

Documentation = Employability

Support Services for the Documentation
of Various Communities



Documentation = Employability: Support Services for the Documentation of Various Communities

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aditus foundation is an independent, voluntary & non-profit organisation (NGO) established by a group of lawyers with a mission to monitor, act & report on access to fundamental human rights in Malta. We believe in the universality, interdependence and indivisibility of all human rights.

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1. Introduction

The right to access employment, social services, education and other services essential to a dignified life are inextricably linked to the possession of personal documents, such as an identity document or a residence document. These identification documents usually display a person's name and surname, country of birth, nationality, date of birth, country of residence and also address.

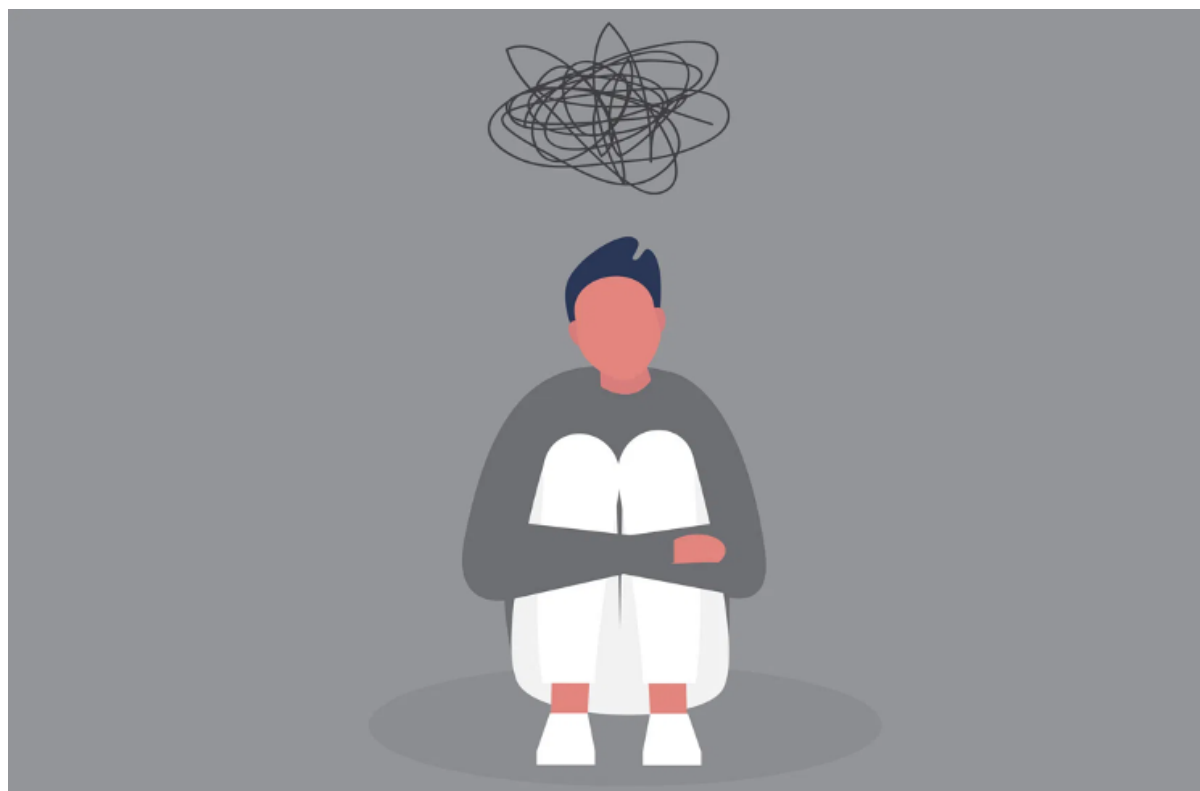
They also indicate an official number signalling the holder's registration on the State's records. There are other forms of documentation such as passport and birth certificate that also contain information as to the identity of the person, date of birth, nationality and country of residence.

Most nationals of any particular country

would have no difficulty in being issued with identity documentation or a passport. However, there are instances when the issuance or the details contained in such documentation are not always as it should be. Certain minority groups, such as Roma people in European states, have faced difficulties in registering the birth of their children and of continuing a cycle of statelessness¹.

Furthermore, persons without a fixed address such as homeless persons or people in prisons would face a number of hurdles if trying to apply for documentation, since many times the authorities require proof of residence.

Lastly, transgender or non-binary individuals may have details in their documentation that do not reflect the true identity of that person. Migrants, asylum-seekers and refugees are a group that face



¹ European Commission, Considering the Diversity of the Roma population in a post-2020 EU-initiative for Roma equality and inclusion, 2020, https://ec.europa.eu/info/sites/default/files/post2020_eu_roma_in_diversity.pdf.

serious problems when trying to apply for or renew residence documents. It should also be pointed out that the status of persons is not one that is static and stuck in time, and some migrants may enter regularly and apply for international protection during their regular stay².

Conversely, some may enter irregularly and then become regularised or are granted protection after passing through an administrative process.

What all migrants have in common is that they face the uncertainty of always being at risk of authorities withdrawing residence documents or permits.

Such also extends to persons who had their application for asylum rejected finally but who are however non-returnable due to a number of possible circumstances. This particular group becomes undocumented with no or little hope of ever being granted a residence permit³. This does not apply only to them but to their spouses and children, even if such are born in the host country.

What is the importance of having a residence or identity document?

An identity or residence document contains a person's information which also includes the person's legal status in the issuing country. In this context, the legal status would refer to the law or regulation on

which their right to reside in a particular country is based.

It would state whether the person is a Maltese or an EU citizen, and, if the person is a third country national (TCN), on what legal basis such person is authorised to reside in Malta. A TCN would be allowed to reside in Malta on the basis of certain family relations, for employment or studying purposes, and also for international protection purposes.

It is this very legal basis of residence, of which proof is contained in the identity or residence document, which determines the rights that individuals are entitled to. The document is the evidence on which government authorities or bodies, police and private service providers rely on to ascertain an individual's entitlement to access a whole array of rights ranging from the right to marry, to the right to an education to the right to access free healthcare.

It is therefore important to understand that challenges in obtaining documentation have enormous implications on a person's level of access to the labour market, healthcare services, social welfare support services, schools and other educational entities and private services, such as banking and rent contracts.

The end result of lack of documentation is an increased risk of poverty and social exclusion borne of the inability to secure regular and stable employment, healthcare and education. Prone to discrimination, exploitation and abuse, undocumented or

² OHCHR, *Technical Note: Differentiation between regular and irregular migrants*, 2018 <https://www.ohchr.org/Documents/Issues/Migration/GlobalCompactMigration/RegularAndIrregular.pdf>.

³ Doris Doku, *Malta: migrants call for decent regularisation mechanism*, PICUM, 2021 <https://picum.org/malta-migrants-call-for-decent-regularisation-mechanism/>.

incorrectly documented persons' risk remaining in the legal and social shadows unable to regularise their situations and set on the path of self-sufficiency and self-reliance.

aditus foundation's years of experience working with marginalised communities has shown that lack of documentation lead to periods of homelessness, discrimination, drug and alcohol abuse, human trafficking, sexual exploitation, undignified living conditions, institutionalisation, deteriorating mental health conditions, increased reliance on service-providers and higher risks of domestic and other forms of violence.

Although many times there are problems specifically relating to an individual's circumstance, there are also institutional factors that result in the challenges faced by nationals and non-nationals alike in accessing documentation.

This report seeks to highlight these very same institutional barriers that hinder the issuance of documentation which results in a spiralling downwards of the individual into destitution and social exclusion. Furthermore, it is hoped that it will sensitise stakeholders to their crucial role in the prevention of poverty through timely provision of appropriate documentation.

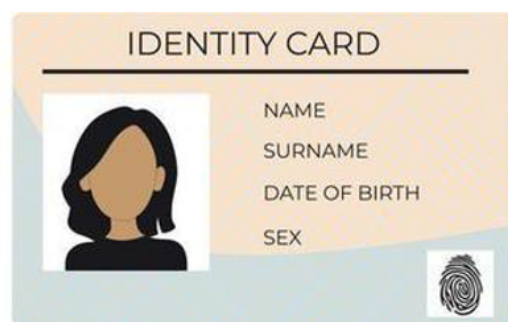
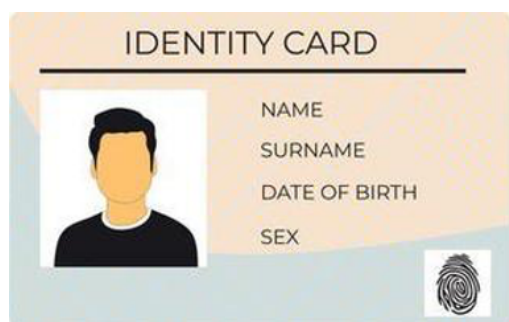
Methodology

This report was written within the ambit of the Documentation = Employability: Support Services for the Documentation of Various Communities, a project funded by the European Social Fund⁴. Through this project the aditus legal team has provided support and advisory services to persons, both Maltese and non-Maltese, who are encountering difficulties in securing updated and accurate documentation.

The project also enabled us to offer a rent subsidy to those clients who needed financial support pending the resolution of their documentation problems.

Besides providing individualised assistance, we have identified the personal and/or institutional obstacles preventing persons from being appropriately documented through client interactions and also meetings with stakeholders, such as homeless NGOs and migrant-led NGOs.

We have also carried out desk-research covering publicly available academic literature, published government policies and other relevant reports and studies. In this regard, it emerged that to date there has been no technical research in Malta



⁴ Documentation = Employability: Support Services for the Documentation of Various Communities <https://aditus.org.mt/our-work/projects/documentation-employability-support-services-for-the-documentation-of-various-communities/>.

that looks at the relationship between access to documentation as a trigger of poverty and social exclusion.

A 2016 report found that asylum-seekers, many of whom enter Malta without the necessary documentation, face a far higher risk of poverty and material deprivation than Maltese nationals, with the main trigger factor being the inability to secure regular and stable work that would enable them to live in dignity⁵.

Another factor that came to light was the State's response to the COVID-19 pandemic. It was reported that in Malta *"applications for residence permits have been impacted by the pandemic, and the government has announced that residence permits would be rescinded from third-country nationals found to break quarantine rules"*⁶.

The COVID-19 pandemic also effected those migrants that had been residing in Malta based on employment or having satisfied an employment criterion, that found themselves without work and unable to leave the island. Furthermore, due to the pandemic migrants arriving by boat in order to seek asylum were automatically detained and their registration was delayed

for several weeks or months from arrival⁷. The lack of registration and delay in issuing the asylum-seeker documentation effects individuals in accessing the labour market, education and social resources.

The institutional problems relating to trafficking in persons was highlighted by the Group of Experts on Action Against Trafficking in Human Beings (GRETA) in its 2017 Report on Malta. It found, when assessing Maltese laws, that the practice of linking visas and residence permits to a single employer could increase the risk of exploitation as an employee would not be able to leave an exploitative employer⁸.

A 2021 report by the European Commission Against Racism and Intolerance (ECRI) took note of the problems of failed asylum-seekers to obtain documentation. It urged Malta to allow persons who cannot be returned to stay legally in Malta and for those who have resided in Malta for more than ten (10) years to be given a more permanent form of regularisation⁹.

However, it is not only migrants who find difficulty with being issued with a correct documentation that brings with it proper access to rights. An ILGA-Europe report

⁵ Aditus Foundation and JRS (2016) Struggling to survive: An Investigation into the Risk of Poverty among Asylum Seekers in Malta, <https://aditus.org.mt/Publications/strugglingtosurvive.pdf>.

⁶ European Website on Integration, How are third-country nationals affected by the response to COVID-19 in Malta?, 23/03/2020, <https://ec.europa.eu/migrant-integration/news/how-are-third-country-nationals-affected-by-the-response-to-covid-19-in-malta>.

⁷ aditus foundation, AIDA report, 2021 https://asylumineurope.org/wp-content/uploads/2021/05/AIDA-MT_2020update.pdf.

⁸ Group of Experts on Action Against Trafficking in Human Beings (GRETA), Report concerning the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by Malta – Second Evaluation Round, GRETA(2017)3, 2017 <https://rm.coe.int/greta-2017-3-fgr-mlt-en-w-cmts/1680782abd>.

⁹ European Commission Against Racism and Intolerance, ECRI Conclusions on the Implementation of the Recommendations in respect of Malta subject to interim follow-up, CRI(2021)17, May 2021 <https://rm.coe.int/ecri-conclusions-on-the-implementation-of-the-recommendations-in-respe/1680a27d87>.

found that individuals with an “X” on their IDs or passports may encounter obstacles in accessing services in the healthcare system, similar to those experienced by intersex people or trans men when, for example, trying to schedule gynaecologist visits¹⁰.

Similarly, Caritas Malta highlights the problems faced by homeless persons in accessing social and healthcare benefits and services due to that fact that they do not possess an Identity Card¹¹.

2. Important Considerations

2.1. Gender Issues

Through aditus foundation’s years of experience working with particular social groups, we noted that there are specific issues relating to gender that exacerbate the difficulties in being issued with correct documentation.

In particular these are the problems that women or those who identify as female face in the issuance of residence cards or Identity Cards:

- Often it is problematic for women to be in permanent employment, whether it is due to pregnancy, child rearing obligations or other social limitations. There are a number of permits that require the applicant to be in full-time employment to be eligible for the

issuance of documents, including if the woman is an EU national.

- The process of citizenship by naturalisation does not allow for applications as a family unit, and government policy generally requires that each individual applicant is in or was in long-term employment. This leads to a situation where, if the woman in a couple has not been in employment and has been a homemaker, she would not be eligible for citizenship but her male partner would be.
- Women in abusive relationships and where their residence permits are tied to that of their abusers often times find themselves at the mercy of their abusers, facing deportation and being made undocumented.
- Women, and their children, who are dependant family members often find themselves with their residence documents withdrawn if their sponsor does not meet the requirements any longer.

2.2. Equality

Often times it is those very same communities that face regular discrimination, either at a personal or at an institutional level, that risk being or becoming undocumented. The lack of institutional support and inflexibility of rules result in injustices being perpetuated in a never-ending cycle which frequently begins

¹⁰ ILGA-Europe, *Non-Binary Gender Registration Models in Europe - Report on third gender marker or no gender marker options*, 2018 https://www.ilga-europe.org/sites/default/files/non-binary_gender_registration_models_in_europe_0.pdf.

¹¹ Caritas Malta, *Minimum Essential Budget for a Decent Living (MEBDL) 2020*, 2020, <https://www.caritasmalta.org/wp-content/uploads/2021/02/Caritas-MEBDL.pdf>.

with the lack of documentation.

It continues with the effect that not only are many denied a fair system to apply and be issued with documents, but consequently they are denied access to other rights that would ensure a dignified living.

From a personal perspective, many find difficulties finding proper housing, either due to high costs or due to discriminatory practices. There were suggestions that this problem could stem from discrimination based on ethnicity¹². Furthermore, in many cases Identity Malta requires proof of a bank account in order to issue residence permits although there is no logical or legal reason for this. Migrants and asylum-seekers have perennial issues when trying to open a bank account in local banks, that oftentimes require proof of employment in order to open accounts.

This results in a constant chicken and egg situation, where no documentation would be issued if no bank account exists, however the bank account can only be opened on proof of employment, which is in turn impossible without a valid document.

Although there are laws in place obliging banks to open accounts for any person residing legally in Malta, including those without a fixed address, certain groups of migrants, including refugees and asylum-seekers, regularly face a brick wall¹³.

From an institutional angle, many applicants find that it is the institutional structures that discriminate against them, and that they face barriers when attempting to access those State agencies that are tasked with issuing documents. Recently a group of migrants, in a press statement, highlighted that they “have very serious concerns about the ways in which Identity Malta staff and personnel address, treat and discriminate against migrants and asylum seekers whose security, livelihood and future depend on their services”¹⁴. This has been reiterated in a number of reports which state that Identity Malta staff have strong negative attitudes towards their service users¹⁵.

¹² Fsadni, Pisani for NCPE, *Immigrant and Ethnic Minority Groups and Housing in Malta - A Research Study*, 2012 [https://ncpe.gov.mt/en/Documents/Projects_and_Specific_Initiatives/I_m_Not_Racist/imnrb_research\(1\).pdf](https://ncpe.gov.mt/en/Documents/Projects_and_Specific_Initiatives/I_m_Not_Racist/imnrb_research(1).pdf).

¹³ Malta Financial Services Authority, *Payment Account with Basic Features Leaflet*, <https://www.mfsa.mt/wp-content/uploads/2019/01/mfsa-3-gate-leaflet-eng.pdf>.

¹⁴ Press Statement, *Migrant Representatives, Stability, not Uncertainty* - Migrant community in Malta highlights urgent basic needs and presents them to Home Affairs Ministry, 4th October 2021.

¹⁵ aditus foundation, AIDA report, 2021 https://asylumineurope.org/wp-content/uploads/2021/05/AIDA-MT_2020update.pdf.

3. Identified Problems & Recommendations

3.1. Transgender and Non-Binary Individuals

Transgender persons whose Identity Cards (and other personal documents) indicate a gender and name different to the gender and name the person identifies with, also of course including a photo showing a 'different' person', face challenges turning up for job interviews, obtaining correct educational certificates, attending school and other educational activities.

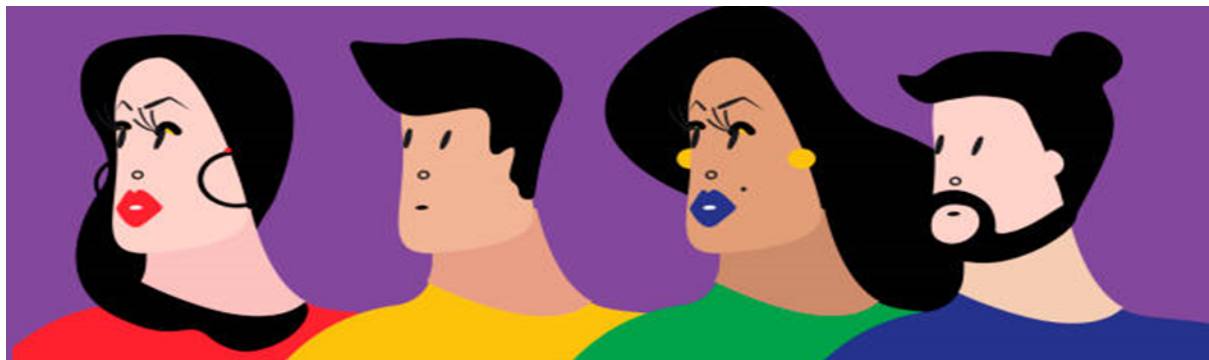
Despite the dramatic change in law through the **Gender Identity, Gender Expression and Sex Characteristics Act (GIGESC)**¹⁶ in 2015, facilitating the gender and name change process for Maltese nationals, certain categories of persons still have difficulty in securing the correct documentation.

These include children under the age of 16, persons with little or no access to means of

mass communication, adopted trans persons who also require changes to their adoption documents through the Courts, trans persons on low income that cannot afford to pay for the notarial services required for the GIGESC procedures and migrants.

The **LGBTIQ Equality Strategy and Action Plan (2018-2022)**¹⁷ provides the national policy framework for ensuring equality for the LGBTIQ+ community. However, the Strategy does not include any provision to assist the trans and binary community to ensure documentation that reflects their gender identity, specifically from those that do not have access to legal advice or the means to pay for notarial or legal services.

The “X” marker policy was introduced in 2017¹⁸ and it allows for an alternative gender marker to “M” or “F” by indicating “X” on Identity Cards and Passports issued by Identity Malta for Maltese nationals. This is done by taking an oath before a notary, which will then be presented to Identity Malta for the issuance of new documentation.



¹⁶ Gender Identity, Gender Expression and Sex Characteristics Act, CAP 540 of the Laws of Malta, <https://legislation.mt/eli/cap/540/eng/pdf>.

¹⁷ LGBTIQ Equality Strategy and Action Plan (2018-2022), Ministry for European Affairs and Equality, https://meae.gov.mt/en/Documents/LGBTIQ%20Action%20Plan/LGBTIQActionPlan_20182022.pdf.

¹⁸ Legal Gender Recognition and Bodily Integrity: <https://humanrights.gov.mt/en/Pages/LGBTIQ%20Equality/Legal%20Provisions/Legal-Gender-Recognition-and-Bodily-Integrity.aspx>.

A non-Maltese person can only indicate “X” on their residence card if they have accessed a gender marker that is not “M” or “F” in their home country. Unfortunately, it is not possible for a person wishing to indicate an “X” on their documentation to also change their name, as can be done in the situation of trans persons changing their name and gender on their birth certificates.

This due to the fact that, for the time being, there is no possibility to change gender to indicate “X” on birth certificates and consequently also allowing a change of name.

This results in non-binary persons having to live with a name that does not necessarily reflect their identity.

Recommendations:

Grant legal aid to trans and non-binary persons to ensure documentation that reflects their gender identity.

Waive Identity Malta fees for trans and non-binary persons when changing their documentation.

Enact legislation that permits a change in name for persons wishing indicate “X” on their identity documents.

Allow for the change of name and gender or the inclusion of the “X” marker in residence permit for TCNs, including persons with protection on the basis of an affidavit containing a declaration by the TCN that the gender assigned sex at birth does not correspond to the lived gender, and a specification of name and gender that the TCN would like to be registered.

3.2. Homeless Persons

In order to be issued with an Identity Card for Maltese or EU-citizens, or a residence card for TCNs, the applicant is required to submit to Identity Malta proof of residence in the form of a lease agreement, a rental declaration form signed by lessor when required for TCNs, or a property purchase agreement with the name of the applicant showing on such documents¹⁹.

Inevitably, persons who do not have any fixed address, those who are homeless or those who live in homeless shelters, are not able to apply for any documentation. Many shelters, such as homeless shelters or shelters for victims of trafficking, are not keen on providing their address for applicants on residence cards for migrants and Maltese alike.

This results in homeless persons being unable to have official documentation, to access services and most importantly to access employment that could essentially lift them out of the precarious situation they are in.

It was also reported that there has been a rise in homelessness in the migrant community and in particular with asylum-seekers, due to over-crowding in centres and difficulty of finding work²⁰.

Recommendations:

Set up an official temporary address for homeless persons in order for them to be issued with a temporary Identity Card which can be renewed on verification of their status on a bi-monthly basis.

Provide for Jobsplus to issue employment licences on the presentation of other forms of documentation, such as a valid passport or driver's licence.

3.3. EU citizens on maternity break

European Union legislation allows for EU citizens to move and reside in another EU Member State on the basis of work, self-employment, self-sufficiency or study.

However, women who give up their employment before birth or who take a maternity break when self-employed run the risk of losing their status as “worker” and all the rights granted on that basis



¹⁹ FORM ID10 https://www.identitymalta.com/wp-content/uploads/2019/10/Form-ID-10_Application-for-ID-Card-1.pdf and CEA Form C2 <https://www.identitymalta.com/wp-content/uploads/2019/10/CEA-Form-C2-2.pdf>.

²⁰ MaltaToday, Migrants are prey to homelessness without proper help to get jobs, July 2020 https://www.maltatoday.com.mt/news/national/103668/migrants_are_prepared_to_homelessness_without_proper_help_to_get_jobs#.YoXZQKhBy3A; Times of Malta, Migrants end up homeless as centres overflow, July 2020, <https://timesofmalta.com/articles/view/migrants-end-up-homeless-as-centres-overflow.802176>; Reuters, Evicted from Maltese cowshed, African migrants left homeless, August 2018 <https://www.reuters.com/article/us-europe-migrants-malta-idUSKBN1KY1UY>.

when they are residing in another Member State.

The Court of Justice of the European Union has, in multiple judgements, held that previously-employed or self-employed EU citizen new mothers retain their free movement status as a work when they give up work due to the constraints of late pregnancy²¹.

Recommendations:

Ensure that pregnant women retain 'worker' status for 12 months under the free movement rights provided by EU law.

Ensure that this 12-month period contributes to the period of time necessary to acquire the right of permanent residence under **Directive 2004/38** for EU citizens.

3.4. Applicants for Citizenship

Maltese law follows the doctrine of *ius sanguinis*, which determines that citizenship is acquired through parents or ascendants who are citizens of a state, as

opposed to *ius soli* that grants citizenship to persons born on the territory of a state.

Increasingly, due to rising immigration levels, many countries have started to adopt a hybrid system mixing both *ius sanguinis* and *ius soli* principles²².

In Malta, citizenship can be acquired through adoption, through marriage after five years of marriage, by registration, acquisition by naturalisation, for performance of exceptional services to Malta and by purchase²³. The naturalisation has been called-out by international monitoring bodies as being lengthy, non-transparent and not subject to judicial review²⁴.

In order to be eligible for naturalisation, a TCN must have been resident in Malta 12 months immediately preceding the date of application, and have resided in Malta for periods amounting in the aggregate to a minimum of 4 years, during the 6 years preceding the above period of 12 months. Applicants must also be of good character, have an adequate knowledge of the Maltese or the English languages and be a suitable citizen of Malta²⁵.

Furthermore, a new amendment to the **Citizenship Regulations** increased the fee from €34.94 to an exorbitant €450²⁶ for applications for naturalisation.

²¹ Case C-507/12, *Jessy Saint Prix v Secretary of State for Work and Pensions*, 2014; Case C-544/18 *Her Majesty's Revenue and Customs v Henrika Daknėvičiūtė*, 2019.

²² Patrick Amir Imam & Kangni Kpodar, *Does an Inclusive Citizenship Law Promote Economic Development?*, *Review of Law & Economics*, 2020.

²³ Maltese Citizenship Act, CAP 188 of the laws of Malta, <https://legislation.mt/eli/cap/188/eng/pdf>.

²⁴ Human Rights Council Working Group on the Universal Periodic Review Thirty-first session, Summary of Stakeholders' submissions on Malta, A/HRC/WG.6/31/MLT/3, 2018 <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G18/257/06/PDF/G1825706.pdf?OpenElement>

²⁵ Article 10 of the Citizenship Act, Chapter 188, September 1964 <https://legislation.mt/eli/cap/188>.

²⁶ Citizenship Regulations, S.L. 188.01 <https://legislation.mt/eli/sl/188.1/eng>.

The fact that there are no public guidelines on how to satisfy these broad requirements makes it difficult for TCNs to apply. There is no time limit foreseen for a decision and the law does not require the authorities to provide reasons for rejections of applications.

Furthermore, the law does not grant the right of appeal in any court for the refusal of an application for citizenship²⁷.

Although there are no public guidelines, TCNs and refugees are in practice only considered for naturalisation after 10 years of residence, whilst persons with subsidiary protection are only considered after 18 or 20 years, if at all²⁸.

Furthermore, the laws do not grant any form of citizenship entitlements to children born or raised in Malta.

The difficulties in accessing citizenship results in TCNs, and their children, that have been living in Malta for years to continue to live precariously. They also limit integration efforts as they fail to provide a sufficiently realistic incentive.

by naturalisation.

Amend the law to include the obligation of the Minister to give reasons for the refusal of citizenship applications.

Introduce a facilitated naturalisation process for children who have been residing in Malta long-term.

Amend the law to include the right of appeal for refused citizenship applications.

3.5. Asylum-Seekers

When a TCN enters Malta (whether by plane, boat or other means) and registers an application for asylum, their legal status becomes that of an asylum-seeker. Under EU and Maltese law, asylum-seekers are entitled to access employment after 9 months²⁹ of arrival in Malta and only if they are still in the asylum process. However, in practice asylum-seekers are granted access to the labour market before the 9 months, unless they come from a country listed as 'safe' in the Schedule to the **International Protection Act**³⁰.

Recommendations:

Reduce the fee for citizenship applications

²⁷ Jesuit Refugee Service Malta, aditus foundation, Integra Foundation, *Long-Term Residence and Citizenship by Naturalisation: A Necessity for Integration*, Project Integrated Publication, 2018 https://aditus.org.mt/Publications/pipublicationltrcitizenship_2018.pdf.

²⁸ Human Rights Council Working Group on the Universal Periodic Review Thirty-first session, Compilation on Malta Report of the Office of the United Nations High Commissioner for Human Rights, A/HRC/WG.6/31/MLT/2, 2018 https://www.upr-info.org/sites/default/files/document/malta/session_31_-_november_2018/a_hrc_wg.6_31_mlt_2_e.pdf; Jesuit Refugee Service Malta, aditus foundation, Integra Foundation, *Long-Term Residence and Citizenship by Naturalisation: A Necessity for Integration*, Project Integrated Publication, 2018 https://aditus.org.mt/Publications/pipublicationltrcitizenship_2018.pdf

²⁹ Reception of Asylum Seekers Regulations, S.L. 420.06 <https://legislation.mt/eli/sl/420.6/eng>.

³⁰ Schedule to the International Protection Act, CAP 420 of the Laws of Malta, <https://legislation.mt/eli/cap/420/eng/pdf>.

In order for asylum-seekers to obtain an employment licence from JobsPlus, they require the Asylum-Seeker Document (ASD) issued by the International Protection Agency (IPA).

Due to backlog, time spent in closed centres, and rules requiring asylum-seekers to leave open reception centres after 6 months, hundreds of asylum-seekers end up living in the community with no ASD and therefore unable - prevented - to seek regular employment.

European Union law obliges Member States to provide an asylum-seeker with an ASD within three days of the lodging of an application for international protection³¹.

The ASD should be issued in the name of the applicant, certifying his or her status as an applicant or stating that he or she is allowed to stay on the territory of the Member State while the application is pending.

The results are clear: labour exploitation, undignified working conditions, unstable income that cannot secure decent housing, risk of human trafficking, material deprivation.

With our interventions and those of other NGOs, based on liaison with the authorities, many asylum-seekers are able to secure their ASD whilst still living within open or closed centres, thereby being given the possibility to seek regular and stable employment.

Yet it is clear that NGO services are unable to meet the requirements of hundreds of

asylum-seekers.

Recommendations:

Increase capacity within the IPA in order to register asylum seekers and issue their ASD within a reasonable time.

Establish a procedure where all asylum-seekers are released from detention with their ASDs.

Ensure that the details included in the ASD are correct and reflect the true name and status of the applicant/s.

3.6. Family Members of Refugees

Spouses and minor children or dependant adult children, of recognised refugees are entitled to reunite with them in Malta³². Upon arrival, they have the right to be issued with a residence permit from Identity Malta that entitles them to the same rights as their refugee sponsor.

Very often we see prolonged delays in the issuance of this important document, without which newly-arrived family members are unable to work, access healthcare, attend school or other educational services.

Furthermore, many times the staff employed with the public service or public

³¹ Article 6 of Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast) <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32013L0033>.

³² Family Reunification Regulations, S.L. 217.06, <https://legislation.mt/eli/sl/217.6/eng/pdf>.

agencies are not familiar with the terminology indicated on the 'family member' residence cards, resulting in obstacles accessing health, employment and other core services.

Furthermore, there are instances whereby a beneficiary of international protection in Malta has a child after being granted protection by the IPA. In these cases, the IPA does not issue a protection certificate for that child, but issues a letter stating that that child is a family member of a protection beneficiary. This would result in the child having a different status noted on the residence card to his or her parents and siblings.

This is also the case when one of the applicants in a family unit is granted a different status to that of his or her spouse, either due to an appeal or different times of application or arrival. The result is that in a family unit there could be members who have different statuses, as the IPA does not grant protection to the family as a unit but on an individual basis.

Furthermore, children who are granted protection as a family member of a protection beneficiary, lose that protection on reaching majority. That person would then have to apply to the IPA for protection as an independent adult.

This exposes them to a risk of becoming undocumented, as the nexus to their parent's claim may have become weaker with the passing of time between arrival in Malta and becoming an adult.

Recommendations:

Grant family units a uniform protection status, being the highest protection that any one of them would be entitled to. In specific, grant reuniting family members derivative international protection, and not the status of "*family member of*".

Grant children born to protection beneficiaries a protection certificate to reflect their parents' status and issued with a birth certificate and residence card reflecting that.

Issue family members reuniting with refugees a protection certificate that reflects the status of the family member they are reuniting with.

Establish a short and reasonable timeframe within which to issue residence cards to reuniting family members of protection beneficiaries, considering that the application to be reunited should have already been approved.

3.7. Undocumented Third Country Nationals

In 2018 the Ministry for Home Affairs introduced a regularisation exercise targeting undocumented third-country nationals who had been through the asylum process unsuccessfully and were not able to be returned to their country of origin, or did not voluntarily do so.

The Specific Residence Authorisation (SRA)³³ is a residence permit granted to persons fulfilling very specific criteria, including a minimum number of social

³³ Policy regarding Specific Residence Authorisation - Updated policy October 2020, <https://www.identitymalta.com/wp-content/uploads/2019/10/SRA-updated-policy-Nov2020.pdf>.

security payments, years of residence in Malta and arrival in Malta in a particular time-frame. The SRA therefore allowed a migrant who fulfilled all the necessary criteria to convert from an undocumented status to one that is documented and regular, with the possibility to work, seek educational opportunities, engage in other mainstream services, marry and form a family.

Although the SRA was lauded as being an inclusive and humane way forward, in October 2020, the Government announced that it would be not allowing for any new SRA applications after 31st December 2020. It however confirmed that the current SRA holders would be allowed to renew their documents if they met the required employment criteria contained in the SRA policy³⁴.

The termination of the SRA policy, the rigid application of the employment criteria after the COVID-19 pandemic threw hundreds of people into an uncertain future³⁵. The lack of documentation has prohibited them and their family members from accessing basic rights such as healthcare, education, training and travel³⁶.

For those to continue to be eligible for the SRA, the renewal process and the inclusion of spouse, life partners and children continue to be an arduous task. Many times, applicants are not considered as a

family unit, women who are homemakers continue to be excluded due to lack of employment and periods of vulnerability, illness or involuntary unemployment are not taken into consideration as such.

It should be reiterated that the SRA document was envisaged to be issued to migrants who did not or could not be returned to their country of origin and who have established themselves and their families in Malta. Possession of the SRA document equates to dignity, stability, peace of mind, security.

Recommendations:

Re-open applications for the SRA to those who satisfy the criteria contained in the SRA policy.

Protect the right to the unity of the family when issuing SRA documentation.

Recognise the homemakers, vulnerability, illness and involuntary unemployment as such and without penalisation during the renewal process.

³⁴ Rejected asylum seekers forced to sleep rough to make Identity Malta deadlines Times of Malta <https://timesofmalta.com/articles/view/rejected-asylum-seekers-forced-to-sleep-rough-to-make-identity-malta.840959>.

³⁵ Press Statement, Migrant Representatives, Stability, not Uncertainty - Migrant community in Malta highlights urgent basic needs and presents them to Home Affairs Ministry, 4th October 2021.

³⁶ A new policy that will lead to increased social exclusion and poverty, Press statement by aditus foundation, African Media Association Malta, Allied Rainbow Communities, Anti-Poverty Forum Malta, Azzjoni Kattolika Maltija, Blue Door English, Christian Life Communities in Malta, The Critical Institute, Dean of the Faculty of Education, Drachma, Great Oak Malta Association, Integra Foundation, Jesuit Refugee Service (Malta), KOPIN, Malta Emigrants' Commission, Malta Humanist Association, Migrant Women Association Malta, Millennium Chapel, MOAS, Moviment Graffiti, People for Change Foundation, Repubblika, SOS Malta, SPARK15, Women's Rights Foundation, 25 November 2020 <https://aditus.org.mt/a-new-policy-that-will-lead-to-increased-social-exclusion-and-poverty/#.YWmEphpByUl>.

3.8. Victims of Trafficking

Victims of trafficking could have been trafficked from all over the globe, and for multiple reasons. They are not limited to sex workers but also predominantly found in the economic activities of care workers, agriculture and commercial/industrial cleaners.

The victims have generally suffered extreme labour or sexual exploitation, together with the confiscation of passports, excessive working hours, work requirements exceeding contractual obligations, physical and sexual violence.

Due to Malta's system whereby TCN residence permits are tied to a specific employer, where a TCN is being exploited and wishes to file a complaint or report with police or any other entity, the employer is able to immediately terminate the employment contract.

On termination of the contract, the right to reside terminates and this renders the victim's status (and dependant family members, if any) irregular and prone to arrest, detention and removal from Malta.

The protection, documentation and reintegration of victims of trafficking is in line with Malta's **National Action Plan Against Human Trafficking**³⁷. It is therefore possible for the victim to be issued with a residence permit as a victim of trafficking³⁸.

In order for this to happen the victim needs

to report the trafficking to the police and to be recognised as a victim by the police.

There are no public guidelines on how this assessment to determine status of 'victim of human trafficking' is made by the police. It is on this basis that Identity Malta issues a residence card. Although it is a relatively simple process, Identity Malta requires a number of documents to be presented, including a home address.

As mentioned above, this could be a potential stumbling block if the victim is residing in a shelter, safe-house or detention centre pending removal.

Furthermore, residence cards issued to victims of trafficking are done so on the basis of Subsidiary Legislation 217.07, which only grants this right to TCN victims of trafficking and not to victims of trafficking who are EU nationals.

This deprives extremely vulnerable victims



³⁷ National Action Plan Against Human Trafficking – January 2020 – December 2023, <https://homeaffairs.gov.mt/en/MHAS-Information/Documents/Trafficking%20in%20Human%20Beings/National%20Action%20Plan%20January%202020%20-%20December%202023.pdf>.

³⁸ Permission to Reside for Victims of Trafficking or Illegal Immigration who co-operate with the Maltese Authorities Regulations, S.L. 217.07 <https://legislation.mt/eli/sl/217.7/eng/pdf>.

of trafficking from accessing basic healthcare and social security services.

Recommendations:

Allow for the issuance of residence cards through the use of a temporary address set up for this purpose.

Issue public guidelines that are used in the identification and determination process of victims of trafficking by the police.

Amend the legislation to allow for EU nationals who are victims of trafficking to be issued with a residence card on the basis of S.L. 217.07.

3.9. Dependent Third Country Nationals

TCNs who are in Malta on the basis of their partner or spouse's employment status are dependent on their sponsor spouse for their legal residence in Malta. Often times the dependent TCNs living in abusive relationships are effectively made unable to leave such abusive spouse or partner, since a severance of the relationship would lead to a termination of their right to live in Malta.

Under the **Family Reunification Regulations**, spouses and children who have reached the age of majority, are entitled upon application to an autonomous residence permit³⁹.

In the situation where a TCN is a partner of a Maltese national, a partner permit may be granted for that person to reside, but not work, in Malta solely on the basis of this relationship. In this regard, Maltese legislation is particularly discriminatory against Maltese persons and their TCN partners in that the latter are not allowed to work if they are residing in Malta on the basis of a partner permit.

This creates a situation of total dependency and imbalance, whereby the Maltese partner is essentially the gatekeeper to residency rights in Malta.

It is extremely important that such permits do not create the situation of total dependency of one partner over the other. Furthermore, it is imperative that any victims of domestic violence are able to secure autonomous residence permits, under the **Family Reunification Regulations**⁴⁰, for themselves and any children in a timely fashion, in order to allow for access to employment, education and support services.

Recommendations:

Allow for the facilitated issuance of autonomous residence permits for victims of domestic violence and any of their dependent children.

Allow for the facilitated issuance of autonomous residence permits of TCN spouses or partners after 5 years.

Allow for access to the labour market of TCNs partners of Maltese nationals.

³⁹ Family Reunification Regulations, S.L. 217.06, <https://legislation.mt/eli/sl/217.6/eng/pdf>.

⁴⁰ Family Reunification Regulations, S.L. 217.06, <https://legislation.mt/eli/sl/217.6/eng/pdf>.

3.10.Third Country National Parents of EU Nationals

It is a well-established principle of European law that TCN parents have a right to reside and work in the EU Member State of residence and nationality of their child.

The Courts have reiterated and developed this principle over the years⁴¹ and out of this principle the Zambrano-type permits have emerged.

The Courts importantly have stated that the issuance of these permits is not a matter of humanitarian consideration of the child but a right of the child under European Union law.

Under this principle, TCN residing in Malta have the right to be granted a Zambrano-type permit if they have dependant Maltese minor children. The dependency, in accordance with the principles developed by the courts, does not necessarily have to be financial and the children do not necessarily have to be residing with the TCN requesting the permit.

Each case needs to be evaluated on its own individual merits in order for the authority to assess the dependency and whether the child would have to leave the EU territory due to its dependency on its TCN parent.

The Zambrano-type permits do not require that the parent is residing in Malta in a

regular fashion, entered Malta regularly nor that the parent is employment or has financial stability.

Unfortunately, there are no publicly available guidelines on what applicants have to do in order to satisfy the unpublished requirements for the Zambrano permits.

Recommendations:

Amend the law to reflect the right of Maltese and EU children residing in Malta to have the Maltese state allow for their TCN parent to reside and work in Malta.

Issue the requirements that need to be satisfied in order to be eligible for the Zambrano-type permits, together with guidelines on how to satisfy such requirements.

Make the process of application less burdensome and more reflective of EU and national jurisprudence, specifically with reference to financial stability, bank accounts and regular entry.

⁴¹ Case C-34/09, Gerardo Ruiz Zambrano, Case C-133/15, H.C. Chavez-Vilchez and Others v Raad van bestuur van de Sociale verzekeringsbank and Others, Tanya Mihedova vs Director of Department for Citizenship and Expatriate Affairs, App. No. 39/2017, 19th February 2018.

3.11. Vulnerable Migrants

Particularly vulnerable TCNs may be issued with a residence permit on humanitarian grounds if they are undocumented or if they have become undocumented after residing in Malta in a regular fashion. This permit is issued on the basis of the **Immigration Regulations**⁴² and through the submission of the FORM O with Identity Malta⁴³.

The vulnerability may stem from multiple factors, which include old age, disability, extreme marginalisation, mental health, addiction or other medical condition.

If the applicant shows that they have no other option but to reside in Malta due to their vulnerability, then they could be issued with a temporary residence document on the basis of humanitarian considerations. This permit allows them to work and access services in Malta. However, it is extremely difficult to apply for and be granted this permit.

It generally takes a number of years and contact with the Principal Immigration Officer and Identity Malta to finally convince them of the vulnerability of the applicant, many times the delay increases the situation of vulnerability which snowballs into much larger difficulties.

Furthermore, if the TCN has passed through or is passing through the asylum procedure and is not eligible for international protection but is considered to be vulnerable enough to qualify for

protection on humanitarian grounds⁴⁴ then that person is granted Temporary Humanitarian Protection (THP) by the International Protection Agency.

Such protection is only granted to unaccompanied minors who cannot be returned, applicants who are terminally ill or suffering from a severe or life-threatening medical condition that cannot be treated in their country of origin and to applicants who cannot be returned in view of other humanitarian considerations, which may include cases of serious disability.

It should be noted that prior to 2020 amendments that introduced these new provisions, THP was granted for a much wider variety of reasons which also took into consideration gender and LGBTIQ+ issues, pregnancy and the situation in the country of origin in general. Furthermore, during the applicant process for THP, applicants are not issued with any form of document that attests to the fact that they are THP applicants.

The THP assessment by the IPA often takes months, and therefore extremely vulnerable individuals remain undocumented for long periods of time



⁴² Immigration Regulations, S.L. 217.04 <https://legislation.mt/eli/sl/217.4/eng>.

⁴³ Form O: <https://www.identitymalta.com/wp-content/uploads/2019/10/CEA-Form-O.pdf>.

⁴⁴ International Protection Act, CAP 420 of the Laws of Malta, <https://legislation.mt/eli/cap/420/eng/pdf>.

pending the outcome of their application.

In addition, the law is unclear on whether there is a right to appeal a rejection decision on eligibility for THP and this creates a situation whereby possibly vulnerable TCNs would be denied access to an effective remedy. Besides the lack of an effective remedy for refusals, the process for the withdrawal of THP status lacks any procedural guarantees that would protect from arbitrary decisions.

The law holds that the IPA can revoke, end or not renew THP when it believes that the conditions under which THP was granted no longer subsist⁴⁵.

The holder of THP is informed in writing by the IPA that status of THP is being reconsidered and has 10 days⁴⁶ within which to submit a statement as to why such status should not be withdrawn. If the THP document expires within that timeframe, then the person is not given any document by the IPA and remains undocumented.

The law specifies that there is no right of appeal from the decision of the IPA to revoke, end or not renew THP.

Recommendations:

Facilitate the issuance of residence permits based on humanitarian consideration and shorten the timelines.

Issue guidelines to applicants on what is considered to be a humanitarian reason in the broad sense and what type of

documentation can be submitted to strengthen the application.

Broaden the eligibility criteria for Temporary Humanitarian Protection to include issues relating to gender and domestic violence, LGBTIQ+ individuals, pregnancy and the situation of the country.

Publicise the guidelines and procedures used by the IPA to examine new and renewal applications for Temporary Humanitarian Protection.

Amend the **International Protection Act** to include the right to an effective appeal in those instances where there was a rejection decision on eligibility for THP.

Amend the **International Protection Act** to include the right of appeal an IPA decision to revoke, end or not renew THP.

Grant THP applicants a document confirming their status as such, with related rights that – as a minimum – secure dignified livelihood.

Ensure that any person appealing any IPA decision relating to the granting or withdrawal of THP are given an identification document valid throughout the appeals procedure.

3.12.Stateless Persons

Malta has a small population of stateless persons. Not being nationals of any State, they are perpetually undocumented, invisible and unable to access the most

⁴⁵ Article 17A(2), *ibid*.

⁴⁶ This time limit is not set in law and the THP holder is informed of this in the IPA letter.

basic of services and activities.

In 2019 Malta acceded to the **1954 UN Convention Relating to the Status of Stateless Persons**, following which it should have introduced a procedure for the identification and processing of stateless applicants. However, Malta is still not party to the 1961 Convention on the Reduction of Statelessness.

Although Malta acceded to the **1954 Convention** a couple of years ago, it still does not have any stateless determination procedure and it does not have any stateless protection status⁴⁷. Under the Convention, once formally identified, stateless persons should be granted a residence permit which would also allow them to work and have access to certain rights under the Convention.

However, due to the fact that there is no determination process, this procedure is not being carried out. This is particularly problematic for those persons whose application for asylum has been rejected and nationality recorded as “*unknown*”.

Furthermore, in the **Maltese Citizenship Act**⁴⁸, there is a provision for children born stateless in Malta which allows them to acquire citizenship after five years’ residence. However, this provision is not applicable automatically and there are no reports of this provision ever having been used. Another provision of the Act allows for Maltese nationality to be automatically conferred to children born when parents are Maltese citizens. The concern here lies in the discriminatory limitations in the Act. Indeed, in the case of unmarried parents, a

child born in Malta on or after 1st August 1989 shall only automatically become Maltese if the mother is a Maltese citizen. There is an obviously risk of statelessness if only the father is Maltese.

Recommendations:

Establish an effective and efficient statelessness determination procedure, with an identification and referral mechanism for individuals who are undocumented and at risk of statelessness.

Introduce a stateless protection status within the local legal system.

Raise awareness about statelessness among relevant Government institutions that may encounter stateless persons, such as immigration and asylum authorities, citizenship authorities and civil registries among others.

Accede to the **1961 Convention on the Reduction of Statelessness**.

Amend the **Maltese Citizenship Act** to address the shortcomings in relation to stateless children and children born to unmarried Maltese men.

⁴⁷ ENS Stateless Index, Malta, 2021 <https://index.statelessness.eu/country/malta>.

⁴⁸ Maltese Citizenship Act, CAP 188 of the Laws of Malta.

4. International and European Perspectives

At the international level, the main organisation focusing on the impact of lack of documents on the enjoyment of fundamental rights is certainly the Platform for International Cooperation on Undocumented Migrants (PICUM)⁴⁹.

The umbrella organisation, having over 160 NGO members worldwide across 31 countries, *“is committed to ensuring that undocumented migrants have a dignified standard of living and rights.”*

We note that, although PICUM is expressly focused on migrants, and not the other communities mentioned throughout this report, the organisation’s research and advocacy work is central to underlining the relationship between lack of documentation and limited or barred access to rights, including employment.

This report’s research stage involved engagement with PICUM (aditus foundation is a PICUM member), discussing the theme and exploring central publications commenting on the documentation/employability relationship.

In particular, our colleagues at PICUM directed us to the following:

- Guide to Undocumented Workers’ Rights at Work under International and EU Law (2022)⁵⁰;

- A Worker is a Worker: How to Ensure that Undocumented Migrant Workers Can Access Justice (2020)⁵¹

- Navigating Irregularity: the Impact of Growing Up Undocumented in Europe (2021)⁵². This report zooms in on the situation of undocumented children, clearly spelling out:

“Children in migration are at particularly high risk of poverty and social exclusion. Even more so when they or their parents have a residence status that limits parents’ access to the labour market or when they are undocumented.

However, there is little to no data on the income of undocumented households and the risk, or the level, of poverty they face.”

“Income is a key social determinant of health and inextricably linked to children’s well-being and life chances: it affects the community in which they live, the quality of life, the food available to them, type of housing they live in and the sense of security they experience.”

“Experiences of toxic stress on children can lead to high risk of cardiovascular disease, cancers, asthma, and depression when they are adults.

Being constantly preoccupied with financial problems can cause a drop in cognitive function, comparable to the loss of a night’s sleep.

⁴⁹ <https://picum.org>

⁵⁰ <https://picum.org/wp-content/uploads/2022/04/Guide-to-undocumented-workers-rights-EN.pdf>

⁵¹ <https://picum.org/wp-content/uploads/2020/03/A-Worker-is-a-Worker-full-doc.pdf>

⁵² https://picum.org/wp-content/uploads/2021/03/Navigating-Irregularity_EN.pdf

Research (2017) has confirmed that growing up in poverty, or experiencing poverty later on in life, influences the way people make decisions.

People that live in poverty are likely to focus on their short-term (pressing) circumstances and make their decisions based on these conditions, which at times can be at the expense of long-term goals.”

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