria for the granting of THPN, which focus on integration efforts and employment status (e.g self-employed, recently unemployed), are unclear, leaving a broad margin of discretion in the hands of the decision-maker. The conditions for cessation, non-renewal or withdrawal of THPN are also unclear. The same applies to the criteria for granting THP.
- The procedural rules contained in the policy document regulating the granting of THP and THPN only serve to reinforce the discretionary nature of this status, as the said procedure lacks even the most basic guarantees – in particular, individuals do not have the right to appeal from a decision denying them THP/THPN.
- Families are not automatically granted THP/THPN as a whole unit. At times we have clients whose children have THP/THPN but the father and/or mother and/or siblings do not. We feel that this goes contrary to the best interests of the child, since the parent not benefitting from THP/THPN status remains in a precarious situation, at risk of being returned or of not being able to enjoy basic rights.
- The situation of children who turn 18 and of other family members who can no longer live within the family unit is not regulated.

In spite of the above, our greatest concerns regarding the THPN regime are not so much the criteria and procedures for inclusion, but rather the criteria for exclusion from this status and the implications of such exclusion.

THPN is only granted to persons arriving before 2008, a cut-off point that has no reasonable or justifiable basis. It is clearly arbitrary and ignores the fact that persons arriving after 2008 could be equally eligible for, and in need of THPN, as those who arrived before.

This effectively means that those migrants who arrived in and after 2008, whose asylum applications were rejected yet have not been returned, live in limbo with limited access to rights, services and benefits, and no possibility of redemption even in the long term. They are known to the authorities and are granted ‘tolerated stay’, which they regularly extend by ‘checking-in’ at the Police headquarters, but in practice can count on little more than that.

The net result is a wholly precarious existence that deeply affects all areas of their lives, places them at risk of poverty, and leaves them extremely vulnerable to exploitation and abuse.

Thus, for example:

- They can work in a quasi-legal manner. Employers wishing to employ them can apply for a 3-6 month work permit, using the procedure stipulated to employ asylum-seekers despite the fact that they are no longer asylum-seekers when they apply. Furthermore, the granted work permit clearly states that it will be revoked once their asylum application is finally determined. Importantly, the application procedure is lengthy and highly bureaucratic, and most employers are reluctant to undertake it. As unemployed rejected asylum seekers are not entitled to any form of financial support, this means that for most the only option is to take up irregular employment if they are to survive. In the vast majority of cases this means they will be denied even the most basic rights – such as the right to be paid the minimum wage, the right to payment for overtime, the possibility of taking paid leave or sick leave, the possibility of compensation if injured at work, and the right to

obtain redress for violations suffered due to the fact that they are working irregularly. This is of particular concern where families with children are involved.

- If they succeed in securing legal employment, pay taxes and NO contributions, they remain ineligible for non-contributory social support and are effectively excluded from contributory benefits and support due to the number of required contributions. This situation is clearly extremely unjust and amounts to institutionalised exploitation.

It is effectively creating a category of people who can be exploited at will, who are denied the protection that most of us take for granted, who are completely disenfranchised and who in practice have little or nothing to lose.

- They are entitled to 'core' (emergency) health care on presentation of the last three payslips showing their NI contributions. Those who are unable to present payslips may be required to pay for health services. This situation has the potential of failing to prevent or treat serious health conditions, leading to inhumane and undignified living conditions and possible public health concerns.
- Many encounter difficulties when attempting to enjoy their right to marry and found a family, due to the impossibility of providing identification documentation and valid proof of residence (in Malta or elsewhere).
- Ultimately, this group of persons may be returned to their country of origin at any time, even after 8 years living in Malta.

In addition to being highly questionable in both moral and legal terms, as there is no legal or reasonable basis for this discriminatory treatment, we believe that this policy is extremely short-sighted and has very serious implications for Maltese society in general both now and in the longer term.

It is effectively creating a category of people who can be exploited at will, who are denied the protection that most of us take for granted, who are completely disenfranchised and who in practice have little or nothing to lose.

Considerations and applicable legal principles

It is clear that the State has a right to return those who have no legal right to stay on its territory. However, it has a corresponding duty to ensure that returns are carried out efficiently, in a timely manner and with due respect for human rights. These principles are very clearly enshrined in international, European and national law on the return of migrants.

International law stipulates that the duty to undertake the necessary procedures to effect return of those migrants who refuse to return voluntarily rests with the State, whilst migrants are expected to cooperate with the State's legitimate efforts to make arrangements for their return.

Where they refuse to cooperate, States are authorised by law to use measures designed to enable them to enforce the return decision and effect removal, with due respect for fundamental human rights such as the right to an effective remedy, the right to freedom from inhuman and degrading treatment and the right to family life.

In Malta, the situation of migrants who cannot be returned for logistical or humanitarian reasons is currently not specifically regulated either by law or policy, with the consequences highlighted above.

It is for this reason that we believe the entire framework regulating the treatment of non-returnable migrants needs to be reviewed, through development of a holistic policy that strikes an acceptable balance between respect for individual rights and the State's right to return those with no legal right to stay.

In our view, the following principles and considerations should guide and shape both the way in which the review is implemented and its outcome:

Respect for human dignity and fundamental rights

Malta has clear legal obligations to ensure utmost respect for human rights. This includes an obligation to ensure that no one is subjected to treatment which can be considered cruel, inhuman or degrading, as a result of State action or inaction.

We feel that resorting to measures pushing people to live for years in an state of indefinite limbo, characterised by the reduction of all support and entitlements – except the most basic – and vulnerability to exploitation and abuse is not only morally reprehensible, but also raises serious human rights concerns. This situation observation is particularly pertinent in a context where, in practice, it is impossible to effect return for legal or logistical reasons.

It is clear that in order to qualify as 'inhuman and degrading treatment', the personal experience of harm must meet or surpass the threshold set by human rights law; the treatment complained of must attain a minimum level of severity. On several occasions, the European Court of Human Rights has held that to satisfy the criteria it is necessary that the treatment:

> *"involves actual bodily injury or intense physical or mental suffering. Where treatment humiliates or debases an individual showing a lack of respect for, or diminishing, his or her human dignity or arouses feelings of fear, anguish or inferiority capable of breaking an individual's moral and physical resistance, it may be characterised as degrading and also fall within the prohibition of article 3.*
>
> *The suffering which flows from naturally occurring illness, physical or mental, may be covered by article 3, where it is, or risks being, exacerbated by treatment, whether flowing from conditions of detention, expulsion or other measures, for which the authorities can be held responsible."*[1]

In all cases the Court stresses that the assessment of this minimum is relative, as it depends on all the circumstances of the case such as the nature and context of the treatment or punishment that is in issue. In R v Secretary of State for the Home Department ex p Adam, Limbuela and Tesema [2005] the House of Lords dismissed the notion that:

> *"the test is more exacting where the treatment or punishment which would otherwise be found to be inhuman or degrading is the result of…legitimate government policy. That would be to introduce into the absolute prohibition, by the backdoor, considerations of proportionality… proportionality, which gives a margin of appreciation to states, has no part to play when conduct for which it is directly responsible results in inhuman or degrading treatment or punishment. The obligation to refrain from such conduct is absolute."*

Legal certainty

One of the main shortcomings of the current system is that it is not enshrined in law, but simply the result of a policy decision, which cannot grant legally enforceable rights.

In order to ensure respect for human rights, while ensuring sufficient time for immigration authorities to conduct return, we believe it is important that both the treatment of migrants awaiting return as well as the regularisation process and any resulting rights are clearly enshrined in law.

We underline that this approach would also facilitate the provision of services by Government departments and entities which are, under the current regime, unable to present a harmonised approach due to lack of clarity.

Distinguish between THP and THPN

Whereas THP may be effectively considered a form of protection, as it is linked to the possibility of harm upon return, e.g. due to the individual's minor age or medical condition, THPN is essentially a form of regularisation. As such these two statuses are fundamentally different in nature and should therefore be treated as completely distinct from each other.

We feel that the Office of the Refugee Commissioner is best placed to deal with the determination of claims requiring an assessment of conditions in the individual's country of origin, due to the accumulated national expertise of caseworkers and its access to important Country of Origin Information resources. The same cannot be said of THPN determinations, since these are not related to the risk of harm upon return but on an assessment of the individual's integration efforts.

[1] Pretty v United Kingdom (Application No. 2346/02), 2002.

Treatment of THPN holders

Any review would have to take into account the fact that THPN is a status created by the State, by means of an administrative decision, which granted holders protection from forced return and a number of benefits,: primarily documentation, privileged access to the labour market, free healthcare and the possibility to open and maintain a bank account.

Although THPN did not grant legal entitlements, since it was established by policy not law, the policy document explicitly stated that this status would be renewed if the eligibility criteria were met, thus creating a legitimate expectation among holders that they would continue to benefit from THPN if they satisfied the criteria laid down in the policy.

The principle of legitimate expectation is a corollary of the notion of rule of law, which requires that a State respects and honours all obligations entered into with the people in its territory, and which holds that a State is accountable for its actions vis-a-vis such persons.

As such, where a State has granted a right, it cannot revoke such a right without coming to an agreement with the person as this would amount to arbitrary treatment, unless the person breaches the conditions which regulate the same right. Furthermore, no body or person within the State can withdraw such a right in a discriminatory, unreasonable and arbitrary manner. This is a natural justice principle enshrined in the administrative or Constitutional law of most States, and upheld by Courts when evaluating the procedural fairness and legality of State action.

We underline that this approach would also facilitate the provision of services by Government departments and entities which are, under the current regime, unable to present a harmonised approach due to lack of clarity.

The 'how' is as important as the 'what'

It is essential that the review be conducted in a manner that ensures respect for the individuals concerned whilst of course achieving its goals. Any suspension of THPN, even temporarily, will have a devastating effect on the lives of the individuals impacted, directly and indirectly. It is therefore important to ensure that no changes are made to the current system until the review is finalised and the way forward is clear.

Given the potentially massive impact of any change in the current system on the lives of the individuals concerned, uncertainty about the future is likely to cause great distress and tension, both for individuals and within the broader migrant community. It is therefore key to ensure that any changes are clearly explained and that decisions are not taken arbitrarily without reasons being given.

We also underline the potential impact these changes may have on local employers, faced suddenly with an increased administrative burden to maintain their employees within their employment.

Consider the bigger picture

In creating a legal or policy framework which will determine the future of people who will most likely live in Malta in the long term, it is important to take a long-term view and assess what we want Maltese society to look like in twenty or thirty years' time. Do we want to have in our midst a permanently marginalised and chronically disgruntled community, forced to live from hand to mouth in a state of permanent insecurity, or should we plan for something better?

Whatever the choice Government makes, it is clear that Malta cannot and should not handle this as something that will have implications only for the group of people directly impacted – it is also about the nation, about the kind of society we want to live in and, therefore, the kind of society we must work to create...together.

Our recommendations

In view of the above, we recommend the following:

I. Temporary humanitarian protection (THP)

Essentially, this recommendation is based on existing practice in relation to persons presenting compelling humanitarian considerations.

Clearly define the criteria for granting THP, i.e. protection from forced return on humanitarian grounds, the procedure for assessing requests, and the rights of beneficiaries and their dependent family members through an amendment to the Refugees Act or to the related subsidiary legislation.

The procedure should include all of the guarantees provided to applicants for refugee status, including the right to appeal a decision to refuse THP.

The rights of beneficiaries of THP, and their family members, should be the same as those granted to beneficiaries of subsidiary protection, including the right to social benefits based on necessity in the individual case.

II. Current holders of THPN

Ensure that current holders of THPN are not prejudiced in any way by the ongoing review. This implies that they should continue to enjoy protection from forced return and all of the benefits that they had to date under the current system, including the right to a renewable residence permit, access to travel documents, free healthcare and privileged access to the labour market.

III. Treatment of migrants awaiting return

Clearly regulate the situation of migrants awaiting return and granted 'tolerated stay', ensuring access to basic rights and the possibility to live with dignity, while the immigration authorities are working to enforce return.

IV. Pathways to regularisation for non-returnable migrants

Establish legal pathways for regularisation for non-returnable migrants who are regularly known to the authorities and have not obstructed the immigration authorities' legitimate attempts to enforce return.

The legal framework regulating such pathways should establish clear time-limits beyond which non-returnable migrants will no longer be considered as being subject to return procedures if they meet the criteria for qualification. We recommend that such time limit should not exceed 4/5 years, as this gives the authorities more than ample time to effect removal.

Regularisation would imply that, as with the current THPN system, the regularised person would no longer be subject to return proceedings. Possible exceptions to this could be linked to failure to abide by the conditions imposed as part of the regularisation process.

In view of the fact that regularisation would only apply to non-returnable migrants, eligibility conditions should not include the requirement to obtain valid documentation from the country of origin or to have regular employment.

As such it should be seen as distinct from the existing possibilities for legal stay (e.g. the possibility to reside in Malta for the purposes of study or employment) which are available to TCNs generally and which are currently not available to rejected asylum-seekers or other migrants subject to return proceedings, except in exceptional circumstances. It is clear that in order to obtain a residence permit under the existing channels for legal migration it is legitimate to require the production of valid

national documents, however such a requirement makes little sense in the context of a regularisation procedure for non-returnable migrants.

Furthermore, the legal framework could allow for a shorter time-frame for regularisation for those who can show that they have made a concerted effort to integrate, e.g. those who can show that they have been in regular employment or self-employment for 2 years preceding their application, paid taxes and NI contributions, made efforts to learn the language or otherwise contributed to the local community.

In determining qualification or regularisation accepted legal principles such as family unity and the best interests of the child should always be taken into account.