SUBMISSIONS TO THE MINISTRY OF HOME AFFAIRS & NATIONAL SECURITY ON THE TRANSPOSITION OF THE RECAST RECEPTION CONDITIONS DIRECTIVE, & TO CHANGES TO IMMIGRATION LEGISLATION

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INTRODUCTION & BACKGROUND

The purpose of this recast Directive (RCD) is to establish common procedures for receiving asylum-seekers, in order to ensure treatment that is in accordance with their fundamental rights. The Directive is clear in that it applies from the moment an asylum application is made, and seeks to provide further guarantees for detained asylum-seekers and to those persons who are, for whatever reason, vulnerable or in need of special reception conditions.

Malta's transposition of this Directive is being effected through amendments to the 'Immigration Act' as well as to Legal Notice 320 of 2005, transposing into Maltese law the first Reception Conditions: 'Reception of Asylum Seekers (Minimum Standards) Regulations', adopted under the 'Refugees Act' (Chapter 420 of the Laws of Malta).

These comments are to be read in conjunction with our earlier comments on legislation proposed to transpose the recast Procedures Directive, as the entire legislative package ought to be seen as a comprehensive system composed of distinct yet interrelated elements. In this regard, we reiterate our central concern that Malta's asylum regime is fragmented and lacks cohesion, particularly within a broader immigration context.

In fact, our comments on the proposed legislation is less a commentary on compliance with the Directive and more a critique of the manner Malta repeatedly chooses to regulate the reception stages of its asylum regime. The transposition of the original Reception Conditions Directive was a rather superficial copy/paste exercise whereby the Directive's provisions were simply 'transformed' into a Legal Notice and adopted as such, with no effort at engaging with national realities to ensure an effective inclusion in Maltese law of the Directive's procedures, obligations and standards.

As a result, since 2005 (Legal Notice 320) there has been a wide chasm between Malta's actual reception regime and the law regulating it. In practice, this results in entire systems and norms being based on a series of policy measures adopted by various institutions, rarely in coordination with each other and with little attention to legal obligations emerging from EU law.

Whilst we fully appreciate Malta's very specific situation with regard to the arrival by sea of the majority of asylum-seekers, we nonetheless reiterate that much can be done to ensure a reception system that takes due consideration of Malta's realities whilst simultaneously upholding human dignity and fundamental human rights. In recent years, we have presented several documents to the Office of the Prime Minister, and to the Minister for Home Affairs and National Security wherein we share our views on how we feel Malta's reception regime could be structured.

In addition to commenting on the transposition exercise, this document also presents a number of observations to proposed changes to the Immigration Act. We feel it is important to highlight these observations as the proposals go beyond amending Malta's reception regime for asylum-seekers by suggesting changes to Malta's broader immigration context also when this affects other groups of third-country nationals.

The comments in this document are based on the spirit and recommendations we have been promoting through our activities. We therefore strongly urge the Ministry to refer to these recommendations and to more fully engage with us and other civil society organisations in the

formulation of the norms regulating the way Malta treats asylum-seekers and other groups of third-country nationals.

GENERAL COMMENTS

Whilst we appreciate Malta's efforts at transposing this important EU Directive, and of reforming key aspects of the national immigration set-up, we wish to highlight key concerns with the proposed legislation:

1. As with the transposition of the recast Procedures Directive, we strongly urge Malta to undertake a more **comprehensive reform exercise** that assesses practice since, at least, 2002 in order to strengthen good and promising practices, and to amend or remove practices that have shown – consistently – not to work;

2. The use of **detention**, as proposed, remains contrary to the requirements of human rights law, as reiterated by the European Court of Human Rights in its judgements against Malta. It is also in violation of various Directive provisions. Whilst we appreciate the removal of non-mandatory detention from the Immigration Act and the introduction of legal aid in key instances, the combined operation of all provisions relating to detention is of serious concern. We are seriously concerned that the proposals will expose Malta to further violations of Article 5 ECHR, specifically contrary to the clear instructions provided to Malta by the Strasbourg Court;

3. The Regulations do not enshrine the current policy to abolish the **detention of children**. On the contrary, not only is child detention envisaged, but the protection safeguards contained in the Directive are either incorrectly transposed or wholly absent;

4. The Directive's provisions on vulnerable individuals and **persons with special reception needs** are either not transposed or incorrectly transposed, resulting in serious breaches of the Directive but – more importantly – protections gaps for the most vulnerable persons reaching Malta in search of protection;

5. Provisions relating to protection of most vulnerable groups of asylum-seekers – **abused children and unaccompanied minors** – are missing from the Regulations.

6. The provisions of **alternatives to detention** are based on a presumption of detention, instead of a presumption in favour of the fundamental right to personal liberty.

7. **Access to asylum-seekers**, whether detained or residing in open reception centres, by civil society organisations must be protected. We feel that the proposed norms fall short of the Directive's provisions since they omit important safeguards;

8. This transposition exercise is part of a larger exercise seeking to transpose three different yet interrelated Directives. We feel that the larger transposition effort could have been affected in a smoother and more cohesive manner so as to ensure increased **clarity, consistency and uniformity**;

Our Input on the Bill & the Regulations

In our comments we are not providing an article-by-article assessment of compatibility with the Directive or with human rights and refugee law. Instead, in view of the need we see for Malta to undertake a far more comprehensive review exercise, we are presenting our comments under three main headings.

The first emphasises our main observation that Malta's chosen reception regime needs to be clearly enshrined in legal norms, and cannot remain in the realm of policy. Secondly, we focus on the use of detention and related procedural guarantees. Finally, we comment on material reception conditions, including those providing for vulnerable individuals and persons with special reception needs.

From Policy to Law

Malta's regime for the reception of asylum-seekers has greatly developed throughout recent years. Institutions have been established, procedures put in place, reception centres built or remodelled, projects implemented, budgetary allocations made and thousands of persons have passed through the regime's various stages. Yet in spite of such significant developments happening on the ground, the legal framework regulating the way Malta receives and treats asylum-seekers from the moment an asylum application is made until a final decision is taken remains a sparse one.

In fact, the main legislative instruments in this regard are the regulations transposing the Reception Conditions Directive, the norms creating the Agency for the Welfare of Asylum-Seekers (AWAS) and other provisions dispersed in various legal instruments. Key elements to the reception system remain wholly unregulated, as for example the Age Assessment procedure for unaccompanied minors, the Adult Vulnerability Assessment procedure, open reception centres, the situation of asylum-seekers entering Malta in a regular manner, and fundamental details of the detention system. This lack of regulation fails to endorse and enshrine positive developments, fosters legal uncertainty and permits margins of discretion by individuals and institutions that, in specific circumstances, could amount to serious breaches of asylum-seekers' human rights.

The current transposition exercise comes at a time when Malta's reception regime is undergoing major changes. Although we are not privy to details regarding these changes, it is clear (at the time of writing) that the direct operation of Marsa Open Centre will revert to AWAS, that an Initial Reception Centre (IRC) for children has been established in Ħal Far and that plans for other IRCs are underway. Mention may also be made of other issues, such as for example the on-going improvements to the age assessment process, increased social welfare support provision by AWAS, and revisions to the detention system.

However it seems that these major changes are nowhere reflected in the legal measures proposed to transpose the recast Reception Conditions Directive. It seems that, yet again, practice and law will remain largely unrelated with the latter failing to appropriately regulate the former. For example, the proposed norms provide no information on the Age Assessment procedure or on the mandatory procedure to identify and provide for persons with special reception needs, and the

situation of persons (including potential asylum-seekers) refused admission at the border remains unclear.

We feel this approach is ultimately detrimental not only to the persons directly affected by the reception system, i.e. asylum-seekers, but also to all entities involved therein, primarily AWAS, the Detention Services, the Malta Police Force, but also civil society organisations and other public entities somehow coming in touch with asylum-seekers.

> Adopt a proactive approach to the transposition of this Directive, in order to take stock of Malta's experiences since the first arrival by boat of groups of asylum-seekers. The exercise should look at good and bad practices in order to build on lessons learnt and ensure a transposition that is not simply a reflection of the recast Reception Conditions Directive but, more importantly, a legal regime that establishes Malta's reception system in a manner that is effective and efficient.

Detention Grounds

Should the proposed amendments to Malta's immigration and asylum laws become part of national legislation, asylum-seekers may find themselves deprived of their liberty in any of the circumstances highlighted below.

Following a removal order, in terms of article 14(2) of the Immigration Act

From a cursory reading of the amended article 14 (Immigration Act) it would appear that the immigration authorities will have a much wider margin of discretion when it comes to issuing both return decisions and removal orders, and that detention is now no longer either mandatory or an automatic consequence of the decision to issue a removal order.

In terms of the proposed amendments, a return decision ***"may"*** be issued by the PIO against any person *"considered… to be liable to return as a prohibited immigrant under any of the provisions of article 5 [of the Immigration Act]"*. (Article 14(1)).

Article 14(2) stipulates that: *"If such a return decision is accompanied by a removal order, such person against whom such order is made, may be detained in custody until he is removed from Malta."* The article as formulated therefore implies that return decisions will now no longer automatically be accompanied by a removal order, as has been the case in practice to date, at least to our knowledge. Moreover, the proposed amendment moves away from the previous formulation, which provided for the mandatory detention of all against whom a removal order was issued, stating instead that a person against whom a removal order is issued *"may"*, as opposed to *"shall"*, be detained.

It should be noted however that both the issuing of decisions regarding return and removal as well as the use of detention are not governed exclusively by the Immigration Act, but also by the Common Standards and Procedures for the Return of Illegally Staying Third Country Nationals Regulations (Return Regulations, S.L. 217.12). With the proposed amendments, the applicable legal regime becomes not only increasingly fragmented, but now also at least partly contradictory. According to our reading of the Return Regulations as they stand today, contrary to the proposed amendments, no discretion is afforded to the PIO when it comes to issuing return decisions against third country nationals deemed to be illegally staying in Malta in terms of the Regulations.

In fact, Regulation 3(1) provides that, in all but a few exceptional circumstances outlined in sub-regulations (2), (3) and (4) of the same regulation, *"the Principal Immigration Officer shall issue a return decision to any third country national staying illegally in Malta."*

Regulation 2 defines *"illegal stay"* as: *"the presence in Malta of a third-country national who does not fulfil or no longer fulfils the conditions of entry as set out in Article 5 of the Schengen Borders Code or other conditions of entry, stay or residence in Malta"*, which would presumably include the provisions of article 5 of the Immigration Act.

The Immigration Act, both in its current formulation and with the proposed amendments, seems to afford the PIO a margin of discretion when it comes to the issuing of removal orders. In spite of this, to our knowledge in practice a return decision is always automatically accompanied by a decision refusing to grant a period of voluntary departure – even if no request to this effect is made – and a removal order. Although this practice has drawn criticism, it is usually justified by reference to Regulation 3(5) which stipulates that: *"Nothing in this regulation shall be construed as preventing the Principal Immigration Officer from ending a legal stay and issuing a return decision and/or a decision on a removal and/or entry ban in a single administrative decision."*

Regulation 5(1), on the other hand, directs the PIO to *"take all necessary measures to enforce the return decision and issue a removal order,"* where no period for voluntary departure has been granted or where the obligation to return has not been complied with within the period for voluntary departure granted, seemingly limiting the PIO's discretion in this regard and actually creating an obligation to issue a removal order.

In relation to detention, the Return Regulations are seemingly both internally contradictory and incompatible, at least in part, with the proposed amendments to the Act. Regulation 11(7) states that: ***"without prejudice to the provisions of sub-regulation (8)*** (which speaks about the possibility of obtaining a review of detention)***, detention shall be a consequence of the removal order issued by the Principal Immigration Officer"***. Moreover, the proviso to Regulation 5(1) states that: *"…where it is necessary for the Principal Immigration Officer to confirm the identity of the third-country national concerned, to obtain the necessary documents, or it is possible to return the third-country national concerned*[1] ***he shall place in custody*** *the third-country national who does not return within the period granted to him in the return decision."*

These provisions would seem to run counter to the provisions in the same Regulations intended to limit the authorities' power to detain migrants for the purposes of removal (Regulation 11(6), (11), (13), (14)).

- Streamline the provisions regulating the issuing and enforcement of return decisions and the use of detention within the context of removal in order to ensure consistency;

- Consider consolidating all related provisions into a single body of law to avoid the current fragmented approach.

Impact of an asylum application on removal and on detention for the purposes of removal

Article 14(4) of the Immigration Act as amended prescribes that, where an individual against whom a removal order is issued applies for asylum in terms of the Refugees Act, *"all the effects of the removal order"*, with the exception of detention, *"shall be suspended pending the final*

[1] Quite a different standard to the requirement that proceedings are in progress and carried out with due diligence.

determination of the asylum application." Should the asylum application be rejected by a final decision of the competent authorities, the removal order and all of its effects will come into force once more. In the case of detention, the law stipulates that detention in terms of the Immigration Act provisions on treatment of persons against whom a removal order is issued *"shall continue until a final decision on detention is reached in terms of the regulations issued under the Refugees Act".* This provision raises a number of questions, although it is a significant improvement on the current arrangement that fails to even minimally address the impact of an asylum application on a decision to detain in terms of the Immigration Act.

Firstly, the way in which it is drafted seems to imply that all individuals against whom a removal order is issued will be detained, which seemingly contradicts the provisions in Return Regulation cited above, which oblige the PIO to use detention only as a measure of last resort where proceedings are in progress and are being prosecuted with due diligence, and where other less coercive measures are deemed insufficient to secure removal.

More importantly, the proposed amendment falls short of mandating the PIO to review the detention of any and all individuals detained in terms of the said Immigration Act provisions, in the light of the criteria laid down in Regulation 6 of the Reception Regulations once they apply for asylum.

It also fails to ensure that any such review is carried out efficiently and within a stipulated timeframe.

- In Article 14(4) clarify that the detention shall only continue if the applicant was detained at the moment he/she made the asylum application;

- Amend the Immigration Act to impose an obligation on the PIO to conduct a review of the detention of any and all individuals detained in terms of the Immigration Act provisions on detention for the purposes of removal, in the light of the criteria laid down in Regulation 6 of the Reception Regulations, within a fixed timeframe from the date when they file an application for asylum, with an obligation to release the asylum seeker concerned if there are no grounds fro detention in terms of the proposed Regulation 6 of the Reception Regulations

The proposed amendments to the Immigration Act also stipulate that: *"whenever a prohibited immigrant has filled an application for asylum, the Principal Immigration Officer shall not be required to issue a return decision or a removal order."*

Presumably this refers to cases where the individual concerned files an asylum application prior to the issuing of the return decision/removal order, although it is not explicitly stated. Apart from the fact that this proviso seems to imply that the PIO is required (obliged) to issue a return decision or removal order in all other cases, in spite of the fact that article 14(1) and (2) indicate otherwise, the law only refers to those cases where the individual concerned *"has filled an application for asylum".*

It is recommended that this protection from removal and consequent detention be extended to those individuals who indicate to the PIO that they wish to apply for asylum, thus ensuring that, in line with the recast APD, asylum-seekers are considered to have *"made"* an application from the moment they indicate that they wish to apply for asylum. Specifically, in view of our observations of boat arrivals and consequential asylum applications, we feel that it is safe to assume that most – if not all – persons reaching Malta by boat will also apply for asylum. This reality should be reflected

in the legal regime, since these considerations also affect grounds of detention and related protection measures.

- Link this scenario with proposed detention grounds and procedures under the Reception Regulations, so that where a prohibited immigrant 'makes' an asylum application his/her detention would not be based on a return decision and removal order but only on the grounds – and in accordance with the procedure – set out in the Reception Regulations;

- During post-disembarkation procedures, Immigration Officials should request new arrivals if they intend to seek protection in Malta. Positive responses should trigger the recast Procedures and Reception Conditions Directives, granting the persons the status of asylum-seekers. As in all other circumstances, this status will require implementation of all the protection measures contained in the two Directives, including with regard to detention grounds, access to support and information and protection from *non-refoulement*.

Following a refusal of entry decision, in terms of article 10 of the Immigration Act

This article stipulates that:

"Where leave to land is refused to any person arriving in Malta…such person may be placed temporarily on land and detained in some place approved by the Minister…until the departure of such aircraft is imminent." In terms of the same article, such individual *"shall be deemed to be in legal custody and not to have landed."*

Individuals detained pursuant to a decision to refuse entry are afforded far less protection than those detained under the provisions regulating removal, outlined above, even if they apply for asylum. For example:

a. The law fails to lay down any rules to limit or regulate the PIO's seemingly unfettered discretion to detain persons refused entry;

b. Regulation 11(1) of S.L. 217.12 specifically excludes third-country nationals who are subject to a refusal of entry in accordance with Article 13 of the Schengen Borders Code from all but the most basic procedural guarantees against arbitrary detention (primarily the possibility of review);

c. Although there is the possibility to appeal a decision to refuse entry, such appeal does not have suspensive effect on return; by contrast the PIO is specifically precluded from executing a return decision or removal order if appeal proceedings are pending before the Board (Article 14(8));

d. Although Regulation 11(3) of SL217.04 states that: *"Nothing in this Part shall prejudice the application of special provisions concerning the rights of persons governed by the Refugees Act"*, the provisions regulating the impact of an asylum application on an individual's immigration situation refer specifically and exclusively to persons against whom a removal order is issued – there are no parallel provisions regulating the impact of an asylum application on the situation of persons refused entry;

   Hence, presumably, there is no parallel obligation to that found in the proviso to the amended article 14(4) of the Immigration Act, to review the detention of persons refused

entry in the light of the proposed Regulation 6 of the Reception Regulations, with a view to ordering release if these do not apply;

e. As highlighted below, there are also significant limitations in terms of applicable remedies to challenge the lawfulness of detention for persons detained pursuant to a decision to refuse admission. These are exacerbated by the fact that in many cases these persons are 'quietly' returned within days of their arrival.

The situation of persons refused admission needs to be properly regulated in line with Malta's human rights legal obligations.

Following the issue of a deportation order, in terms of Article 22 of the Immigration Act

Article 22(5) stipulates *"a person with respect to whom a deportation order is made may be detained in such manner as may be directed by the Minister until he leaves Malta".*

Although it is far from likely that asylum seekers would find themselves detained pursuant to the issuing of a deportation order, this cannot be completely excluded.

As with individuals detained pursuant to a decision to refuse entry, individuals subject to a deportation order are afforded far less legal guarantees, both in terms of their right to challenge the deportation order as well as in terms of protection against arbitrary detention:

a. The law does not provide for the possibility to appeal a deportation order;

b. Once more, the law seemingly fails to lay down any rules to limit or regulate the PIO's discretion to detain persons against whom a deportation order is issued – the extent to which the provisions of the Return Regulations apply to persons against whom a deportation order is issued is unclear, however since they refer specifically to illegally staying third-country nationals and specifically exclude *"persons who are subject to return as a criminal law sanction or as a consequence of a criminal law sanction or who are the subject of extradition procedures"*, it is considered unlikely that they apply;

c. There are no rules regulating the impact of an asylum application on the situation of persons against whom a deportation order is issued;

d. Even in terms of the availability of an effective remedy to ensure protection from *refoulement*, it would seem that persons against whom a deportation order is issued are afforded far less protection than those issued with a return decision/removal order.

Article 22(3) stipulates that: *"Notwithstanding any other law to the contrary, no deportation order shall be obstructed, nor shall the implementation of such order be delayed, by means of any warrant issued under the Code of Organization and Civil Procedure"*. By contrast Article 17, which states the same in relation to return decisions/removal orders, provides however that: *"Article 17 shall not apply to orders issued by the Constitutional Court."*

Amend Article 17 to also include the Civil Court First Hall in its Constitutional Jurisdiction, since this could be the constitutional entry-point for applicants.

In terms of the amended provisions of Regulation 6 the Reception Regulations

In terms of the proposed amendments to the Reception Regulations, for the first time the law will allow for the detention of asylum seekers whose immigration status is regular.

Regulation 6(1) is in fact largely in line with Article 8(3) of the recast Reception Directive in stipulating that asylum-seekers may only be detained under any of the listed grounds.

Procedural Guarantees

If the proposed amendments become law, national legislation will contain a rather confusing and not completely complementary array of legal safeguards against arbitrary detention, applicable in different circumstances. More importantly, both the existing and the proposed guarantees raise a number of questions both in terms of quality and effectiveness.

Detention order

In terms of the proposed amendments to the Reception Regulations, asylum-seekers may only be detained following a specific order to this effect by the PIO, which needs to be supported by reasons and delivered in writing, in a language the applicant is reasonably supposed to understand.

The Immigration Act, by contrast, still fails to ensure that detention in terms of the Act is the result of a specific detention order. As was highlighted above, whenever detention is authorised by the Immigration Act, it is always as a consequence of another order, not a specific detention order supported by reasons in fact and in law.

Regulation 11(7) stipulates that: *"detention shall be a consequence of the removal order issued by the Principal Immigration Officer and the removal order shall contain reasons in fact and in law"* – for the removal not for the detention. This falls short of the requirements of the Return Directive, which states in Article 15(2) that: *"detention shall be ordered in writing with reasons being given in fact and in law."* In our view, the requirement of a specific written decision on detention in the individual case, which is duly justified by reasons in fact and in law, is an essential safeguard to ensure that in fact an independent decision on detention is taken in each case, in line with the requirements of the Return Regulations.

> Amend the law to introduce the requirement of a detention order in all cases where a decision to detain is taken in terms of national law.

Review of initial decision to detain and authorisation of prolongation of detention

Both European and human rights law require that, where detention is ordered by an administrative authority, the law provides for review by a judicial authority with the power to order release if detention is not justified.

If the proposed amendments become law, national law will contain two separate possibilities of review: one in terms of the Return Regulations, which is currently being applied to all detainees; and a new procedure for review of the detention of asylum-seekers detained in terms of Regulation 6 of the Reception Regulations.

In terms of the latter process, after a period of seven working days, which may be extended by a further seven working days for duly justified reasons, the Immigration Appeals Board is obliged to review the lawfulness of an applicant's detention. In cases where the applicant's detention is

confirmed, the lawfulness of his/her continued detention will be reviewed by the same Board at two-monthly intervals thereafter. Asylum-seekers will be provided with free legal assistance and representation within the context of this review, a significant and extremely positive development (refer section (4) below for further comments).

It is worth noting that there is no specific requirement to give reasons for the decision to release or to allow detention to continue, however presumably the general administrative law duty to give reasons for decisions taken would apply in this context. We also note that the IAB review process fails to mention other procedural standards such as: possibility of detained persons to make oral and/or written submissions; possibility to challenge the IAB's conclusions.

Moreover, it seems that under the proposed Reception Regulations the individual asylum-seeker is not allowed to request a review of his detention on his own initiative.

For migrants detained in terms of the provisions of the Immigration Act, possibly however excluding those detained by virtue of a deportation order, Regulation 11(8) of the Return Regulations provides that: *"Without prejudice to the provisions of article 25A of the Act, the third-country national subject to the provisions of sub-regulation (6) shall have his detention reviewed either on application or ex officio by the Principal Immigration Officer at reasonable intervals of time which, in any case, shall not exceed three months. In the case of detention periods of six months or more, the Principal Immigration Officer shall carry out such review and notify the Board which shall supervise and, where necessary, revise such review."*

In terms of Regulation 11(1) this provision applies both to migrants subject to return proceedings following the issuing of a return decision/removal order in their regard, and to persons refused entry in terms of the Schengen Border Code. It is worth noting that in this case the review is conducted by an administrative authority – the same authority that initially decided to detain – albeit under the supervision of the Board, where the individual concerned has been detained for six months or more. Moreover the law makes no reference to the criteria to be applied when conducting the review, unlike the proposed amendments to the Reception regulations that oblige the Board to conduct a review of the lawfulness of detention.

What is however positive is that the law allows the individual concerned to request a review, rather than simply waiting for the *ex officio* review to be conducted on the initiative of the authority concerned.

Once again there is no explicit duty to give a written decision supported by reasons in fact and in law. Moreover there is no possibility of free legal assistance/representation within the context of a review of detention in terms of the Immigration Act.

- In the interest of consistency designate one single procedure for the review of the lawfulness of the detention of all persons detained in terms of immigration/asylum law. As a minimum, this process should allows for both *ex officio* review and review following an individual application. This single review process should be mandated to review any form of immigration detention – whether imposed on the Immigration Act or on the Reception Regulations – and independently of the applicant's status (asylum-seeker, third-country national denied entry, third-country national pending removal, etc.);

- Furthermore, this review process should be in line with the requirements of the Directive and of human rights law. These require a judicial review, particularly since Maltese law

envisaged a detention order issued by an administrative authority. We seriously doubt whether the IAB can be considered a judicial remedy in terms of the Directive and human rights law;

- Should the IAB be the preferred option, we strongly urge the Ministry to dramatically revise its approach to the Board's operations. In particular, there is a strong need for the Board to be provided with the necessary resources to manage its affairs. Also, in view of the growing list of duties assigned to the Board, we feel it cannot continue to operate on a part-time basis. The IAB should be a full-time quasi-judicial entity equipped with an efficient registry and headed by a person who fulfils the eligibility criteria for appointment as a Magistrate;

- Finally, yet most importantly, it is imperative that all Board members are well versed in the complexities of EU and national migration and asylum law. Where difficulties are encountered in identifying such members, on-going professional development should be made compulsory through, *inter alia*, attendance of conferences, seminars, trainings, and research projects;

- Free legal aid should be provided within the context of all reviews;

- All review should provide decisions in writing supported by reasons in fact and in law.

Remedies to challenge the lawfulness of detention

In terms of ECHR Article 5(4), migrants detained with a view to preventing their unauthorised admission into national territory or pending their removal from national territory are entitled to bring proceedings to challenge the lawfulness of their detention. Such proceedings must be judicial in nature and 'speedy', in order to ensure their effectiveness. It is clear from ECtHR case law on this Article that the scope of the said remedy must be such as to allow for a review of the lawfulness of detention not only in terms of national law but also in terms of the requirements of article 5.

It is worth noting that the ECtHR has found on several occasions that, while adequate in terms of scope, Malta's Constitutional proceedings fail to qualify as an adequate remedy in terms of Article 5 as they are not sufficiently speedy.

The Reception Regulations do not provide asylum-seekers detained in terms of the said Regulations with a specific remedy to challenge the lawfulness of their detention. The Return Regulations too fail to provide anything other than the request for a review mentioned above, which does not remotely resemble an independent, judicial remedy.

In fact, Article 25A(9) of the Immigration Act provides that: *"The Board shall also have jurisdiction to hear and determine applications made by persons in custody in virtue only of a deportation order or return decision and removal order to be released from custody pending the determination of any application under the Refugees Act or otherwise pending their deportation in accordance with the following subarticles of this article."* In our view this remedy falls short of the requirements of human rights law for a number of reasons:

a. The Board is directed to hear applications for release, which are to be examined in the light of Article 25A(10), which directs the Board to grant release where detention is no longer *"required"* in terms of the Immigration Act or the Return Regulations (i.e. to secure removal) or where there is no reasonable prospect of return within a reasonable timeframe.

An assessment conducted on the basis of these two criteria falls far short of an assessment of the lawfulness of detention in terms of Article 5 of the ECHR, which requires the adjudicator to look into a number of other factors to ensure protection from arbitrary detention. Moreover, article 25A(11) limits the power of the Board to grant release in certain specific circumstances.

b. The law makes no provision to ensure that proceedings are speedy – compare to the proceedings in Article 409A of the Criminal Code where specific timelines for action are clearly stipulated. From our experience it is safe to say that proceedings before the Board are anything but speedy – which is hardly surprising considering the Board's severe resource limitations;

c. We reiterate the above-described concerns relating to the competence of the IAB members in relation to EU and national migration/asylum law;

d. Moreover, and possibly most worryingly, this remedy only applies to individuals detained by virtue of a deportation order or return decision/removal order – asylum seekers detained in terms of the Reception Regulations and persons refused admission are excluded;

e. The law does not provide for free legal assistance/representation to make an application for release.

- The above-made considerations regarding the IAB are reiterated under this heading;

- All challenge procedures should be governed by strict timelines, in accordance with the requirement of human rights law. Resource limitations cannot be brought in defence of delays lasting over 12 months, where the fundamental right to liberty is at stake. ECtHR jurisprudence, including in relation to Malta, is extremely clear about this key protection guarantee. The proposals run the risk of exposing Malta to further violations under the ECHR.

Access to legal aid

On several occasion the ECtHR raised questions regarding the availability and accessibility of legal aid for detainees in Malta, in view of the fact that this is an essential legal safeguard for detainees to be able to access their rights at law and challenge the lawfulness of their detention.

It has been noted in the course of these submissions that legal aid is now available in certain circumstances, which is no doubt extremely positive. However, for this right to be effective, legal aid needs to be not only available on paper but also in practice. This has been repeatedly stressed by the ECtHR.

This level of accessibility can quite easily be achieved through the provision of information on how to access the service in practice and the setting up of a service that takes into account the fact that the individuals needing to use it are deprived of their liberty and therefore unable to go to the Law Courts to request a service, as currently required by the provisions of the COCP.

Furthermore, given that many migrants are unable to communicate in English or Maltese, it is essential that, in order to ensure effectiveness and accessibility, the service be provided with the resources necessary to ensure proper communication between detainees and their lawyers.

Ensure that legal aid is in fact accessible to detainees in practice, through the provision of information and the setting up of a service that takes into account the specific situation of detainees.

Initial Reception Centres

At the time of writing these submissions, we are aware of plans to establish a number of Initial Reception Centres (IRC). From the limited information available to us, we understand the following:

a. The overall aims of IRCs are to offer accommodation for a very short period of time, as required to conduct assessments and take administrative decisions on individual cases;

b. During the time spent in an IRC, individuals will have access to information on issues such as the asylum procedure;

c. It is in the IRC that decisions regarding reception modalities will be taken, leading to one of three possible decisions: freedom, detention, alternatives to detention;

d. One IRC will accommodate children (accompanied and unaccompanied). In the case of unaccompanied children, the Age Assessment Procedure will be conduced by AWAS whilst persons are residing at the IRC;

e. Another IRC will accommodate adults;

f. UNHCR will have access to the IRCs, yet NGO access is unclear;

g. The situation of asylum-seekers not entering Malta in an irregular manner by boat remains unclear;

h. Accommodation at the IRC is obligatory, and persons will be deprived of their freedom of movement.

Beyond the fact that we have numerous questions as to the operation of the IRCs, in the context of the present submissions we feel we must underline one important feature. On the basis of what we know about the IRC model, we understand that the IRC fulfils the definition of 'detention' as repeatedly defined by the ECtHR. In this regard, we wish to highlight that living conditions, duration, purpose and level of support are all irrelevant in assessing whether a residential setting constitutes a deprivation of liberty or otherwise. As such, the IRCs – including that established with children in mind – will be detention centres.

The reason we are highlighting this feature is not only limited to underlining that the IRCs must comply with the requirements of the Recast Reception Directive, but really to stress that its classification as a detention centre triggers the application of the detention-specific provisions in the Directive and also of the ECHR.

In practice, this means that the IRCs must ensure that all necessary procedural and substantive guarantees are respected at all stages. We are particularly interested in understanding the approach that will be adopted in terms of ground for detention, and whether this will be based on

the Immigration Act or on the Reception Regulations. This element is increasingly relevant in a context where the ground for detaining an individual shifts from one legal regime to another, our emphasis being on the procedural guarantees operating at the moment of this shift. We are keen to emphasise that this was one of the main points raised by the ECtHR in its judgements against Malta, since it noticed a shift in detention grounds, yet an absence of legal and procedural clarity.

- Since the Initial Reception Centres will constitute deprivation of liberty as defined in the ECHR, all detention-related safeguards must be secured at all stages of a person's stay within an IRC;

- Any shift in detention ground must be clearly based in law, and the procedure must respect all necessary safeguards.

Detention Alternatives

We believe that the provisions on alternatives to detention contained in the proposed amendments to the Reception Regulations run directly counter not only to the letter but also to the spirit of the Reception Directive, which allows States to detain asylum seekers only in the circumstances listed in Article 8(3), *"when it proves **necessary** and on the basis of an **individual assessment** of each case… if other **less coercive alternative measures** cannot be applied effectively."*

It is therefore clear that alternatives to detention, or less coercive measures, should only be applied in those cases where there are grounds for detention, but the same objective may be achieved without resorting to deprivation of liberty. The way the proposed amendments to the Reception Regulations are drafted would seem to imply that alternatives to detention apply in all those cases where detention is not resorted to – including those cases where there are no grounds for the detention of the asylum seeker. Human rights law dictates that where no grounds to detain a person are found to exist, the person remains entitled to enjoyment of personal liberty, instead of having an alternative to detention imposed on him/her.

The said Article states that:

"Where the Principal Immigration Officer does not order the detention of an applicant in accordance with sub-regulation (1), he may require the applicant:

a) to report at a Police Station within specified timeframes;
b) to reside at an assigned place; …
c) to deposit or surrender documents; or
d) to place a one-time guarantee or surety, with the Principal Immigration Officer.

Such measures shall have a maximum duration of nine months.

Provided that, if the applicant concerned does not comply with conditions referred to in this sub-regulation, the Principal Immigration Officer may order the detention of such applicant in accordance with the terms and conditions prescribed in this sub-regulation."

It is clear that, in certain circumstances, the Directive does allow for the imposition of restrictions on asylum-seekers' freedom to reside where they please or to link the provision of material support to residence in a particular place. For example, Article 7 of the Directive which allows the

authorities to decide on an asylum seeker's place of residence, *"for reasons of public interest, public order or, when necessary, for the swift processing and effective monitoring of his or her application for international protection."* However, such decision needs to be justified in the circumstances of the individual case.

This said it is equally clear that alternatives to detention are another matter entirely and should only be imposed where there are grounds for detention, but the stated aim can be achieved through the imposition of less draconian measures. Furthermore, it is incongruous to establish a maximum duration of nine months where the duration of alternatives to detention should be intrinsically bound to the duration of the existence of grounds to detain a person, established on a case-by-case basis on the basis of necessity and proportionality.

We also stress that the entire procedure regulating the imposition, or otherwise, or alternatives to detention, should be more closely associated with the procedure decisions to detain, or otherwise, are taken. By this we mean that asylum-seekers should be in a position to challenge the imposition, or otherwise, or an alternative to detention as well as its duration. The process to review a person's detention should be extended to also included a review of the decision to impose, or otherwise, an alternative to detention.

It is clear from the proposed amendments that alternatives to detention are being treated more akin to freedom, rather than to detention. Whilst, in practice, the asylum-seeker might not be detained, the legal norms regulating alternatives to detention need to be based on those regulating detention, and its review.

- Ensure that alternatives to detention are only resorted to where there are grounds for detention of the individual concerned, which grounds must be those listed in the Reception Directive and none other;

- Provide the procedural guarantees necessary to regularly review the imposition of an alternative to detention. In this regard, cross-reference should be made to our above recommendations regarding *ex ufficio* and own initiative review of a person's detention;

- The second listed alternative, *"to reside at an assigned place"* should not require the asylum-seeker to request permission to leave, since the alternative is based on the requirement that the person maintains a known and fixed address and not on limitations on freedom of movement. The proviso to this sub-regulation should therefore be deleted;

- Clarify the meaning of the last phrase of this sub-regulation, *"if the applicant concerned does not comply with conditions referred to in this sub-regulation, the Principal Immigration Officer may order the detention of such applicant* ***in accordance with the terms and conditions prescribed in this sub-regulation.****"*

Material Reception Conditions and Persons with Special Reception Needs

Detention Facilities

a. Directive Article 10(1) clearly specifies that the Directive's detention provisions shall also apply when asylum-seekers are detained in prison or other non-specialised centres.

   The Regulations fail to include this important protection safeguard.

b. When an asylum-seeker is detained, the new Regulations foresee that he shall be detained in a specialised facility that shall not be used as a place of detention for sentenced people. The Regulations also state that if the applicant *has to be* detained in such place, he shall be kept separate from inmates not detained for immigration reasons. Regulation 6A(2) foresees that applicants detained will be kept separate from third-country nationals who are not asylum-seekers, "*insofar as possible*".

   The latter phrase is not envisaged in the Directive and runs contrary to it.

c. Regulation 6A(5) tackles access to detainees by legal advisers, counsellors, NGO representatives and family members, allowing such access to be limited where necessary for various reasons. The Directive contains an important limitation on the State's authority to limit access to detainees, which limitation is excluded from the Regulations[2].

   This omission is a violation of the Directive.

- Specify that the Regulations apply to all persons irrespectively of where they are detained;
- Delete *"insofar as possible"* from Regulation 6A(2);
- Insert the limitation clause from Directive Article 10(4).

Reception Conditions

a. The Directive stipulates that it applies from the moment a person 'makes' an asylum application, clearly linking to the recast Procedures Directive that explains how asylum applications may be 'made', 'registered' and 'lodged'. In this latter Directive, the three steps are distinct from each other yet of course not all present in each and every asylum application.

   This distinction must be reflected in Maltese law in order to clarify that the entire set of reception conditions is applicable the moment a person 'makes' an asylum application, meaning from the very moment the person even simply indicates that he/she fears return to his/her country of origin. No formal RefCom application is required, nor the Preliminary Questionnaire. Regulation 3 (Scope) fails to include this extremely important safeguard.

b. Regulation 11 is limited to *"reception centres"*, creating a potential legal vacuum in situations where asylum-seekers are not accommodated in such centres. This is particularly relevant for asylum-seekers entering regularly – and therefore not detained and possibly not residing in AWAS centres – or for persons who, for whatever reason, do not live in any of the centres managed by AWAS.

   It is contrary to the Directive to limit the enjoyment of reception conditions to asylum-seekers living in reception centres (closed or open).

c. Directive Article 18(2)(c) on limiting access to reception centres of family members, legal advisers, counsellors, UNHCR and NGO representatives includes an exhaustive list of reasons on which such limitations may be based, through use of the word *"only"*. The

[2] *"...provided that access s not thereby severely restricted or rendered impossible."*

Regulations create an open-ended list, possibly reflecting the absolute discretion currently enjoyed by AWAS.

This omission is contrary to the Directive.

d. Directive Article 18(4) creates an obligation to *"take appropriate measures to prevent assault and gender-based violence, including sexual assault and harassment, within the premises and accommodation centres…"* This protection safeguard is omitted from the Regulations, seemingly ignoring the reality in many of the larger open centres.

This omission is contrary to the Directive.

e. Directive Article 18(7) on the obligation to ensure that reception centre staff are appropriately trained and bound by confidentiality agreements is omitted.

This omission is contrary to the Directive.

- Clarify that the reception regime begins to apply from the moment an asylum application is 'made', the latter term being understood as required by the recast Procedures Directive;

- Correctly transpose Directive Article 17(1) stating that material reception conditions shall be available to all applicants, with no distinction as to their place or manner of residence.

- Correctly transpose Directive Article 18(2)(c) by limiting the discretion of reception centre management in deciding to limit access to reception centres by family members, legal advisers, counsellors, UNHCR and NGO representatives;

- Include the obligation to protect from sexual violence, as required by Article 18(4);

- Include the obligation to ensure training for all reception centre staff, including the obligation to be bound by confidentiality agreements, as required by Article 18(7).

Vulnerable Persons and Children

Our above-made comments regarding the need to regulate existing practice is particularly relevant under this section, since the proposed Regulations wholly fail to even acknowledge the developments made by AWAS in the improvement of their assessment procedures. Further specific comments in this regard will be made here.

a. The Regulations fail to incorporate the protection safeguards relating to the detention of children. We find this particularly worrying in view of Malta's publicly stated commitment to abolish child detention.

Directive 11(2) states children shall only be detained *"after it having been established that other **less coercive alternative measures** cannot be applied effectively. Such detention shall be for the **shortest period of time** and **all efforts shall be made** to release the detained minors and place them in **accommodation suitable for minors**."*

These omissions are serious violations of the rights of the child, as well as violations of the Directive.

b. Furthermore, the Regulations are extremely lacking in terms of detention of unaccompanied children. They allow such detention when the person's claim to be a child is *"evidently and manifestly unfounded"*, when this possibility is not only contrary to the Directive but provides absolutely no information on key procedural elements such as: which entity will decide on the unfoundedness of the claim? Is there an appeals procedure? Duty to give reasons? At which stage is this assessment carried out?

c. Directive Article 14(1), third paragraph, is omitted. This paragraph prohibits Malta from withdrawing secondary education for the sole reason that the child attains majority.

   This omission is a violation of the Directive.

d. The Regulations fails to transpose the central obligation of granting access to rehabilitation services for minors victims of abuse, neglect and other forms of exploitation. Directive Article 23(4) states:

   "MS shall ensure access to rehabilitation services for minors who have been victims of any form of abuse, neglect, exploitation, torture or cruel, inhuman and degrading treatment, or who have suffered from armed conflicts, and ensure that appropriate mental health care is developed and qualified counselling is provided when needed."

   This is a serious omission that fails to offer support to the most vulnerable groups of asylum-seekers: abused children.

e. Article 24 caters for the specific situation of unaccompanied children, and attempts to provide for their needs and rights. It includes elements such as access to a guardian, access to information, the best interests of the child principle, residential arrangements, family tracing, and training of related professionals.

   The corresponding provisions in the proposed Regulations merely cater for family tracing (at an extremely basic level) and the accommodation with adults of children aged 16+. Such omissions are in violation of the Directive.

- Incorporate the policy commitment to abolish the detention of children;
- Correctly transpose the protection safeguards for those exceptional instances where the detaining is absolutely necessary;
- Ensure a proper regulation of the situation of unaccompanied children;
- Correctly transpose Article 14(1), third paragraph;
- Grant access to rehabilitation services to abused children;
- Correctly transpose the provision relating to unaccompanied children in order to ensure their appropriate protection.

CONCLUSION

As reiterated above, we would like to thank the Ministry for Home Affairs and National Security for granting us the opportunity to present these submissions. We consider this to be a gesture towards increased openness and dialogue with civil society organisations.

We hope that our input proves to be useful in designing and implementing immigration/asylum rules that are fair and humane and that respect fundamental human rights whilst also fulfilling Malta's needs in relation to national order and security.

We also urge the Ministry to take note of our comments, particularly where issues of non-compliance are raised, in order to avoid the initiation of infringement procedures by the EU Commission.