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Accelerated procedures in Maltese asylum law: Making Violations of Fundamental Rights the order of the day

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1. Dystopian background

Imagine a scenario where an individual submits an application with a government body or agency, empowered by law to take decisions on such applications, without the right to a legal aid lawyer. Then imagine that the deciding body refuses such application for reasons of inadmissibility or for it being manifestly unfounded. Imagine that the deciding body automatically refers that decision to a tribunal: a body composed of individuals appointed solely by the Prime Minister.

The decision does not inform the applicant of the supposed right to submit pleas and it does not inform the applicant that this automatic referral to the tribunal is, in fact and at law, the 'appeal'. It does not inform the applicant that the tribunal will review the referred decision within three days. In most cases, applicants will receive the refusal from the deciding body and the confirmation of the refusal by the tribunal on the same day. Lastly, imagine that there is no further appeal from the 3-day review of the tribunal to a court of law.

Consider that this procedure could have the consequence of denying protection to those who may be entitled to it, of detaining individuals for long periods of time prior to removal, of having the right to return persons to places where they could possibly face inhuman treatment or of non-returnable persons living for years without documentation.

As lawyers, we would believe that it is unthinkable that in an EU Member State, signatory to the European Convention on Human Rights and purporting to adhere to the rule of law and principles of natural justice, this is allowed to happen. Yet it happens, daily, through the accelerated procedures within the asylum regime.

2. Accelerated Procedures

Accelerated procedures in the asylum legal regime were introduced in order to address the heavy caseload of applications faced by Member States, by introducing shorter time limits for certain procedural steps within the asylum procedure. Through these procedures, Member State authorities were permitted to introduce legislation that provided for accelerated applications under a less protective procedural regime, on the assumption that certain applications will most likely be rejected.[1]

1 European Council on Refugees and Exiles, 'Accelerated, prioritised and fast-track asylum procedures Legal frameworks and practice in Europe' (May 2017) <https://www.ecre.org/wp-content/uploads/2017/05/AIDA-Brief_AcceleratedProcedures.pdf>.

Under Maltese law, the procedure is regulated under the International Protection Act[2] (the 'IPAct'), previously the Refugees Act. Articles 7(1A)(ii), 23(3), 23(4), 23A, and 24(2) of the IPAct aim at transposing those articles relating to inadmissibility and manifestly unfounded decisions and the subsequent accelerated procedures, specifically Articles 25(6)(c), Articles 31(8), 32(2), 33, Article 46(1)(a)(i) and (ii) and Article 46(3) of Directive 2013/32/EU on common procedures for granting and withdrawing international protection[3] (the 'Procedures Directive').

In this paper, it is submitted that Maltese legislation fails to transpose the relevant articles of the Procedures Directive in the correct manner by denying applicants the right to appeal against decisions taken in pursuance of Articles 31 and 33 of the Procedures Directive. This results in breaches of the Procedures Directive and violations of Article 47 of the Charter of Fundamental Rights[4] (the 'Charter') relative to the right to an effective remedy and the right to a fair trial. It should be noted that Member States, including Malta, are bound by the provisions of the Charter of Fundamental Rights when implementing European Union legislation.

2.1 Accelerated procedure in numbers

In 2020, 238 applications for international protection were rejected as manifestly unfounded, whilst 196 applications were considered inadmissible. Therefore, in total, 434 applicants were subject to the accelerated procedures, as will be examined in further detail below. To put the numbers in context, in 2020 the International Protection Agency (the IPA)[5] took a total of 850 decisions, 605 of which were rejections and at least 434 of those by accelerated procedures. In 2019, 55% of decisions taken by the then Refugee Appeals Board, now the International Protection Appeals Tribunal (the 'IPAT'), were taken under the accelerated procedure.[6]

It was reported that the majority of Bangladeshi, Moroccan, or Ghanaian

2 International Protection Act, Chapter 420 of the Laws of Malta.

3 Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection [2013] OJ L 180.

4 Charter of Fundamental Rights of the European Union [2000] OJ C364/01. <https://www.europarl.europa.eu/charter/pdf/text_en.pdf>.

5 International Protection Agency, <https://homeaffairs.gov.mt/en/MHAS-Departments/International%20Protection%20Agency/Pages/Refugee.aspx> accessed 26 August 2021.

6 ECRE, 'Asylum Information Database, Country Report: Malta', written by aditus Foundation (May 2021). <https://asylumineurope.org/reports/country/malta/asylum-procedure/procedures/accelerated-procedure/>.

applicants were processed through the accelerated procedures, whilst being detained, as their claims were automatically considered as manifestly unfounded on the basis of safe country of origin.

2.2 Article 23 and Article 24(2) of the International Protection Act

Article 23 of the IPAct lays down that '*manifestly unfounded*' applications must be examined under accelerated procedures. An application is considered manifestly unfounded where the applicant:

- Has only raised issues that are not relevant to the examination as to whether such applicant qualifies as a beneficiary of protection;
- Is from a safe country of origin;
- Has misled the authorities by withholding relevant information or documents with respect to his or her identity and/or nationality that could have had a negative impact on the decision;
- Is likely, in bad faith, to have destroyed or disposed of an identity or travel document that would have helped establish his identity or nationality;
- Has made clearly inconsistent, contradictory, false, or obviously improbable representations which contradict sufficiently verified country-of-origin information;
- Has introduced a subsequent application for international protection that is not inadmissible in accordance with Article 24(1)(e);
- Applied in order to delay or frustrate the enforcement of an earlier or imminent removal decision;
- Entered Malta unlawfully or prolonged his stay unlawfully and, without good reason, has not presented himself to the authorities or has not applied for protection as soon as possible;
- Refuses to comply with an obligation to have his or her fingerprints taken;
- May, for serious reasons, be considered a danger to the national security or public order.

Article 23A of the IPAct allows for unaccompanied minors to be examined under accelerated procedures without specifying that such should be done keeping the best interest of the minor as a primary consideration, as mandated by Article 25(6) of the Procedures Directive. The absence of the best interest of the minor principle within Article 23A is particularly worrying, in particular considering that they would not have access to a legal aid

lawyer at this stage.

Furthermore, under Article 24(2) of the IPAct '*inadmissibility*' is also a ground for an application to be processed under the accelerated procedure in accordance with the procedures laid down in Article 23 of the IPA. An application is inadmissible if:

- Another Member State has already granted the applicant international protection;
- A non-EU State is considered as a first country of asylum for the applicant;
- A non-EU State is considered as a safe third country for the applicant;
- It is a subsequent application where no new elements or findings have arisen or have been presented by the applicant;
- A dependent of the applicant lodges an application after consenting to have his case part of an application made on his behalf, and there are no facts relating to the dependent person's situation which justify a separate application or;
- The applicant has been recognized in a non-EU State as a refugee and can still avail himself of that protection or otherwise enjoys sufficient protection in that country including benefiting from the principle of non-refoulement, and such person can be re-admitted to that country.

3. The Misnomered Appeal

Once IPA decides that an application is manifestly unfounded or inadmissible, it immediately refers such decision to the Chairperson of the IPAT.[7] If at any stage of the procedure the IPA is of the opinion that an application is manifestly unfounded, the Chief Executive Officer of the IPA must examine the application within 3 days and immediately refer such recommendation of inadmissibility or manifestly unfounded to the Chairperson of the IPAT. The IPAT Chairperson must examine and review the IPA's decision within 3 working days.[8]

Recent changes in the law included a new Article 7(1A)(a)(ii),[9] which lays down that the review conducted by the Chairperson of the IPAT through the accelerated procedure shall be deemed to be an appeal. It is, however, submitted that the review of the Chairperson, even if such is referred to as

7 International Protection Act (n 2) Article 23(3).

8 ibid Article 23(3) and Article 24(2).

9 ibid Article 7(1A).

an appeal by the legislator, should not be considered to be an appeal nor an effective remedy for the reasons examined below.

Finally, the IPAct[10] lays down that the decision of the Chairperson is final and no appeal or form of judicial review lies before the IPAT or any other court of law. There is therefore a legal impossibility of challenging the substantive elements of a decision before a court of law, which raises extremely serious concerns in accelerated procedures.

3.1 An effective remedy?

It is crucial that time limits set down by national legislation provide a realistic opportunity for both the applicant to present the case as well as for the judicial body to properly re-assess or review the application or decision. During this expedited 3-day review process, the 'appellants' are not given the opportunity to present their views or submit written pleas. This violates the requirement within the Procedure's Directive that obliges Member States to set time limits within the accelerated procedure that are reasonable.[11]

Furthermore, the manifestly unfounded or inadmissible decisions of the IPA do not contain any information on, or reference to, the possibility to participate in the appeal nor the right to free legal assistance. In some cases, applicants receive the IPA decision and the IPAT confirmation of the decision on the same day. In other cases, the confirmation from IPAT is received within a few days from receiving the IPA's decision. It follows that since the IPAT review is carried out within 3 days from receipt of the IPA decision and that the 'appellants' cannot submit any pleas, the obligation to provide free legal assistance at appeal stage under the Directive and the right to participate in appeals although mandated by law[12] is legal fiction.

IPAT decisions on manifestly unfounded or inadmissible 'appeals' are not motivated and only contain a simple statement confirming the IPA decision. This does not constitute a full and *ex nunc* examination of both facts and law before a court or tribunal of first instance, as required by the Procedures Directive.[13] The Procedures Directive explicitly states in Article 46 that:

> *Member States shall ensure that an effective remedy provides for a full and ex nunc examination of both facts and points of law,*

10 ibid Article 23(4).

11 Procedures Directive (n 3) Article 31(9).

12 Procedures Directive (n 3) Article 20 and Article 46.

13 ibid Article 46.

> *including, where applicable, an examination of the international protection needs pursuant to Directive 2011/95/EU, at least in appeals procedures before a court or tribunal of first instance*.

In Case C-651/19 ***JP v Commissaire général aux réfugiés et aux apatrides***, the European Court held that '*the characteristics of the remedy provided for in Article 46 of Directive 2013/32 must be determined in a manner consistent with Article 47 of the Charter*'.[14]

In ***Samba Diouf***[15] (CJEU C-69/10) the CJEU held that that the legality of the final decision adopted in an accelerated procedure – and, in particular, the reasons which led the competent authority to reject the application for asylum as unfounded – needs to be the subject of a thorough review by a national court or tribunal.

3.2 A breach of Article 47 of the Charter?

In Union law, the right to a fair hearing is not confined to disputes relating to civil law rights and obligations. Although Article 47 of the Charter is based on Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (the 'ECHR'),[16] it is not limited in the same way as the Convention. Article 6 of the ECHR only applies to the determination of civil rights or obligations and criminal charges, with the exclusion of the determination of rights relating to immigration and asylum obligations.

Article 47 of the Charter is much broader and the right to an effective remedy is not confined to disputes relating to civil law rights and obligations, but is also applicable in asylum cases.[17] However, the fact that the interpretation of Article 47 is to be inspired by Article 6 of the ECHR, including the guarantees contained in its case-law on the interpretation of the latter article, means it can be reasonably concluded that these guarantees must also be ensured in asylum cases. This is confirmed by the explanations of the Charter that provides that '[…] *In all respects other than their scope, the guarantees afforded*

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14 C-651/19 *JP v Commissaire général aux réfugiés et aux apatrides* [2020] ECLI:EU:C:2020:681.

15 C-69/10 *Brahim Samba Diouf v Ministre du Travail, de l'Emploi et de l'Immigration* ECLI:EU:C:2011:524.

16 European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5.

17 European Council on Refugees and Exiles, 'The application of the EU Charter of Fundamental Rights to asylum procedural law', October 2014 <https://www.ecre.org/wp-content/uploads/2014/10/EN-The-application-of-the-EU-Charter-of-Fundamental-Rights-to-asylum-procedures-ECRE-and-Dutch-Council-for-Refugees-October-2014.pdf>.

by the ECHR apply in a similar way to the Union'.[18]

4. The International Protection Tribunal

The IPAct lays down that each IPAT chamber, tasked with adjudicating on appeals of decisions within the asylum system, must be composed of a chairperson and 2 other members.[19] However, as examined above, the review process within the accelerated procedure is carried out by the Chairperson of the IPAT. In essence, the appeals process mandated by the Procedures Directive is reduced to a review by the Chairperson of a chamber tasked with conducting reviews relating to inadmissibility and manifestly unfounded decisions. It is debatable whether a review by one member of the IPAT would fall into the definition of an appeal procedure before a court or tribunal of first instance.

4.1 Independence of the International Protection Tribunal

The composition of the IPAT, even if duly constituted, raises concerns as to its compatibility with the common values of the Union enshrined in Article 2 of the Treaty of European Union,[20] which lays down that the Union is founded '*on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights*'. The Court of Justice of the European Union has developed the definition of whether a body is a court or a tribunal, and in its assessment it takes into consideration:

> [...] *whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is inter partes, whether it applies rules of law and whether it is independent*.[21]

The CJEU mentions two aspects to determine 'independence' of courts or tribunals:

> *The first aspect, which is external, presumes that the body is protected against external intervention or pressure liable to*

18 Explanations relating to the Charter of Fundamental Rights [2007] OJ C 303, <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32007X1214%2801%29>.

19 International Protection Act (n 2) Article 5(5).

20 Consolidated version of the Treaty on European Union [2012] OJ C 326/13, Article 2 <236 https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012M%2FTXT>.

21 Case C-506/04 *Wilson v Ordre des avocats du barreau de Luxembourg* [2006] ECLI:EU:C:2006:587.

> *jeopardise the independent judgment of its members as regards proceedings before them. That essential freedom from such external factors requires certain guarantees sufficient to protect the person of those who have the task of adjudicating in a dispute, such as guarantees against removal from office. The second aspect, which is internal, is linked to impartiality and seeks to ensure a level playing field for the parties to the proceedings and their respective interests with regard to the subject-matter of those proceedings. That aspect requires objectivity and the absence of any interest in the outcome of the proceedings apart from the strict application of the rule of law.*[22]

The method of appointment and removal of the members of the IPAT brings into question adherence to basic rule of law principles, in particular, the effective judicial protection by independent and impartial courts and effective judicial review, including respect for fundamental rights.

Members of the IPAT are appointed by the President of the Republic on the advice of the Prime Minister,[23] they are not members of the judiciary and they are not required to have any specific qualifications or experience relating to asylum law. In this regard, Article 5(1) of the IPAct stipulates that such appointed persons must be of known integrity and who appear to the Prime Minister to be qualified by reason of having had experience of, and shown capacity in, matters deemed appropriate for the purpose. It does not, however, stipulate that such qualification or experience must consist specifically of asylum law or international humanitarian law. Each chamber is composed of 3 persons and the only requirement is for 1 member to be a lawyer who has practised for 7 years and 1 person representing the disability sector. The President, on advice of the Prime Minister, may remove members of the IPAT on grounds of gross negligence and the like, without the possibility for members to appeal the removal in a court of law.

Concerns relating to the control of the executive on the appointment and removal of members of these forms of tribunals have been raised by the Venice Commission[24] and also by the European Commission in the Malta

22 ibid.

23 International Protection Act (n 2) Article 5(1).

24 European Commission for Democracy through Law, 'Malta: Opinion on Ten Acts and Bills Implementing Legislative Proposals Subject of Opinion CDL-AD(2020)006', Opinion CDL-AD(2020)019 8 October 2020: 'In comparison to its size, Malta has a surprisingly high number of specialised tribunals that adjudicate in specific areas […] As many of them have special appointment procedures involving the executive power, these tribunals do not enjoy the

Chapter of its most recent Rule of Law report.[25] Both institutions consider that such tribunals do not enjoy the same level of independence as that of the ordinary judiciary and that the lack of further access to the Courts for individuals is problematic.

4.2 Procedural guarantees

The IPAT also has the right to regulate its own procedure and manner in which it conducts its proceedings. The rules of procedure or guidelines, if they exist, are not publicly available. In this regard, there is a lack of procedural transparency, proceedings are not appropriately recorded, the minutes of the hearing are poorly done and the method of receiving submissions from parties is not formalised. IPAT decisions are not published and are not publicly available. IPAT does not publish any data or statistics relating to the decisions it takes.

5.Way Forward

It is still to be seen how the local Courts will interpret these provisions in cases relating to breaches of fundamental rights and to breaches of the State's obligation to implement EU law correctly. At the time of writing, two cases relating to accelerated procedures were pending in local courts. In ***Chehade Mahmoud vs L-Avukat Ġenerali et***,[26] an action for damages for breach of EU law was filed in the Maltese civil courts. The applicant claimed that Malta's legislation violated the Procedures Directive and as a consequence of this his procedural rights were violated. The Civil Court, presided by Judge Grazio Mercieca, unsure as to whether the application was one of judicial review, under 469A of the Code of Organisation and Civil Procedure,[27] or one of damages, requested the parties to file submissions on the nature of the action. The State insisted it was judicial review, whilst the applicant that it was an action for damages. The Court concluded that the case was an action for judicial review and thus time-barred. An appeal was filed and is currently

same level of judicial independence as that of the ordinary judiciary' <https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2020)019-e>. See also Opinion CDL-AD(2020)006 <https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2020)006-e> and Opinion CDLAD(2018)028 <https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2018)028-e>.

25 European Commission, 'Commission Staff Working Document: 2021 Rule of Law Report: Country Chapter on the rule of law situation in Malta', SWD(2021) 720 final, 20 July 2021. <https://ec.europa.eu/info/sites/default/files/2021_rolr_country_chapter_malta_en.pdf>.

26 909/2018 *Chehade Mahmoud vs L-Avukat Ġenerali et*, Civil Court (First Hall) 28 January 2020, available at: <https://ecourts.gov.mt/onlineservices/Judgements/Details?JudgementId=0&CaseJudgementId=120270>.

27 Code of Organisation and Civil Procedure, Chapter 12 of the Laws of Malta, Article 469A.

pending at the time of writing of this paper.

Parsons Mariama Ngady vs L-Aġenzija Għal Protezzjoni Internazzjonali et[28] was filed on the 28 December 2020 and was decided on 1 March 2022 by the Civil Court, First Hall. Ms Parsons was handed down a decision that her application was manifestly unfounded by the IPA, followed by a confirmation of such decision by the IPAT 7 days later. The applicant claimed a breach of the right to a fair trial under Article 32(a) and Article 39(2) of the Constitution Malta,[29] a violation of Article 47 of the Charter of Fundamental Rights, and of Articles 6 and 13 of the European Convention for Human Rights and Fundamental Freedoms.

The Court observed that the Appeals Tribunal's role in the accelerated procedures is not that of an appeal *stricto iure,* as an appeals process is one where there is equal access to both parties in a case. The Court noted the lack of further appeal and the strange and byzantine decisions which lack motivation, and concluded by stating that the denomination of 'Appeals Tribunal' in these circumstances is a misnomer:

> *Fil-fehma tal-Qorti reviżjoni bħal din titlob li ż-żewġ naħat għandhom ikollom l-opportunita' li jressqu l-każ tagħhom. Imma l-applikant ma jiċċentra mkien f'dan l-istadju tal-proċess! Għalhekk biss, din il-Qorti ma tistax tifhem kif qatt tista', l-anqas bit-tiġbid tal-immaġinazzjoni, tikkonsidra, li dan it-Tribunal huwa imparzjali meta qiegħed jitqiegħed mill-liġi f'posizzjoni li jisma' u jikkunsidra biss dak li jirċievi mill-Aġenzija, deċiżjoni fi kwistjoni li tista' tkun ta' ħajja jew mewt għall-applikant.*[30]

The Court found that Article 23 of the International Protection Act breaches the rights protected in Article 39(2) of the Constitution and Article 6 of the European Convention on Human Rights. It therefore ordered the International Protection Tribunal to re-examine the decision relating to the applicant in accordance with the principles guaranteed by the Directive.

The Procedures Directive is clear in obliging Member States to provide for an effective remedy against a decision declaring an application manifestly unfounded and a decision of inadmissibility. It would be hard not to conclude

28 318/2020 *Parsons Mariama Ngady vs L-Aġenzija Għal Protezzjoni Internazzjonali et*, Civil Court (First Hall) 1 March 2022.

29 Constitution of Malta.

30 318/2020 *Parsons Mariama Ngady vs L-Aġenzija Għal Protezzjoni Internazzjonali et*, Civil Court (First Hall) 1 March 2022 (emphasis added).

that the IPAct provisions examined above are in violation of the Procedures Directive, that Malta has incorrectly transposed such Directive, and that the current local legislation violates the right to an effective remedy under Article 47 of the Charter of Fundamental Rights. The rule of law is at the heart of the EU, both in theory and in practice.

Finally, it is important to conclude on the principle that Malta is obliged to ensure the full application of EU Law both in terms of correct transposition and in terms of the aims of such laws:

> *Member States remain bound actually to ensure full application of the directive even after the adoption of those [implementing] measures. Individuals are therefore entitled to rely before national courts, against the State* […] *not only where the Directive has not been implemented or has been implemented incorrectly, but also where the national measures correctly implementing the directive are not being applied in such a way as to achieve the result sought by it.*[31]

31 Case C-62/00 *Marks & Spencer plc v Commissioners of Customs & Excise* [2002] ECLI:EU:C:2002:435.