# COMMENTS ON BILL NO. 133 REFUGEES (AMENDMENT) BILL

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# INTRODUCTION

The *Refugees (Amendment) Bill* was presented in Parliament on 25 May 2020 by the Minister for Home Affairs, Law Enforcement and National Security. It states that its objects and reasons *are to amend the Refugees Act with a view to changing the nomenclature from 'Refugees' to 'International Protection' as well as introducing new provisions in relation to the granting of Temporary Humanitarian Protection."*

aditus foundation and JRS Malta are keen to submit this input with a view to seeking to ensure the highest level of protection for asylum-seekers and refugees, in accordance with the principles and standards of the 1951 Refugee Convention and relevant Directives of the Common European Asylum System.

Our comments are based on years working closely with Malta's asylum regime, engaging not only with asylum-seekers and refugees but also with all those public entities somehow involved in protecting persons in need of international protection such as the Office of the Refugee Commissioner, the Refugee Appeals Board, the Agency for the Welfare of Asylum-Seekers, the Detention Service, APPOĠĠ, and so many more.

It is our hope that our comments contribute to the strengthening of Malta's asylum procedure in order for it to truly fulfil its purpose, namely that of ensuring the protection of persons fleeing war, persecution or other serious human rights violations.

Whilst we regret to note that no consultation was carried out by the Ministry in drafting and presenting these amendments, we nonetheless reiterate our constant willingness to actively participate in the formulation of legal and policy norms on Malta's asylum regime.

# GENERAL OBSERVATIONS

We welcome the Ministry's review of the Refugees Act, in particular the Ministry's decision to entrench in law Temporary Humanitarian Protection (THP), to upgrade the present Refugee Appeals Board and to include a more LGBTIQ+ friendly approach. The 2000 Refugees Act was drafted within an asylum and legal context far removed from today's. Then, Malta was not a Member State of the European Union, no harmonised approach to asylum was agreed upon by the Union and arrivals to Malta of asylum-seekers were not in the numbers and modalities Malta has been witnessing since around 2002.

Since 2000 much has changed. Malta's membership of the European Union and the development by the latter of a Common European Asylum System has required Malta to include in its national legislation norms and principles agreed upon by the Union in its attempt to harmonise the way the region receives, processes and protects asylum-seekers. Over the years, Malta faced severe administrative, social, financial and political challenges receiving thousands of asylum-seekers reaching its shores by sea. It is therefore appreciated that the Ministry is engaging in an exercise to review the legal regime with a view to its updating.

Yet we fear that the overall impact of the amendments will be a shrinking of protection space in Malta. The existing confusion in the present Act between manifestly unfounded applications, inadmissible applications and the accelerated procedure is not only maintained but further strengthened. In practice, we know this will result in refugees being unable to present their asylum application in full due to being channelled to an accelerated procedure that might not include a personal interview or the right to an effective remedy. We note that these are fundamental procedural guarantees required by the EU Procedures Directive (APD) and by basic norms of rule of law.

For years we have advocated for a reform of the THP regime, in particular following the reform of the Temporary Humanitarian Protection N system and the establishment of the Specific Residence Authorisation (SRA). We therefore think it is an excellent development to have THP enshrined in law, offering a level of legal certainty and enjoyment of rights. Yet we do urge the Ministry to offer a higher level of legal certainty and to clarify the status of family members of THP holders.

# SPECIFIC INPUT

## Manifestly Unfounded Applications

The Bill lists 10 criteria to consider an application manifestly unfounded (Art. 4). This list is taken from the APD to justify the use of accelerated procedures, in Art. 31(8), however this article is not relevant to manifestly unfounded applications. As with the present Act, there is a confusion between inadmissible applications, manifestly unfounded applications and accelerated procedures[1].

This is not merely a conceptual issue. According to the APD, the consideration that an application is manifestly unfounded does not entail procedural consequences. However, in the Bill, the qualification *"manifestly unfounded"* entails very serious consequences since such applications shall be processed by RefCom in three days and immediately sent to Refugee Appeals Board for a three-day review (Art. 20). Concretely, it means that there will be no personal interview, no full assessment of the application and no effective remedy. At no point the applicant will be allowed to present his/her claim.

This concern is exacerbated with a reading of the list of countries considered safe countries of origin, expanded earlier in 2020 to include Algeria, Bangladesh, Egypt, Morocco and Tunisia.

This constitutes a clear and serious breach of the APD. According to the APD, all basic principles and procedural guarantees remain applicable during accelerated procedures. The APD is very clear on this point and foresees an obligation for Member States (MS) to lay down reasonable time limits[2] for the adoption of a decision in accelerated procedures. Such time limits should not only be reasonable, but also proportionate. They should provide for a realistic opportunity for both the applicant to present the case as well as for the determining authority to assess the application. Moreover, the APD provides for the possibility to exceed the time limits necessary in order to ensure an adequate and complete examination of the application.

The Bill does not provide for any possibility to exceed this three days' time limit.

Moreover, the APD does not allow MS to do without a personal interview for the sole reason that an application is processed through an accelerated procedure (Art. 14 APD). The Directive states that the personal interview may be omitted when a positive decision is to be taken anyway, when the applicant is unfit/unwell, and in terms of Art. 33 in case of inadmissible decisions where anyway a series of procedural guarantees are required to be applied.

The Bill provides for the automatic review by the RAB of manifestly unfounded cases within three days. Art. 46 APD provides for an effective remedy against a decision rejecting an application because it is manifestly unfounded, a decision of inadmissibility or a decision to withdraw the application. Again, the Bill is in violation of the APD.

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[1] E.g. according to the Bill, a subsequent application deemd admissible will be considered manifestly unfounded at the same time. The APD is very clear: when a subsequent application is deemed admissible, it can be processed using an accelerated procedure but the personal interview cannot be omitted.

[2] Art 31(9), *"MS shall lay down time limits for the adoption of a decision in accelerated procedures. Those time limits shall be reasonable. MS may exceed the time limits where necessary in order to ensure an adequate and complete examination of the application."*

Moreover, the above-mentioned provision also specifies that *"MS shall provide for reasonable time limits and other necessary rules for the applicant to exercise his/her right to an effective remedy. The time limit shall not render such exercise impossible or excessively difficult"*. In our experience, a three-day review does not allow the applicant to present his/her views, especially in a context where asylym-seekers are detained without effectie access to legal assistance.

We also note that in 2019, 55% of decisions taken by the RAB were under the accelerated procedure.

> Ensure that the notions of 'manifestly unfounded', 'inadmissibility' and 'accelerated procedures' conform to the Directive's requirements, as a minimum.
>
> It is imperative that all asylum-seekers are able to present their claim in a system that guarantees fairness and efficiency whilst securing the right to an effective remedy.

## Implicit Withdrawal of Appeals

The Bill provides for a broader scope to decide an appeal to be considered implicitly withdrawn. Art. 28 APD allows MS to consider an application withdrawn in two occasions: when the applicant fails to respond to requests or when he absconds/leaves without authorisation. In both cases, an applicant must have the possibility to demonstrate within a reasonable time limit that such failure was due to circumstances beyond his/her control.

This important safeguard is being removed by the Bill, constituting a clear breach of EU law.

In practice, considering the average length of the appeals procedure (usually between one and two years), many applicants change address during this time period. This increases the risk of potential missed notifications. The fact that they would not have the possibility to explain a potential failure to respond to the RAB entails a very high risk of automatic withdrawals.

> Introduce the APD safeguard in situations where appellants fail to respond to notifications.

## International Protection Tribunal

We strongly welcome a reform of the appeals' process. The current system, dominated by part-time Board members and little administrative support, has led to appeals taking up to two years to be decided and hearings that are – in the majority of cases – a poor semblance of justice. A position of a full-time Chairperson has the potential to increase the Board's technical capacity, introduce the notion of relevant and consistent jurisprudence and a secure a more efficient procedure.

Yet the Bill falls short of a comprehensive review, introducing a number of elements of concern.

1. We question the manner of appointment of members of the International Protection Appeals Tribunal. In a national context where Malta's rule of law values and systems are being put into question by, *inter alia*, the CoE Venice Commission, we are concerned that having the Prime Minister appoint members of an independent and impartial tribunal somewhat incongruent. Coupled with the fact that the Bill does not list any specific qualification whatsoever for eligibility to the Tribunal, this manner of appointment is certainly open to

abuse, resulting in a Tribunal composed of individuals owing their allegiance to the Prime Minister and not to a fair and effective asylum process.

2. The Bill requires appellants to submit their appeal documentation within 20 days of the appeal application. Whilst we appreciate the intention to speed up the appeals procedure, the reality is that the number of available lawyers (legal aid and pro bono) to actually interview, research and compile such appeal submissions is extremely low. It is impossible for lawyers to comply with this timeline and, if maintained, will result in appellants – including refugees – being excluded from the procedure.

3. The Bill does not clarify the criteria to be adopted by the Tribunal in deciding whether to hold an oral hearing or otherwise.

4. Article 9(j) of the Bill says that the Tribunal shall regulate its own procedure. Yet the Bill does not stipulate a timeline within which this procedure must be adopted by the Board. The Bill also does not require that the procedure be publicly available and that it conforms to national, European and international standards on asylum procedure best practice. To date, more than 20 years after its establishment, the Refugee Appeals Board has not regulated its procedure and this has resulted in a chaotic, *ad hoc* and unfair adoption of procedural rules by the various Board Chambers.

There should be a public call for applications for the International Protection Tribunal, followed by a rigorous assessment procedure and publication of results.

Members of the International Protection Tribunal should be selected on the basis of criteria in relation to knowledge and experience. The Chairperson should be required to be in possession of a law degree and proven practical experience engaging with a national asylum procedure of at least five years. Other Tribunal members should also either be in possession of a law degree or proven practical experience engaging with a national asylum procedure of at least three years.

Appellants should be permitted to submit appeal documentation within two months, with the exceptional possibility of extending this in cases where effective communication with the appellant is shown to be problematic, for example in cases where interpreters are not available, where the appellant is in prison.

Oral hearings should be held in all cases.

The Tribunal should be required to adopt its rules of procedure within 3 months of its establishment. The Bill should require the Tribunal to publish these rules, and any future amendments, for them to be accessible by lawyers, appellants and other interested parties. The Bill should require the Tribunal to ensure that the procedural rules are in conformity with best practice standards including, as a minimum, the relevant EU Directives and the UNHCR Handbook.

## Refugees in detention

In Art. 9(e), the Bill permits refugees to be detained if the Minister exercises his/her right to appeal a positive asylum decision. This is unacceptable as it envisages the possibility of recognised

refugees being in detention throughout the appeal procedure, in direct violation of international and European rules of deprivation of personal liberty.

Delete Article 9(e) from the Bill to ensure no recognised refugees are held in detention.

## Temporary Humanitarian Protection

It is excellent news that Malta will formalise THP into legal norms. The practice has so far been a policy-based approach granting regularisation and a set of rights to persons who, for personal and specific reasons unrelated to international protection needs, were unable to return to their countries of origin. Over the years, THP has been granted to hundreds of people, including elderly persons, unaccompanied minors and persons suffering from chronic illness. Being merely based in policy has however led to a broad margin of discretion for the granting authority (RefCom) and an unclear set of rights attached to it for holders and their family members.

We therefore strongly welcome the inclusion of THP in the Bill, and hope our comments will contribute to strengthening this regime.

1. It is not ideal to include the assessment for THP considerations in the same interview where the IPA will be exploring international protection issues. The THP assessment is wholly unrelated to asylum and, as such, require persons to present an entirely different set of elements, information and documents. Merging asylum and THP in one interview will create too high a level of expectations from applicants in terms of what to say, present and focus on. We also feel that a person granted THP and subsidiary protection and appealing before the Tribunal to be recognised as a refugee instead of subsidiary protection might be prejudiced in his/her asylum claim due to possession of THP status, leading the Tribunal to considering the appeal either frivolous or unnecessary.

2. We fear that the Bill's maintenance of the status quo whereby granting of THP remains at the discretion of the Agency is problematic. This is exacerbated by the lack of possibility to appeal a decision not to grant THP, a limitation that violates the right to an effective remedy.

3. Whilst we welcome the converging of the rights enjoyed by THP holders with those held by beneficiaries of subsidiary protection, we question why the Bill omits to mention dependant family members of THP holders. For example, if a Ghanaian man is granted THP on the basis of a serious chronic medical condition and he is married with two minor children who are failed asylum-seekers but who have not been returned to their countries of origin. What status would the dependant family members enjoy, keeping in mind the best interests of the child and the principle of family unity?

4. It is noted that some instanced mentioned as THP criteria in the Bill could give rise to a claim for refugee status. For example, an HIV+ woman might be eligible for THP but she could make a valid claim that, upon return to her country of origin, she could face discrimination on the basis of her medical condition since HIV+ women are regularly discriminated against in terms of access to healthcare, employment and social life. In this case, it would contrary to the spirit of international protection to grant her THP since she could validly present a claim of well-founded fear of persecution on the basis of belonging to a particular social group.

5. Persons committing *"a serious crime"* are excluded from eligibility for THP status. Whilst we appreciate the need to ensure public safety, we nonetheless note that – as also in relation to this exclusion ground for refugee status – a careful assessment needs to be conducted in order for this ground to be applied. In particular, we note that the severity of the crime must be of a very high nature for a person to be excluded from humanitarian protection. Furthermore, it would be unjust and contrary to the very spirit of reformative justice for a person to be punished for his/her entire life for a crime committed and for which the person could have undergone a prison sentence or other form of punishment.

Distinguish the THP procedure from the asylum procedure, so that any person may seek THP status at any time of their stay in Malta either directly or via referral by competent entities such as NGOs, AWAS, APPOĠĠ, the IPA, etc. Text currently used in relation to subsidiary protiection – Refugees Act, Article 17(1) – enabling the Commissioner to take such a decision on protection *"in cases where the real risk of suffering serious harm arises even after a decision not to grant subisdiary protection has been taken."*

Grant persons who are denied THP status the right to appeal this negative decision.

Render THP a family status to preserve family unity and respect the best interests of the child principle.

Provide appropriate guidance and training to IP caseworkers to ensure that THP is not relied upon in lieu of international protection, where applicable.

Provide all THP applicants with a fair and individual process composed of a personal interview, the possibility of presenting supporting documentation and an appeals procedure.

## LGBTIQ+ Considerations

We strongly welcome Art. 28, rendering Malta' asylum procedure more inclusive of LGBTIQ+ specific considerations. The provision seeks to ensure that persons fleeing their countries due to them being LGBTIQ+ have full access to an asylum procedure that is sensitive to their stories and their rights.