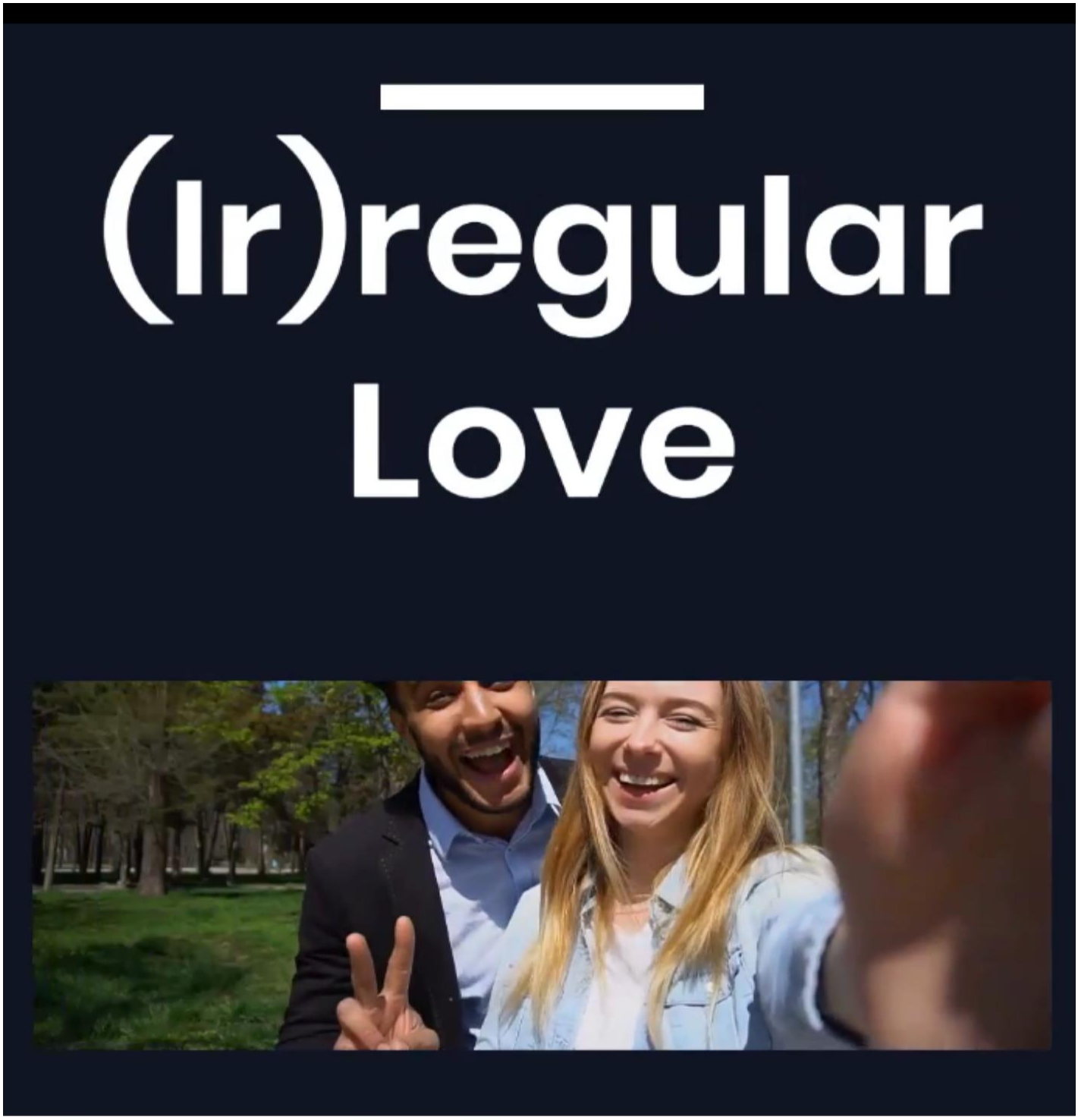

(IR)REGULAR
LOVE - MIGRANTS' RIGHT TO MARRY

A campaign on the rights of asylum-seekers & irregular migrants who face obstacles in contracting a marriage and founding a family in Malta.

A project funded by the Small Initiatives Support Scheme (SIS) managed by the Malta Council for the Voluntary Sector (MCVS)

aditus
accessing rights

(IR)REGULAR LOVE

Migrants' right to marry

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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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Contents

Introduction

> *"… an irregular status does not prevent family and personal relationships developing and these cannot simply be disregarded when dealing with the persons concerned, not least because any action taken against them could have implications not only for the exercise of their rights and freedoms but also for those of the others involved in these relationships."*
>
> MCBRIDE, THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND PROTECTION OF IRREGULAR MIGRANTS (AS/MIG/INF (2005) 21)

In the current legal and policy framework, asylum-seekers and undocumented migrants in Malta are facing obstacles when they wish to contract marriage and found a family in Malta. Under Maltese law any couple wishing to marry is required to request the publication of the marriage banns to the Marriage Registry (the "Registry") at least 6 weeks before the date of the intended marriage[1]. On presenting this request, the Registry requires proof that the persons wishing to marry either have regular residence in Malta or regular residence elsewhere together with a valid visa, should a visa be required to enter Malta. For migrants living in Malta this means that applicants should be in possession of a valid passport together with a valid Maltese residence card or a valid visa. It should be noted that the rules relating to EU nationals differ slightly and when we talk of migrants we are excluding EU nationals, although they too need to show valid identity cards, whether it is a national passport or a residence card, in order for the Registry to issue the banns.

This presents a problem for persons who are currently seeking asylum or have had their asylum application rejected but cannot return to their country of origin. It should be noted from the outset that persons who have applied for asylum are currently residing in Malta in a regular fashion under the asylum regime and that their papers showing their status should be enough to satisfy the Registry's requirement. Persons who have had their application for asylum rejected and cannot return or be returned due to their or their country's particular circumstances continue to reside in Malta and are allowed to work here regularly for many years. Persons who have entered regularly but have overstayed their visa, even for a short period of time, have no way in which to regularise themselves except by exiting Malta - and face a possible Schengen ban that could span 5 years – and applying for another visa from their country of origin.

In the months and years living in Malta, people form relationships and the non-recognition and realisation of the wish of couples to marry, leads to the exclusion from all the rights and benefits attached to marriage to which they should be entitled. This can have devastating effects on the family as a whole,

[1] Article 7(5), Marriage Act CAP. 255 of the Laws of Malta http://www.justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=8749&l=1.

particularly where the couple in question have children. Without the possibility of their parents marrying, children are consequently marginalised and, in the worst case, render it impossible for the family to live together as a family unit.

The recognition of such marriages including the recognition of those unions is key to the short and long-term integration of migrants and their children into Maltese society. The long-term effects will be felt for generations, firstly through the individual family units and then through society in general by turning exclusion into inclusion and refusal into acceptance.

For the purpose of this research, marriage is considered to be defined as the state recognized, voluntary and exclusive contract for the lifelong union of two persons and does not include any other form of religious ceremony that is not recognised by the State.

Laws governing the Right to Marriage

Every person over the age of majority has the right to marry, no matter who they are or where they are from. This is guaranteed by the European Convention on Human Rights and the EU Charter of Fundamental Rights. It should be noted that the European Convention on Human Rights, in spite of the significant population movement at the time of drafting, does not make any reference to migrants of any kind in its text. However, there is recognition in the Convention of the rights of States under international law to control the admission of migrants to their territories[2].

This paper outlines the different legal regimes that grant the right to marry and the requirements attached to such rights. The elements common to all regimes is that marriage is contracted by two persons of marriage age with free and full consent. Marriage is recognised as a fundamental group unit of society that should be entitled to protection by the state.

The main source of law protecting the rights relating to marriage and family life can be found in Article 8 – right to respect for private life and family life, and Article 12 – right to marry, of the European Convention of Human Rights (ECHR)[3]. Article 12 concerns the right to form a marital relationship and a family, which is clearly distinguished from the right to respect for private and family life as protected by Article 8 and "*the latter, in this context, relates to families seeking immigration authorisation on the basis of an already existing family relationship, while the former protects the rights of those who only intend to create a marital bond*"[4]. Within the particular context of the research, this paper will, therefore, focus on the application of Article 12 ECHCR and case-law relating to the right to marry from a European and national perspective.

International law

Article 16 of the Universal Declaration of Human Rights[5] holds that:

> (1) Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.
>
> (2) Marriage shall be entered into only with the free and full consent of the intending spouses.
>
> (3) The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

[2] Council of Europe, Report written by Jeremy McBride, *Irregular Migrants and the European Convention on Human Rights,* AS/Mig/INf(2005)21, 2005.

[3] Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950.

[4] European Union Agency for Fundamental Rights, *Handbook on European law relating to asylum, borders and immigration*, 2013.

[5] UN General Assembly. (1948). *Universal declaration of human rights* (217 [III] A). Paris.

Article 16 was adopted after the Second World War against a background of the family and racial policies adopted by the Nazis and other fascist regimes that prohibited racially mixed marriages. The drafters of the Universal Declaration of Human Rights wanted not only to protect the right to privacy and private life, but also the right to marry and found a family in particular[6].

Article 16 is echoed in Article 23 of the International Covenant on Civil and Political Rights[7] which reiterates that *"the family is the natural and fundamental group unit of society and is entitled to protection by society and the State."* Importantly it states that "the right of men and women of marriageable age to marry and to found a family shall be recognized" by State Parties and that they shall "*take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution. In the case of dissolution, provision shall be made for the necessary protection of any children*".

European Convention of Human Rights

Under the European Convention of Human Rights[8] (ECHR) the rights relating to marriage and family life are regulated by two different articles. Article 8 of the ECHR provides for the right to respect for private life and family life, whereas Article 12 guarantees the right to marry and to found a family according to the national laws governing the exercise of this right.

There is a significant difference between Articles 8 and 12 of the ECHR, as will be shown in further detail below. The rights under Article 8 may be restricted by states if such is necessary in a democratic society and in the interest of national security, public safety or the economic well-being of the country, as well as for the protection of health or morals, or for the protection of the rights and freedoms of others. However, the right to marry and to found a family is an absolute right in the sense that no restrictions as provided for in Article 8 are laid down in Article 12[9].

Article 8 – *Right to respect for private life and family life*

> 1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

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6 B. Van der Sloot, '*Between Fact and Fiction: An Analysis of the Case Law on Article 12 ECHR*', 26 Child and Family Law 1-24, at 2 (2014).

7 Article 23, *International Covenant on Civil and Political Rights*, Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 entry into force 23 March 1976, in accordance with article 49.

8 Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950.

9 B. Van der Sloot, '*Between Fact and Fiction: An Analysis of the Case Law on Article 12 ECHR*', 26 Child and Family Law 1-24, at 2 (2014).

The objective of Article 8 is that of protecting the individual against arbitrary interference by States and their public authorities. However, Article 8 also imposes on the State the positive obligations inherent in an effective respect for private and family life[10]. However, the European Court of Human Rights (ECtHR) has stated that state interference may be justified, under the second leg of Article 8, and this includes a State's right to control the entry, residence and removal of non-nationals.

Therefore, States are entitled to control the entry of non-nationals into their territory and their residence there. However, if a decision restricting the right to enter and reside will interfere with the right to respect for family life, it must be necessary in a democratic society and proportionate to the legitimate aim pursued.

Article 12 - *Right to marry*

> Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.

The origins of this article can be found in the above-mentioned Article 16 of the Universal Declaration of Human Rights. Article 12 is generally thought to be composed of four elements. It specifies who can invoke this right, specifically men and women of marriageable age. It specifies that they have two separate rights which can be invoked: the right to marry and the right to found a family. Lastly, it contains a limitation clause which holds that they must do so in accordance with the national law governing the exercise of this right[11].

It should be noted that the right to marry under this article comes with the requirements that this right should be accorded in compliance with national laws. It therefore confers upon national authorities a certain discretion on how to govern the exercise of the right to marry at national level. National laws may introduce certain proportionate and justified limitations, particularly in the field of immigration and to prevent marriages of convenience, as the right to marry protects the right to enter into a genuine marriage, and does not imply a right to secure an abusive advantage through marriage[12].

The leeway granted to national authorities is, however, limited as the use of this discretion should not be applied literally as that would deprive Article 12 of all meaning at the international level. In this regard, national laws must not restrict or reduce the right in such a way or to such an extent that the very essence of the right is impaired. This was further explained in academic literature that the words *"governing the exercise of this right"* indicate *"that the national laws may regulate but not prohibit or exclude the right altogether … It is for the national law to regulate such matters as form and capacity to marry but any procedural or substantive limitations that are adopted must not remove the very essence of the right."*[13]

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[10] Dickson v. the United Kingdom [GC], no. 44362/04, ECHR 2007-V.
[11] B. Van der Sloot, '*Between Fact and Fiction: An Analysis of the Case Law on Article 12 ECHR*', 26 Child and Family Law 1-24, at 2 (2014).
[12] European Commission, *Handbook on addressing the issue of alleged marriages of convenience between EU citizens and non-EU nationals in the context of EU law on free movement of EU citizens*, 2014.
[13] Harris, O'Boyle & Warbrick, Law of the European Convention on Human Rights (Oxford University Press - Second Edition – 2009).

Migrants, including irregular migrants, will find that being non-nationals may lead to some obstacles in allowing them to marry within a host country. These obstacles should not act as a blanket prohibition to marry as this would lead to a violation of Article 12. Restrictions can only be justified if they are not disproportionate to their effect[14]. However, it has also been held by the ECtHR that the right to marry does not, in principle, include the right to choose the geographic location of the marriage[15]. There is no general obligation on a State to respect the choice of married couples as to the country of matrimonial residence and therefore States enjoy a wide margin of appreciation[16].

European law

The Charter of Fundamental Rights of the European Union[17], mirrors the European Convention of Human Rights and similarly contains two articles that regulate the right to respect for family life and the right to marry:

Article 7 - *Respect for private and family life*

> Everyone has the right to respect for his or her private and family life, home and communications.

According to the Explanations Relating to the Charter, this right corresponds to the right guaranteed by Article 8 of the ECHR, and the meaning and scope of this right are the same as those of the corresponding article of the ECHR[18]. Furthermore, the Commission has emphasized that measures taken by national authorities on a discriminatory or automatic basis with a view to detect and prevent possible abuse – and among these, possible marriages of convenience – are likely to constitute an unjustified and disproportionate intrusion into the private life of all the couples concerned[19].

Article 9 - *Right to marry and right to found a family*

> The right to marry and the right to found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights.

According to the Explanations Relating to the Charter[20], this Article has been modernised to cover cases in which national legislation recognises arrangements other than marriage for founding a

[14] Council of Europe, Report written by Jeremy McBride, *Irregular Migrants and the European Convention on Human Rights*, AS/Mig/INf(2005)21, 2005.
[15] Savoia and Bounegru vs Italy No.8407/05, 2006.
[16] K. Reid, *Practitioner's Guide to the European Convention on Human Rights* 2004, Sweet & Maxwell, London.
[17] *European Union, Charter of Fundamental Rights of the European Union,* 26 October 2012, 2012/C 326/02.
[18] Explanations Relating to the Charter (Official Journal 2007/C 303/02) https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2007:303:0017:0035:en:PDF .
[19] European Commission, *Handbook on addressing the issue of alleged marriages of convenience between EU citizens and non-EU nationals in the context of EU law on free movement of EU citizens,* 2014.
[20] Explanations Relating to the Charter (Official Journal 2007/C 303/02) https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2007:303:0017:0035:en:PDF .

family. This right is thus similar to that afforded by the ECHR[21], but its scope may be wider when national legislation so provides.

It should be noted that the Charter is only applicable to Member States, Malta included, when they are implementing European Union (EU) law[22]. This means that the article cannot be invoked as stand-alone article in Member States' jurisdictions, however it can be used when Member States are implementing other provisions of European Union law.

Maltese law

Article 32(c) of the Constitution of Malta[23] grants the protection of the right to private and family life. It does not have a corresponding article on the right to marry, as is found in the European Convention of Human Rights and the Charter of Fundamental Rights of the European Union. It should, however, be noted that the European Convention for the Protection of Human Rights and Fundamental Freedoms was incorporated into national law, thus making it enforceable in Malta, through the European Convention Act[24].

Under Maltese Law the marriage of two persons is governed by the Marriage Act.[25] In order to contract marriage, both parties must be over the age of 16, they must be free and capable of consenting to marriage. There is no restriction as to the gender, nationality or ethnic origin or residence status of the parties contracting marriage. Importantly, there is no residence requirement for two persons to marry in Malta.

In addition to satisfying the above-mentioned requirements, the Marriage Act lays down a number of formalities that need to be fulfilled before the marriage can be contracted. Article 7 of the Act lays down that the publication of the banns of matrimony must be requested from the Marriage Registrar (the "Registrar") by the parties, six weeks before the date of the intended marriage.

If the Registrar refuses to publish the banns or to issue a certificate of publication he must provide the reasons for doing so. The parties may file an application in the Court of Voluntary Jurisdiction requesting the Court to order the Registrar to publish the banns or to issue a certificate of publication. The Court of Voluntary Jurisdiction, after hearing both the applicant and the Registrar, must give directions it deems appropriate. The Registrar must act in accordance with any of the directions given by the Court.

The Act also states that the banns of matrimony shall state ***"the name, surname, place of birth and residence of each of the persons to be married"***[26] and the place where they intend to contract marriage. The banns will only be published once the Registrar is satisfied that both parties have

[21] European Commission, *2014 report on the application of the EU Charter of Fundamental Rights*, 8 May 2015.
[22] Article 51 European Union, Charter of Fundamental Rights of the European Union, 26 October 2012, 2012/C 326/02.
[23] Constitution of Malta, http://justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=8566&l=1.
[24] European Convention Act, CAP 319 of the Laws of Malta http://www.justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=8795&l=1.
[25] Marriage Act, CAP. 255 of the Laws of Malta http://www.justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=8749&l=1.
[26] Article 7(2) of Marriage Act, CAP. 255 of the Laws of Malta, ibid.

submitted birth certificates and a declaration on oath of non-impediment, "***in addition to all other relevant information"***. The Registrar has the power to do away with the delivery of birth certificates if it is satisfied that it is impracticable to obtain them, and may accept instead any other document or evidence that may be deemed adequate for the purposes of marriage.

Presenting birth certificates often presents a problem for persons who have been displaced or who have fled conflict zones. Therefore, the Registrar allows for persons who have been granted protection in Malta – refugees or persons with subsidiary protection – to submit other forms of evidence or sworn declaration in replacement of birth certificates.

In relation to irregular migrants and asylum-seekers, the Registrar requires the presentation of a valid residence document either issued by Malta or by their country of origin, which is an impossibility in itself as the Maltese state does not issue formal identity documents to these classes of people. Even if the person in question presents birth certificates and free status certificates from their country of origin, their lack of a valid residence document will result in the refusal by the Registrar to publish the banns.

This practice has been found to be "*clearly unacceptable at law*" by the Ombudsman in 2009[27] in a complaint filed on behalf of a number of migrants who were denied the right to marry. In response to the complaint, the Registry explained that this practice was lawful, since marriages could only occur between "*identifiable persons*" (including refugees and those granted subsidiary protection). The Ombudsman found that this line of reasoning leads one to believe that marriage cannot be celebrated by every human being, but only between persons who enter Malta legally and that this distinction was certainly not allowed by Maltese law. Even if such was allowed by Maltese law, then the legislation would be counter to European human rights law and "*to the very essence of a fundamental right which seeks to protect the right of every person to establish formal legal relationships with the partners of their choice*."

The Ombudsman came to the final conclusion that: "*the policy (of the Public Registry and the Marriage Registrar) is, in my opinion, in violation of Article 12 of the European Convention of Human Rights in that it imposes a restriction, limitation or prohibition that is not in pursuit of a legitimate aim and is not proportionate*".

It should also be noted that migrants whose application for asylum have been rejected but who cannot be returned to their country of origin, are allowed to work regularly and pay tax and social security contributions in Malta. Asylum-seekers, on the other hand, are residing regularly in Malta in line with the asylum acquis up until their application has been finally rejected. They are allowed to reside and cannot be returned to their country of origin if their asylum application is pending. During this time, they are allowed to work in Malta regularly, pay tax and social security contributions and access services.

[27] Case No I 466, Immigrants Right to Marry, August 2009, Case Notes Number 28, October 2009.

Marriages of Convenience

Many states attempt to rationalise restrictive provisions in their marriage laws in order to prevent marriages of convenience or sham marriages. Although there is not one definition of what a marriage of convenience is, it is generally defined as a marriage contracted for the sole purpose of acquiring residential or other political rights. At times, the concept of marriages of convenience may be used as a tool to enable states to maintain national sovereignty in regulating and controlling migration, specifically within the ambit of free movement rights with the European Union.

There are also instances were marriages of convenience can be linked to organised crime and trafficking in persons. There are specific provisions in European Union law and national law that apply when there are elements of trafficking found within marriages of convenience, such as the Directive on preventing and combating trafficking in human beings and protecting its victims[28] and provisions in the Maltese criminal code.

There should be in place techniques to assess the veracity of a marriage that do not discriminate and do not violate human dignity and do not impose a blanket ban of specific classes of people based on their residence status. It should be noted that systematic checks of specific nationalities or ethnic groups, religions and even gender, wherein couples with a female sponsor are more frequently under suspicion, may amount to discrimination[29].

In various European countries for instance, certain combinations of nationalities are almost always considered suspect, e.g. in the UK: British and Pakistani, Nigerian or Indian nationals. In several Dutch court cases, the Dutch Immigration Services mention 'cultural and religious differences' between partners as an indicator of marriages of convenience. Ethnically mixed couples are more likely to be framed as marriages of convenience than ethnically homogenous couples. Clearly, it is hard to draw a line between legitimate practices based on 'earlier experience' and unlawful discrimination[30].

Laws, policies and judgements

The ECHR authorises national authorities – as seen in a number of Strasbourg judgments – in the context of immigration laws and for justified reasons to introduce in national laws substantive rules the purpose of which is to prevent marriages of convenience, entered solely for the purpose of securing an immigration advantage[31].

Further to the implementation of rules on family reunification as a means to regulate the entrance and residence of family members of third country nationals, the European Union has adopted a

[28] Directive 2011/36/EU of the European Parliament and of the Council, of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims.
[29] Hart, B. (2017). *The Europeanization of Love. The Marriage of Convenience in European Migration Law*, *European Journal of Migration and Law*, *19*(3), 281-306.
[30] Hart, B. (2017). *The Europeanization of Love. The Marriage of Convenience in European Migration Law*, *European Journal of Migration and Law*, *19*(3), 281-306.
[31] O'Donoghue and Others v. the United Kingdom, Application No 34848/07.

number of Directives[32] and other instruments[33] to harmonise national legislation and policy. Although it was recognised that family reunification regulations may be used to circumvent immigration obstacles and to enter the European Union via marriages of convenience, it was also made clear that the objective of any measure is not to "*introduce systematic checks on all marriages with third-country nationals, but whereas checks will be carried out where there are well-founded suspicions*"[34]. Under EU law, a marriage of convenience can be defined as a marriage contracted for the sole purpose of conferring a right of residence under EU law on free movement to a non-EU national spouse who would otherwise not have such a right[35].

In a Resolution passed by the Council, a number of factors were listed as a possible indication for believing that a marriage is one of convenience:

- the fact that matrimonial cohabitation is not maintained;
- the lack of appropriate contribution to the responsibilities arising from the marriage;
- the spouses have never met before their marriage;
- the spouses are inconsistent about their respective personal details, about the circumstances of their first meeting, or about other important personal information concerning them;
- the spouses do not speak a language understood by both;
- a sum of money has been handed over in order for the marriage to be contracted (with the exception of money given in the form of a dowry in the case of countries where dowry is common practice);
- the past history of one or both of the spouses contains evidence of previous marriages of convenience or residence anomalies.

An EU Member State is permitted, in case of an intended marriage between an EU citizen and a non-EU national, to require the couple to notify the authorities about their intention to marry and, if necessary, submit general information (such as name, place and date of birth, current address and telephone number(s), and nationality), their immigration history and residence status of the non-EU future spouse, including the obligation to reply to questions about whether or not this person has been expelled in the past[36]. It should also be noted that cases of marriages of convenience where EU citizens reside in their Member State of origin and have not exercised their right to free movement fall outside the scope of EU law and are subject to national immigration laws[37].

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[32] Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification.

[33] Council Resolution of 4 December 1997 on measures to be adopted on the combating of marriages of convenience; Commission Staff Working Document - H*andbook on addressing the issue of alleged marriages of convenience between EU citizens and non-EU nationals in the context of EU law on free movement of EU citizens*, 2014; Communication from the Commission to the European Parliament and the Council: Helping national authorities fight abuses of the right to free movement: Handbook on addressing the issue of alleged marriages of convenience between EU citizens and non-EU nationals in the context of EU law on free movement of EU citizens, 2014.

[34] Council Resolution of 4 December 1997 on measures to be adopted on the combating of marriages of convenience.

[35] European Commission, *Handbook on addressing the issue of alleged marriages of convenience between EU citizens and non-EU nationals in the context of EU law on free movement of EU citizens*, 2014.

[36] Klip and Krüger v the Netherlands, Application 33257/96.

[37] European Commission, *Handbook on addressing the issue of alleged marriages of convenience between EU citizens and non-EU nationals in the context of EU law on free movement of EU citizens*, 2014.

Under Maltese Law, marriages of convenience are defined as marriage contracted with the sole purposed of obtaining:

(a) Maltese citizenship; or

(b) freedom of movement in Malta; or

(c) a work or residence permit in Malta; or

(d) the right to enter Malta; or

(e) the right to obtain medical care in Malta[38].

Any person who is found to be guilty of the offence of contracting a marriage of convenience may be liable to imprisonment for a term not exceeding two years. More importantly, the Marriage Act states that any right or benefit obtained through marriage by a person convicted of this offence may be rescinded or annulled by the public authority from which it was obtained. It is common practice in Malta that people who are considered to have contracted a marriage of convenience with a Maltese citizen would have their acquired Maltese citizenship revoked[39].

[38] Marriage Act, CAP. 255 of the Laws of Malta http://www.justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=8749&l=1.
[39] EMN, Misuse of the Right to Family Reunification, Malta, 2012 https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/networks/european_migration_network/reports/docs/emn-studies/family-reunification/mt_20120726_familyreunification_final_en.pdf; Times of Malta, 'I married for love, not for convenience' https://timesofmalta.com/articles/view/i-married-for-love-not-for-convenience.753892.

Jurisprudence

It is imperative to look at the case-law of various supranational and national courts that interpret Convention articles and also national provisions regulating the right to marry.

European Court of Human Rights

The European Court of Human Rights (ECtHR) has taken a conservative approach to the interpretation of Article 12. It initially interpreted the article as granting a social right, not a classical human right, on which states could impose extensive restrictions. In relation to the rights of migrants, the ECtHR's case-law largely permitted far-reaching restrictions, such as requiring migrants to travel to their homeland to obtain a copy of their birth certificate[40].

In an early case, Hamer v. United Kingdom[41], though not specifically on migrant's right to marry, related to a detainee at a prison in the UK. The applicant, Mr. Hamer, a United Kingdom citizen, whilst detained at Gertree Prison petitioned the Home Secretary for permission to marry, but his requests regarding the intended marriage were refused. There were no legal impediments to his marrying his fiancée. He was informed that according to the regulation in force at the time, it was not possible to authorise temporary release for prisoners for the purpose of marriage, nor were there any facilities available for the celebration of marriage within prisons in the United Kingdom. The applicant submitted that "*a limitation which prohibited the exercise of the right in toto for any prolonged period, could not be properly called a limitation*" and, thus, the refusals from the competent authorities amounted to the denial of his right to marry under Article 12.

The European Commission of Human Rights[42] (the Commission) found firstly that the right to marry is essentially a right to form a legal relationship, to acquire a status. Its exercise by prisoners does not pose a threat to prison security or good order, and the marriage ceremony itself can easily be supervised as well. The Commission established that a person deprived of his liberty remains entitled to the right to marry and that any restriction must not be such as to injure its substance.

The Commission also stated that whilst the right to marry is expressed as a right to marry "*according to the national laws governing the exercise of this right*", this does not mean that the scope afforded to national law is unlimited, otherwise, Article 12 would be redundant. ***The role of national law, as the wording of the Article indicates, is to govern the exercise of the right and it cannot substantially***

[40] B. Van der Sloot, 'Between Fact and Fiction: An Analysis of the Case Law on Article 12 ECHR', 26 Child and Family Law 1-24, at 2 (2014).
[41] Hamer v. United Kingdom, 1979, Application No 7114/75. This reasoning was echoed in **Frasik v. Poland, 2010**, Application no. 22933/02 where the ECtHR found that refusing a prisoner leave to marry was a violation of Article 12. The Court held that any restriction that is not an unavoidable and natural consequence of the deprivation of liberty – such as a limitation on the right to marry – must be proportionate and justified by the authorities in each individual case. The Court stated that prisoners do not forfeit their right guaranteed by Article 12 merely because of their status.
[42] **Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Restructuring the Control Machinery established thereby** removed the Commission and created one permanent Court in 1998.

interfere with it. The Commission recalled that hindering the effective exercise of a right may amount to a breach of that right, even if the hindrance is of a temporary character.

Conclusively, the Commission unanimously found that there had been a violation of Article 12 and the substance of Mr. Hamer's right to marry was injured.

In F. v. Switzerland, 1987[43], the ECtHR found a violation of Article 12 in relation to a Swiss law that allows a Court to impose a temporary prohibition on marriage after the granting of a divorce. F, a Swiss national, had married four times, three of his marriages were dissolved by divorce. Following his third divorce, a temporary prohibition on remarriage was imposed on the applicant and a Swiss Court prohibited him from marrying within three years under Article 150 of the Swiss Civil Code.

Firstly, the Court established that Article 12 does not distinguish between marriage and remarriage, so that the prohibition did fall within the ambit of Article 12 and the scrutiny of the ECtHR.

Furthermore, the Court did not accept the Swiss Government's argument that the Swiss concept of divorce is one based on matrimonial fault and that the system of temporarily prohibiting remarriage can be explained by the legislature's determination to protect the rights of others. *Although the Court recognised that the stability of marriage is a legitimate aim and is a public interest, it could not accept the argument that the temporary prohibition of remarriage was designed to preserve the rights of others or the sanctioned person himself.*

In conclusion, the Court decided that the disputed measure, which affected the very essence of the right to marry, was disproportionate to the legitimate aim pursued. Therefore, it found a violation of Article 12.

In Nebil and Maryem Kücükaslan v. Sweden[44], the Commission declared the application inadmissible and found no violation of Article 12. The first applicant came to Sweden in the beginning of 1988. He was a Christian Syrian-Orthodox. The second applicant arrived in Sweden as a young girl and her family are Syrian-Orthodox refugees from Turkey. The applicants married in Sweden in 1990. Mr. Nebil's passport expired in the year of arrival in Sweden which could not be renewed as he did not carry out compulsory military service and he was an Orthodox Christian.

Mr. Nebil requested a residence and work permit in Sweden. The National Immigration Board, however, refused the request, finding that the political reasons involved were not sufficient to consider the first applicant a refugee. After having exhausted all remedies, the Swedish Government found that there were no obstacles to the first applicant's expulsion to Turkey. The expulsion order, however, was never enforced. In 1991 the first applicant lodged a fresh request for a residence permit, and he was eventually granted a permanent residence permit in Sweden.

The applicants originally complained that the first applicant, if expelled to Turkey, would be imprisoned for desertion as well as possibly persecuted and killed. The applicants further complained

[43] F. v. Switzerland, 1987, 2010, Application no. 11329/85.
[44] Nebil and Maryem Kücükaslan v. Sweden, 1992, Application No. 18417/91.

that the expulsion would mean for them to be separated possibly for three years or longer, as the second applicant would not have been granted a residence permit in Turkey. With Nebil having been granted a permanent residence permit in Sweden in December 1991, the applicants later on complained of their fear of an enforcement of the expulsion order up to the issuing of that permit as the execution of the expulsion order was never formally stayed.

The Commission noted that under Article 25 of the Convention, the Commission only considers applications were the applicant is a victim of violation of any right in the Convention committed by a State party. The Commission observed that although the first applicant was subject to expulsion from Sweden by a decision of the Government, this order was never enforced. The Commission accepted that the applicants had felt a certain anxiety before the first applicant was granted a permanent residence permit, however, after having obtained one, they could no longer claim to be victims The Commission declared the application inadmissible and found no violation of Article 12.

Vabdolski and Demonet v. France[45] was an early case that related to a migrant whose refugee application was rejected and could not provide for a birth certificate in order to contract marriage. The applicants were Mr. Vabdolski, a Ukrainian national and Miss Demonet, a French national, parents to two children. Mr. Vabdolski applied for refugee status at the French Agency for Protection of Refugees and Stateless Persons, which was rejected in 1990. In order to marry he was required to present his birth certificate in accordance with the French Civil Code. The USSR Consulate informed him that it was unable to issue the requested document, after which he applied for a declaration of facts as a substitute for his missing birth certificate at the Tribunal d'instance of Limoges. The Court informed him that such a declaration could not replace a birth certificate and that the applicant had failed to prove that a birth certificate had in fact been drawn up in the first place. Refugees or stateless persons would have been issued with documents that would serve as a civil status document.

The applicants complained that as a result of the above, they were unable to register their intended marriage at the registrar, given that they did not have all the necessary documents, which prohibited them from exercising their right to marry. Accordingly, they alleged a violation of Article 12 of ECHR.

The Commission noted that the French authorities could not be blamed for the applicant's failure to obtain the documents necessary to marry under French law. Moreover, the Commission noted that the reason for the refusal by the President of the Tribunal d'instance to issue a declaration of facts was the lack of evidence that the applicant had already had a birth certificate. The Commission, therefore, considered that the reason why the applicants were unable to marry was not because Mr. Vabdolski had been forbidden from doing so, but because they did not comply with the formalities required by French law governing the exercise of the right to marry. For these reasons, the Commission found no violation of Article 12 and unanimously declared the application inadmissible.

The Commission did not find a breach on Article 12 when complainants found difficulties in obtaining a certificate of capacity to marry under French law from an overseas consul office. In Dagan and

[45]Vabdolski and Demonet v. France, 1994, Application No. 2240/93.

Sanders v. France[46], a French woman wishing to marry her Turkish fiancé encountered difficulties and over a year delay in obtaining the required state approval for an intended marriage of a French national residing abroad. The necessity under French law to obtain a certificate allowing for the marriage is there in order to control marriages of convenience.

The Commission therefore assessed whether the need for a certificate of capacity to marry and the abovementioned delay amounted to the breach of Article 12. It considered that however regrettable this period of time may have been, it did not impair the very essence of the applicants' right to marry. As noted by the ECtHR in the case of F. v. Switzerland above, in all the Council of Europe's State Parties, limitations to Article 12 appear as conditions and are embodied in procedural or substantive rules. The Commission did not find the limitation at issue, in itself, to be contrary to Article 12. It also observed that this case can and should be distinguished from the case of F. v. Switzerland, since in the present case, the authorities had to process an application which they failed to do within an ideal timeframe, which resulted in a significant delay, but this result could not be compared to the restrictive measures found in latter case. Hence, the Commission found no breach of Article 12.

The Commission examined a scheme set out in Dutch legislation on prevention and suppression of marriages of convenience in Klip and Krüger v. the Netherlands[47]. According to the relevant Dutch regulation, where one or both future spouses did not hold Dutch citizenship, a systematic examination of the intended marriage needed to be carried out. This required the parties covered by the legislation to provide written statements, which could lead the Aliens Department to oppose and decline consent to the marriage, should it find that the primary purpose of one or both of the parties wishing to get married was to obtain entry into the Netherlands. The standard questionnaire sought information about the alien future spouse's name, date and place of birth, nationality and current address. Where the Department had a reasonable suspicion that the intended marriage was one of convenience, the couple had to complete an additional more in-depth questionnaire that sought information related to the aliens' immigration and residence history.

The applicants complained that "*the exercise of their right to marry was unjustly delayed on discriminatory and humiliating grounds, i.e. an investigation into the motives of their marriage, which went beyond the limits accepted under the Commission's case-law*."

The Commission recalled that the exercise of the right to marry is "*subject to the national laws of the Contracting States, but ... the limitations thereby introduced must not... restrict or reduce the right in such a way or to such an extent that the very essence of the right is impaired*". It nevertheless felt that the "*the Dutch immigration policy is clearly related to the economic well-being of the country, in particular to the authorities' concern, given the population density in the Netherlands, to regulate the labour market*".

In light of the above, the Commission found that the complaint was manifestly ill-founded and the limitation at issue was neither arbitrary, nor disproportionate and, thus, was not contrary to Article 12.

[46] Dagan and Sonia Sanders v. France, 1996 Application No 31401/96.
[47] Klip and Krüger v the Netherlands, Application 33257/96.

The ECtHR started to adopt a more liberal approach to the right to remarry, divorce and the rights of persons to marry, including prisoners and migrants. It also began to curtail the margin of appreciation of states when limiting the freedoms protected under Article 12.

In O'Donogue and Others v. The United Kingdom[48], the applicants argued that the scheme set out in the Immigration (Procedure for Marriage) Regulations violated their right to marry under Article 12 of the ECHR. According to the contested regulations, persons subject to immigration control that sought to marry outside of the Church of England had to have either entry clearance expressly granted for the purpose of enabling them to marry in the United Kingdom or a Certificate of Approval.

Moreover, applicants were charged an application fee, the payment of which was beyond the means of most of the immigrant population. According to the scheme individuals were to be automatically refused Certificates of Approval if they did not have a sufficient number of months extant leave to enter or remain. The applicants – one of whom was an asylum seeker – alleged that the existence of the Certificate of Approval scheme and its application to them constituted a disproportionate interference with their right to marry, since the policy in question automatically excluded all asylum seekers because they did not have a sufficient leave to enter. Furthermore, had they been eligible to qualify for a Certificate of Approval in the first place, they still would have been unable to obtain one, due to the high amount of the application fee.

The ECtHR held that although States are entitled to lay down limitations on the right to marry in national laws, specifically in the context of immigration laws where the prevention of sham marriages is considered a justified reason for such measures, these laws may not otherwise deprive a person or a category of persons of full legal capacity of the right to marry. In view of this, the Court agreed that the requirement that non-EEA nationals submit an application before being permitted to marry is not inherently objectionable. However, ***the fact that granting a Certificate of Approval is not solely based on the genuineness of the proposed marriage but is based on the immigration status of the persons concerned, gives cause for grave concern.*** The regulation imposed a blanket prohibition on the exercise of the right to marry on all persons in a specified category, regardless of whether the proposed marriage was one of convenience or not. This is a general, automatic and indiscriminate restriction on a vitally important Convention right and as such falls outside any acceptable margin of appreciation and amounts to the violation of Article 12.

With regard to the application fee, the Court held that a fee fixed at a level which a needy applicant could not afford could impair the essence of the right to marry and agrees that in the present case the fee of GBP 295 was sufficiently high to impair the right to marry.

The Court found that that the policy regarding both the blanket prohibition and the application fee resulted in the breach of Article 12.

[48] O'Donoghue and Others v. the United Kingdom, Application No 34848/07.

Maltese Courts

The Maltese Courts in 2010 did not find a violation of Article 32 of the Constitution of Malta on the right to private and family life or of Articles 8 and 12 of the European Convention on Human Rights when the Registry refused to publish the marriage banns for a couple in view of the expired visa of one of the applicants. In Ogunyemi Kehinde Olusegum & Sandra Wetterich vs Director of Public Registry and the Attorney General[49], Mr. Olusegum, a third-country national and Miss Wetterich, a German citizen studying in Malta at the time, decided to get married in 2007. Mr. Olusegum's visa had expired by the time of their intended wedding and his subsequent requests for the extension thereof were denied in 2007. The spouses applied at the Marriage Registry for the marriage banns to be published, since under Maltese law, no marriage may be celebrated without the issuance of the certificate about the publication of the banns. The Registrar, however, denied complying with this request, decided that the marriage could not take place and justified this decision with the fact that Mr. Olusegum's visa had expired.

The applicants filed an application in Court on the basis of Article 32 of the Constitution of Malta on the right to private and family life, as well as on the basis of Articles 8 and 12 of the European Convention on Human Rights.

The Court considered that it was legitimate for the Registry to request proof of a valid visa for third-country nationals as this fell within the scope of Article 7(5) of the Marriage Act under "*other relevant information*" and it was the only way to properly ascertain whether Mr. Olusegum's immigrant status in Malta was regular or irregular. The Court further held that even though the right to marry is protected by Article 12 of the European Convention of Human Rights, states are allowed to derogate from this provision when necessary, particularly in cases where a state needs to control the residence and in general the entry of non-nationals into its territory. This is an essential interest of the state and thus it can prevail over the interest of individuals – when adequately and exhaustively reasoned.

The Court concluded that the actions of the Maltese authorities were in compliance with the abovementioned principles and it found no evidence of either discrimination or prejudice in the criteria applied in the case of Mr. Olusegum. The Court in its judgment decided against the applicants and therefore rejected their pleas.

Contrary to the previous judgment in Claudine Desira u Moamar Ali Aled Eltarhuni[50] the Civil Court in its Constitutional Jurisdiction came to the conclusion that the Registry's refusal to publish the marriage banns due to the applicant's expired visa in this particular case did breach Article 12 of the ECHR and that the authority's request to provide a valid visa was not justified.

The Court distinguished this case from the case of Mr. Olusegum based on the fact that the present applicant was unable to provide a valid visa on account of the pending criminal proceedings against him, which prohibited him from renewing his visa by law. The Court ordered the Registry to carry out

[49] Ogunyemi Kehinde Olusegum u Sandra Wetterich kontra Direttur Registru Pubbliku u l-Avukat Generali, 54/2008, 24 May 2010.
[50] Claudine Desira u Moamar Ali Aled Eltarhuni, Qorti civili prim' awla (Gurisdizzjoni Kostituzzjonali), Rikors numru 63/2014.

the publication of the marriage banns, since the required documents had already been provided throughout the criminal proceedings – in which the present applicant was involved as the defendant. The Court noted that the Marriage Act does not request the presentation of a passport nor a valid visa, however, it also noted that the state shall have the discretion in its actions to ensure public order and state security.

The Court concluded that any request from the Registry regarding personal information of the persons involved needs to be well-justified, reasonable and proportionate in comparison to the aim the request seeks to achieve. In the present case, such request could not have fulfilled this criteria, as the law prohibits anyone under arrest to renew his/her visa and thus the Registry's demand to submit such a document could not have been well-justified, reasonable nor proportionate to begin with. Therefore, the decision was made that the Registry illegitimately hampered the applicants' intended marriage and had breached Article 12 of the ECHR.

It should be noted that this judgement was later overturned on appeal, although the basis for this was non-exhaustion of ordinary remedies provided for under Article 8(2) of the Marriage Act[51].

Ombudsman

Ombudsman Case No I 466, Immigrants Right to Marry[52]

In 2009, three cases were presented to the Ombudsman:

1. An Ethiopian widow, whose application for asylum in Malta was rejected in 2007. The plaintiff wanted to marry an Eritrean man she met in Malta who enjoyed humanitarian status. After marrying in the mosque, they wanted to register a civil marriage. They were requested to prove their identities through documentation from their country of origin.

2. An Ethiopian immigrant, whose application in Malta for refugee status was rejected. He wished to marry an Ethiopian woman who lived in the US and travelled to Malta for the wedding. The man produced a baptism certificate and a sworn statement. He was refused the right to marry as he failed to produce a birth certificate. The wedding had to be called off.

3. A Catholic Ethiopian woman and Eritrean man wished to get married in Malta in church. The couple, who have a child together, were denied the marriage banns because the woman failed to produce an official birth certificate.

[51] Claudine Desira u Moamar Ali Aled Eltarhuni, Qorti Kostituzzjonali, Appell Civili Numru. 72/2010/1. The non-exhaustion of ordinary remedies resulted in another inadmissibility decision in Dr Michael Shields u Li Dong Mei Vs L-Avukat Generali et. Qorti civili prim' awla (Gurisdizzjoni Kostituzzjonali), Rikors Numru. 63/2014. See also Akrami Fadl Alla Ebdel Aziz Mobarak u Fakak Bouchra (1) Avukat Generali et. Qorti civili prim' awla (Gurisdizzjoni Kostituzzjonali), Rikors Numru. 21/2018 RGM.
[52] Case No I 466, Immigrants Right to Marry, August 2009, Case Notes Number 28, October 2009.

In all cases the Marriage Registry refused to issue the marriage banns for lack of documentary evidence. The Ombudsman lambasted the practice of the Public Registry and stated that the Registry seemed to be "*completely ignorant of the fact that human rights are enjoyed by everyone, irrespective of legality of presence*". He further condemned the Public Registry's submissions stating that these repeatedly imply that "*a person who has no legal status to be in Malta does not enjoy fundamental human rights … such statements are extremely dangerous and completely unacceptable*". He noted that "*[w]hile it cannot be excluded that some might attempt to enter into a marriage of convenience solely to avoid their rejected status, there is no doubt that other cases were genuine, especially where the relationship was stable and children were born out of it*". The Ombudsman also emphasised that, in these 3 particular cases, exercising the fundamental right to marry does not result in the spouses automatically acquiring any benefits which they would otherwise not be entitled to, and any statement to the contrary is completely false and spurious.

The Ombudsman disagreed with the Public Registry's submission that *"civil marriages can only be celebrated between persons who are identified or identifiable in the sense that such identification has to be absolutely ascertained."* In fact, the Ombudsman noted that the Registrar relies on the refugee's own declaration of identity and status as declared in the Personal Questionnaire[53] as a practical way of satisfying the requirement of identification.

He concluded that if a rejected asylum seeker is eventually, for whatever reason, allowed to remain in Malta, there can be no reason why he/she should be denied the right to marry and found a family, while rightly being given the enjoyment of other fundamental rights, such as the freedom to work.

In conclusion, the Ombudsman found that the Marriage Registrar's policy in relation to the publication of the banns for irregular migrants constitutes a breach or threat to their right to marry as it is a restriction, limitation or prohibition that is not in pursuit of a legitimate aim and is not proportionate.

It should be noted finally that the Ombudsman in Malta lacks executive powers. The Office can recommend a wide range of flexible remedies, including financial compensation, but unlike a court of law, his recommendations are not binding and can be rejected by the public authorities. In this regard, it can be noted that the decision relating to Case No I 466 did not have the expected result and the Registry continues to implement the policy so harshly criticised by the Ombudsman.

[53] The Personal Questionnaire is a documented completed by the Office of the Refugee Commissioner once an asylum application is filed, contains the applicant's personal details, including name, surname, parents' names and surnames, etc.

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